The Royal Commission on Criminal Procedure

Chairman: Sir Cyril Philips

REPORT

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The Royal Warrant

ELIZABETH R.

ELIZABETH THE SECOND, by the Grace of God of the United Kingdom of Great Britain and Northern Ireland and of Our other Realms and Territories QUEEN, Head of the Commonwealth, Defender of the Faith, to

Our Trusty and Well-beloved
Sir Cyril Henry Philips, Knight;

Our Right Trusty and Well-beloved Counsellor
Sir Edward Walter Eveleigh, Knight, upon whom has been conferred the Army Emergency Reserve Decoration, One of our Lords Justices of Appeal;

Our Trusty and Well-beloved:

James Larkin Jones, Companion of Honour, Member of Our Most Excellent Order of the British Empire;

Sir Arthur William Peterson, Knight Commander of Our Most Honourable Order of the Bath, Member of Our Royal Victorian Order;

Sir Douglas Osmond, Knight, Commander of Our Most Excellent Order of the British Empire, upon whom has been conferred the Queen's Police Medal for Distinguished Service;

Daphne Irvine Prideaux Gask, Officer of Our Most Excellent Order of the British Empire;

Cecil Thomas Latham, Officer of Our Most Excellent Order of the British Empire;

Richard Henry Pamplin, Officer of Our Most Excellent Order of the British Empire;

Michael Parker Banton;

William Alfred Beaumont Forbes, One of Our Counsel learned in the Law;

Paul Leonard Fox;

Dianne Hayter;

John Charles Kenneth Mercer;

Walter Hugh Merricks;

Joan Robina Straker;

and Our Beloved in Christ Wilfred Denniston Wood, Clerk, Honorary Canon in Our Cathedral and Collegiate Church of Saint Saviour and Saint Mary Overie at Southwark;

Greeting!

WHEREAS We have deemed it expedient that a Commission should forthwith issue to examine, having regard both to the interests of the community in bringing offenders to justice and to the rights and liberties of persons suspected or accused of crime, and taking into account also the need for the efficient and economical use of resources, whether changes are needed in England and Wales in

(i) the powers and duties of the police in respect of the investigation of criminal offences and the rights and duties of suspect and accused persons, including the means by which these are secured;

(ii) the process of and responsibility for the prosecution of criminal offences; and

(iii) such other features of criminal procedure and evidence as relate to the above;

and to make recommendations:

NOW KNOW YE that We, reposing great trust and confidence in your knowledge and ability, have authorised and appointed, and do by these Presents authorise and appoint you the said Sir Cyril Henry Philips (Chairman); Sir Edward Walter Eveleigh; James Larkin Jones; Sir Arthur William Peterson; Sir Douglas Osmond; Daphne Irvine Prideaux Gask; Cecil Thomas Latham; Richard Henry Pamplin; Michael Parker Banton; William Alfred Beaumont Forbes; Paul Leonard Fox; Dianne Hayter; John Charles Kenneth Mercer; Walter Hugh Merricks; Joan Robina Straker and Canon Wilfred Denniston Wood to be Our Commissioners for the purpose of the said inquiry:

AND for the better effecting the purposes of this Our Commission We do by these Presents give and grant unto you, or any five or more of you, full power to call before you such persons as you shall judge likely to afford you any information upon the subject of this Our Commission; to call for information in writing; and also to call for, have access to and examine all such books, documents, registers and records as may afford you the fullest information on the subject and to inquire of and concerning the premises by all other lawful ways and means whatsoever:

AND We do by these Presents authorise and empower you, or any of you, to visit and personally inspect such places as you may deem it expedient so to inspect for the more effectual carrying out of the purposes aforesaid:

AND We do by these Presents will and ordain that this Our Commission shall continue in full force and virtue, and that you, Our said Commissioners, or any five or more of you may from time to time proceed in the execution thereof, and of every matter and thing therein contained, although the same be not continued from time to time by adjournment:

AND We do further ordain that you, or any five or more of you, have liberty to report your proceedings under this Our Commission from time to time if you shall judge it expedient so to do:

AND Our further will and pleasure is that you do, with as little delay as possible, report to Us your opinion upon the matters herein submitted for your consideration.

GIVEN at Our Court at Sandringham the third day of February 1978;

In the Twenty-sixth Year of our Reign.

By Her Majesty's Command.

Merlyn Rees.

Note

In January 1979 Miss Joan Straker was appointed a Member of the Most Excellent Order of the British Empire.

To the Queen's Most Excellent Majesty

MAY IT PLEASE YOUR MAJESTY

We, the undersigned Commissioners, having been appointed by Royal Warrant on 3 February 1978 to examine, having regard both to the interests of the community in bringing offenders to justice and to the rights and liberties of persons suspected or accused of crime, and taking into account also the need for the efficient and economical use of resources, whether changes are needed in England and Wales in

(i) the powers and duties of the police in respect of the investigation of criminal offences and the rights and duties of suspect and accused persons, including the means by which these are secured;

(ii) the process of and responsibility for the prosecution of criminal offences; and

(iii) such other features of criminal procedure and evidence as relate to the above;

and to make recommendations

HUMBLY SUBMIT TO YOUR MAJESTY THE FOLLOWING REPORT.

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INTRODUCTION

CHAPTER 1

The Challenge

The context

1.1. In announcing on 23 June 1977 the Government's intention to set up a Royal Commission on Criminal Procedure and defining its terms of reference, the Prime Minister told the House of Commons that the time had come for the whole criminal process, from the start of the investigation to the point of trial, to be reviewed. In recent years, he said, some reforms had been introduced into the system, and many more proposed, but the approach had been piecemeal and no complete review had been mounted in this century.

1.2. Consideration, too, of the changes in public opinion lay behind the decision. For some years anxiety had been manifestly growing about the continuing rise in the level of crime, about robbery, drug-peddling, street crime, fraud, the use of firearms and terrorism. There were ignorance and confusion also about the ways in which crime was investigated and prosecuted, and about whether, if these were improved, they could bring the growth of crime under control. On one side, it was asserted that the job of the police in fighting crime and of ensuring that offenders, and particularly dangerous professional criminals, were brought to justice was being made unwarrantably difficult by the restraints of criminal procedure; and on the other side that the use of their powers of investigation by the police was often open to grave question.

1.3. Criticism focused not only on the use made by the police of their powers of investigation, but also upon the wisdom of leaving the decision to prosecute with the people who did the investigating. This, it was often pointed out, was not the position in Scotland and other jurisdictions. Could not a separation of powers be devised for England and Wales which might prove to work more fairly for the accused, and more openly and efficiently for the public generally?

1.4. It did not go unnoticed that similar debates were taking place in other countries. In Scotland, for example, in 1975 the Thomson Committee had presented a report which included proposals on the investigatory powers of the police; in Northern Ireland a committee was studying police interrogation procedures and the admissibility of confessions; and in the United States, Canada and Australia major enquiries into criminal procedure had also recently been mounted.

1.5. In England and Wales uneasiness had already come temporarily to the surface in the heated controversy in 1973 and 1974 over proposals made in the

Report of the Criminal Law Revision Committee (1972);[1] and in the disquiet aroused by the Maxwell Confait murder case in which the Court of Appeal quashed the conviction of three youths and, by implication, raised serious questions about the way in which the police had handled the investigation, particularly in relation to the treatment of juveniles and mentally handicapped suspects. This too was the subject of a specific inquiry.[2] It was against this background that the Royal Commission began its work in February 1978 on terms of reference which fairly reflected the central issues before the public.

The terms of reference

1.6. In the system of criminal justice, major components are formed by the substantive law, the pre-trial procedure, the trial and the arrangements for policing. Our title refers to criminal procedure, but the terms of reference circumscribe the way that it is to be interpreted so that it applies to the process established by law, regulation and practice through which persons suspected or accused of any crime are brought to trial. In understanding the pre-trial procedure one important point must be made at the start. Although specifically directing enquiry to the pre-trial procedure, the Royal Commission's terms of reference do not, indeed cannot, exclude discussion of the trial, for in England and Wales it is the nature of the trial itself which largely determines the pre-trial procedure. This kind of criminal trial is in effect a contest between two sides, designed to provide an answer to a specific accusation and question, "Is it established beyond reasonable doubt that the suspect has committed the offence with which he or she is accused?" This is called the "accusatorial" (or "adversarial") system in contrast to the "inquisitorial" system which places much more of the criminal investigation under the control of the courts, often by the appointment of a judge to direct it. Under the accusatorial procedure it is assumed that the relevant circumstances will have been investigated before the accused is brought before a court, and a trial then takes place which is set in motion by the accusation that the prosecution has seen fit to advance.

1.7. In England and Wales, therefore, the emphasis in pre-trial investigation, once a suspect has been identified, lies in discovering whether there is evidence that will support a prosecution of the suspect or cause him to be eliminated from the enquiry. The prior investigation of a suspect by the police and the circumstances in which statements are made by him and produced in evidence at trial (and the rules that govern these matters) form part of the central core of the whole criminal process. Therefore, in understanding any one part, it is not just that the whole system has to form the context of discussion but that the accusatorial nature of the trial itself broadly dictates the nature of the pre-trial process.

1.8. Although the terms of reference allowed the Royal Commission to consider aspects of the trial, from very early in our work we realized that any root and branch review of the nature of the trial was impractical. We could consider the value of introducing into pre-trial procedures features of inquisi-

[1]Criminal Law Revision Committee *Eleventh Report Evidence (General)*, London HMSO Cmnd 4991.

[2]*The Confait Case. Report by the Hon Sir Henry Fisher* (December 1977), London HMSO HC 90.

torial procedure but change to a fully-fledged inquisitorial system, even if it could be shown to be desirable, would be so fundamental in its effect upon institutions that had taken centuries to build as to be impossible on political and practical grounds. We had to take the accusatorial system of trial as given.

1.9. We have also accepted the scope of the criminal law as given. We have used the terms "crime" and "criminal offence" (both of which appear in the terms of reference) as synonymous, identifying those actions which are proscribed by the legal application of penal sanctions. But this categorisation includes an enormous range and number of offences, extending from minor motoring and regulatory offences, to fraud, robbery, rape, causing grievous bodily harm and murder. Public concern about crime naturally seizes upon the more serious cases, but in pre-trial procedure the methods by which crimes are detected, suspects identified, questioned and charged, and accused persons duly prosecuted, can apply across the whole range of offences and offenders.

1.10. The terms of reference also require the Royal Commission to take into account "the need for the efficient and economical use of resources", a consideration further and sharply highlighted by the financial constraints to which in the last few years government and society have been increasingly subjected. No proposals for change in existing arrangements can be seriously advanced without some prior analysis of their likely savings and costs, not simply in direct terms of money, manpower, buildings and equipment, but also indirectly through the elimination or modification of existing processes, especially those which cause waste, inefficiency or delay and may create injustice for the accused, inconvenience for the witnesses and frustration for those working in the system. Resource consequences of this latter kind are inherently difficult to estimate. Generally there is a lack of information on the level of resources being devoted in England and Wales specifically to the investigation and prosecution of crime, which is largely to be explained by the difficulty of identifying and separately costing these particular aspects of police activity and time, and of assessing which processes are deemed to yield "value for money". Without more of this information, and some more precise standards of measurement and comparison than are now available, any calculation of relative efficiency is bound to be open to question.

The concept of a fundamental balance

1.11. The terms of reference require us to examine the pre-trial criminal process and in so doing to have regard "to the interests of the community in bringing offenders to justice and to the rights and liberties of persons suspected or accused of crime". And in his statement in the House of Commons the then Prime Minister expressed the view that there was "a balance to be struck here between the interest of the whole community and the rights and liberties of the individual citizen ... The Government", he said, "consider that the time has come for the whole criminal process, from investigation to trial, to be reviewed with the fundamental balance in mind". This is the central challenge which the Royal Commission faces.

1.12. At first sight the notion of a fundamental balance of the kind specified may appear unarguable, almost axiomatic, a matter of common sense; but further consideration of the matter raises a number of difficult, and perhaps, in the last analysis, insoluble questions. Can there be in any strict sense an equation drawn between the individual on one side and society on the other? Is the balance some sort of social contract between the individual and society? What are the rights and liberties of the individual which are assumed to provide part of the balance? Who gives them and what justifies them? Are they all of equal weight; all equally and totally negotiable or are some natural, absolute, fundamental, above the law, part of the human being's birthright? On the other side of this assumed balance, especially in an increasingly heterogeneous and specialised society, how is the interest of the whole community to be defined with any useful precision? And where does one see, where do the police see, the role of the police being applied; in one or other of the scales, or at the fulcrum, or both? What is clear is that in speaking of a balance between the interests of the community and the rights of the individual issues are being formulated which should be the concern not only of lawyers or police officers but of every citizen.

The development of the concept

1.13. The liberties that form the ground pattern of state and society began to take shape in the bitter religious, constitutional and legal struggles of the seventeenth century; and it was in that context that the criminal trial was established as accusatorial in character, thus also giving broad shape to the nature of the pre-trial criminal process. In a country which largely lived by work on the land and was slow to move, the system settled down and proved adequate for its purpose. But in the eighteenth and nineteenth centuries the face of England changed. The population, which since the middle ages had been very slowly growing, began to increase vastly. More and better food, improving sanitation and a dramatic fall in the death-rate led to an increase from about five and a half million in 1700 to around nine million in 1801, reaching 14 million in 1831 and over 30 million by the end of the century. Everywhere hamlets grew into prosperous towns and the chimney stacks of industry reached towards the sky; canals linked with the rivers, and high roads and railways criss-crossed the countryside. New opportunities were offered for enterprise, innovation and affluence; and new dimensions for crime. Swollen cities and areas of poverty were both a source of criminal infection and training grounds for new generations of criminals; and the simple, often casual, arrangements which then existed for policing proved quite unequal to what was loosely described by contemporaries as "an overflow of criminality".

1.14. Government and the governing classes reacted to contain the upsurge first by using the threat of criminal sanctions as a weapon to maintain order, and on such a massive scale as soon to dominate the criminal justice system as a whole. Within the criminal law, as the great Victorian jurist, Sir James Stephen, pointed out, the capital code itself soon overshadowed the rest, and to such an extent that the incidence of the death penalty occurred more widely in England than in any part of continental Western Europe. "If this bloodthirsty and irrational code", he said, "had been consistently carried out it would have

produced a reign of terror quite as cruel as that of the French Revolution and not half as excusable. It owed its continued existence", he concluded, "to the fact that its administration was as capricious as its provisions were bloody".[1] It might have been even more cruel had not transportation been available as an alternative to hanging. Indeed, if any kind of equilibrium or balance was to be discerned in the criminal justice system of the eighteenth and first half of the nineteenth century, it lay not so much within the relatively unchanged pre-trial procedure as in the broad and changing relationship between the main components of the system as a whole, that is, between the criminal law, the procedure both pre-trial and trial, and the arrangements for policing.

1.15. Diaries, letters and impressions of continental travellers in England in this period, some of them lawyers of wide experience, show remarkable unanimity in expressing both horror at the harshness of the criminal law and mingled amazement and admiration for the liberality with which irregularities in criminal procedure were used by the courts to soften the full rigour of the law and give broad expression to public unease about the morality of imposing sentences disproportionate in their severity.[2]

1.16. A second, critically important response to the upsurge of disorder was in the creation of a new police beginning in 1829 with the Metropolitan Police. As the network of full-time, regular police spread through the country in the middle decades of the nineteenth century, it became possible steadily to ameliorate the severity of the substantive law so that by 1861, for all practical purposes, the only offence still carrying the death penalty was murder. Within these trends, of a more humane law and a more efficient police, the attention of reformers in society and government then turned to the third component in the system, the procedure, and with it to the problem of defining the investigative powers of the police in relation to the suspect's rights.

1.17. Deriving some initial impulse from Anglo-Saxon common law, reinforced through the centuries by *Magna Carta*, the Petition of Right, the Declaration of Right, and *Habeas Corpus*, the view had gradually become established that the authority of the state and its exercise had to be based on a rule of law as laid down by Parliament. Nevertheless criminal procedure as a method of monitoring the investigative powers of agents of the state had remained embryonic, developing very slowly and unevenly. An analytical digest presented in 1845 by *Her Majesty's Commissioners for revising and consolidating the criminal law and procedures* reveals how tenuous and capricious in practice this procedure still was.[3] Evidently, for example, they did not see it as necessary to refer at all to a right of silence. However their conclusions do reveal a new emphasis that was beginning to be placed on defining procedure, and on the role which it might play in helping to regulate the relationship of the individual to the authority of the State.

1.18. With this impulse the pre-trial procedure during the second half of the nineteenth century gradually assumed clearer definition, but still piecemeal and by fits and starts. An important step was taken in 1848 when the role of

[1] "The punishment of convicts", *Cornhill Magazine*, January 1863, p 192.
[2] Radzinowicz L: *History of English Criminal Law*, Vol. 1 App. 3, pp 699–726.
[3] Eighth Report, British Parliamentary Papers, Criminal Law, I.U.P. Series.

the local justice of the peace in conducting the preliminary enquiry into an alleged crime was changed into that of judge rather than investigator and prosecutor, thus leaving the work of inquiry and prosecution largely to the police.

1.19. Throughout most of the nineteenth century successive waves of the industrial revolution had broken in a smother of social strife and unemployment, only to be followed in our own times by new waves of industry, science and technology bringing with them increasing social and economic strains. Population again began to grow, reaching nearly 50 million by 1980; and step by step prosperity increased. Migration from the countryside to the towns gathered pace and, in the more anonymous urban setting, people came to depend more upon the formal application of the criminal law to preserve the peace. Over this period in which greater material prosperity was experienced in England and Wales than ever before, men of affairs had held to the view that the less the state intervened in social and economic policy and in attempting to allocate the country's resources, the better. But by the twentieth century discontent over economic and social injustice obliged the government to intervene to define and guarantee the social rights of citizens. In the first decade, for example, a graduated system of income tax, the beginnings of a state system of old age pensions and a National Insurance Act were introduced; and as the decades passed, expenditure on health, education and welfare increased, engrossing by 1980 some 40 per cent of the national budget. Through two world wars the power of the state continued to expand and new, large areas of public life came under state regulation.

1.20. In the context of an increasing complexity of society and the growing power of the state the individual has found it difficult to organise for his own protection and has got caught in the dilemma of looking to the state for help whilst fearing the misuse of powers that have been given to institutions of the state. The need to define and assert the rights of the individual, to seek a balance, has assumed urgency and significance.

1.21. The recognition and definition of individual rights was of particular importance in the arena of criminal justice. In the middle of the nineteenth century the responsibility for investigating and preparing a case for prosecution passed largely to the police who, lacking statutory authority to question suspects or to hold them for questioning, before long ran into difficulties as to what they should or should not do. In a necessary effort to provide guidance and some control, a set of what came to be termed "the Judges' Rules" was drawn up in 1912, not by Parliament, but by the Judges, and was revised and added to over the years, latterly by the executive. The Rules were and still are the subject of persistent controversy. This was no more than was to be expected, partly because of their uncertain status and partly because initially they represented a first conscious effort within the pre-trial procedure to set out a considered balance between the need to protect the rights of the individual suspect and the need to give the police sufficient powers to carry out their task. In seeking this balance they acknowledge that any rules which specify a citizen's rights must also impose duties on society generally and on those who have to question him.

1.22. Despite these developments neither of the two major, official enquiries mounted in the last 50 years into the role, organisation and powers of the police in England and Wales made any contribution towards interpreting the idea of balance. Although charged in its terms of reference "to have due regard to the rights and liberties of the subject", the *Royal Commission on Police Powers and Procedure* of 1929[1] made only token and inert use of the concept of balance; and the *Royal Commission on the Police* of 1962 [2] was advised by the Government to continue to leave to the judges the subject of police interrogation, in any discussion of which the question would surely have arisen. Other recent, relevant public reports, for example the 1975 Thomson report in Scotland,[3] make only passing comment, and the Criminal Law Revision Committee, which reported in 1972 on the law of evidence in criminal cases,[4] made no explicit reference to the notion.

1.23. On the other hand, in official reports in the United Kingdom in which the rights and privacy of the individual in relation to the power of the state or to the security of society are most obviously juxtaposed, some general reference to the need for balance in procedure is made. The concept of balance, for instance, is alluded to in the *Report of the Committee to Enquire into the Interception of Communications*.[5] Recently, in April 1980, in the debate in the House of Commons on the Government's White Paper on telephone tapping, the Home Secretary, Mr Whitelaw, in explaining the Government's policy, argued that it depended on "the readiness of the public and their representatives in Parliament to repose their trust in the Ministers concerned to exercise that control with a right sense of balance between the value of interception as a means of protecting order and security and the threat which it may present to the liberty of the subject".[6] Government took a similar approach in attempting to define the rights of peaceful assembly and public protest in relation to the need to preserve public order, a dilemma sharply presented by the activities of various extreme groups. Reviewing possible solutions, the Government's Green Paper takes as its starting point the need "to safeguard fundamental human rights".[7]

The debate on the "right of silence" and the fundamental balance

1.24. Although some idea of consciously seeking within the criminal justice system to define a balance between the rights of individuals and the security of society and the state has been growing, discussion has not often moved beyond the level of generality. To find the issues and arguments relating to the concept most strikingly, usefully and fully exposed, we have to turn to the extensive debate which took place both among the public and in Parliament between 1973 and 1974 on the proposals in the *Eleventh Report of the Criminal Law Revision Committee* (1972).[8] Understandably, this report itself, which dealt with the somewhat circumscribed matter of the law of evidence in criminal

[1] London HMSO Cmd 3297.
[2] London HMSO Cmnd 1728.
[3] *Criminal Procedure in Scotland (Second Report)*, Edinburgh HMSO Cmnd 6218.
[4] *Op. cit.*
[5] London HMSO 1957 Cmnd 283. See for example p 142.
[6] House of Commons Official Report 1 April 1980 Cols 205–208.
[7] *Review of the Public Order Act 1936 and related legislation*, London HMSO 1980 Cmnd 7891.
[8] *Op. cit.*

trials, did not seek to raise broader, still less philosophic issues, but the ensuing debate in the press and in Parliament did just that, and for the light it throws on public understanding of an approach to the whole question, it is instructive to examine this episode in some detail.

1.25. The report started from the position that the many improvements which had taken place in criminal law, procedure and trial over the past century justified the removal of certain safeguards which appeared unduly to favour the defence, the more so because, the Committee said, crime was markedly on the increase and the feeling was abroad among the public that "criminals were getting the better of the law". "There has been", they added, "a good deal of feeling that the law of evidence should now be less tender to criminals generally", and concluded, "we propose to restrict greatly the so-called 'right of silence' enjoyed by suspects when interrogated by the police ... By the 'right of silence' in this connection we mean the rule that if the suspect when being interrogated omits to mention some fact which would exculpate him but keeps this back until the trial, the court or jury may not infer that his evidence on this issue at the trial is untrue. Under our proposal it will be permissible to draw this inference if the circumstances justify it. The subject will still have the 'right of silence' in the sense that it is no offence to refuse to answer questions or tell his story when interrogated; but if he chooses to exercise this right, he will risk having an adverse inference drawn against him at his trial."

1.26. Frankly adopting a utilitarian approach, the Committee further explained, "We need hardly say that we have no wish to lessen the fairness of criminal trials but it must be clear what fairness means in this connection. It means, or ought to mean, that the law should be such as will secure as far as possible that the result of the trial is the right one".[1] In short, the Committee was arguing that in pursuit of "the right result" the pre-trial procedure was to be treated as open to variation, and even the right of silence was not to be seen as a unique or invariable right, but was to be treated as just one of a set of procedures which could and should be modified to achieve the "right result".

1.27. Both within and outside Parliament, a formidable body of professional and lay opinion stood aghast at this proposal, and loudly, often emotionally, protested that the Committee was treating the matter in much too narrow and limited a sense, and that in reality the right of silence formed a vital issue in the whole constitutional relationship in a free society between the individual and the state. Essentially, their opposition rested on two arguments. The first was that the accusatorial system of trial must be accepted in full rigour as dictating the nature of the pre-trial procedure. In Lord Devlin's words in the *Bodkin Adams* case, which were much quoted in the debate, "So great is and always has been our horror that a man might be questioned, forced to speak and perhaps to condemn himself out of his own mouth, that we grant to everyone suspected or accused of crime at the beginning, at every stage and until the very end, the right to say, 'Ask me no question. I shall answer none. Prove your case'." The second argument was that basically an individual's rights in the criminal process had to be related to an understanding of what

[1] *Ibid.*, pp 12, 15, 16.

the individual's relationship to Government ought to be in a free, democratic society, and that each step in the criminal process, pre-trial and trial, including the right of silence, must be judged not only as a means to the goal of achieving a reliable verdict, but also, and equally important, for its coherence with a liberal understanding of how free persons, including suspects in the police station, at all stages ought to be treated.[1]

1.28 Lord Gardiner, a former Lord Chancellor, spoke for many inside and outside Parliament when he invoked British and American experience in declaring, "The privilege against self-incrimination has always been as broad as the mischief against which it seeks to guard . . . As a noble principle often transcends its origins, the privilege has come rightfully to be recognised in part as an individual's substantive right, 'a right to a private enclave where he may lead a private life' . . . The constitutional foundation underlying the privilege is the respect a Government must accord to the dignity and integrity of its citizens."[2]

1.29. Two very different positions, two opposed philosophies in perceiving and evaluating the criminal process, the utilitarian and the libertarian, were therefore so diametrically opposed as apparently to defy reconciliation.

1.30. But the debate also revealed a third group (which included a minority of the Criminal Law Revision Committee). Starting also from the utilitarian viewpoint that the existing procedures should be re-evaluated in the light of changing circumstances and should not be accepted as invariable, this group argued that they would support the proposal to modify the right of silence in respect of interrogations in police stations only if statutory provision was made for the compulsory use of tape-recorders. In other words, they saw the right as negotiable, but only in terms of an associated and considered use of checks and safeguards.

1.31. It was the conjunction of the forces of the second and third groups, united in opposition, if from very different standpoints, that decisively halted proceedings on the report of the Criminal Law Revision Committee. And so high had emotion run, so heated was the controversy both outside and inside Parliament, and ultimately so confused had the issues become, that for these and other reasons Government decided to take no further action. Yet the debate had proved valuable in revealing the main schools of thought in England and Wales on the significance of pre-trial criminal procedure and the nature and role of a possible balance. It had also indicated another way towards reform, avoiding the liberal and utilitarian horns of the dilemma, refusing to start from one or other extreme position, yet finding new methods of evaluating and safeguarding and balancing the rights of the individual in relation to the security of the community.

The Commission's response

1.32. That this debate had given rise to such a degree of public confusion and political stalemate offered both a warning and a challenge to the Royal

[1]House of Lords Official Report 14–15 February 1973 cols 1546–1678. House of Commons Official Report 4 February 1974 cols 891–998.
[2]House of Lords Official Report 14 February 1973 cols 1567–68.

Commission when it first came to its work. We could not but be aware that in relation to the right of silence (which was only one part of our remit) there had been little meeting of minds between the two main opposing groups, between those who gave paramountcy to the principles of the presumption of innocence and the burden of proof, and those who saw the purpose of the criminal justice system as being a means to the end of bringing the guilty to justice. This awareness was not long in being reinforced, since a great deal of the written and oral evidence to us, while bringing the main issues sharply into focus, reflected, without resolving, this stalemate. How were we to escape from the dilemma?

1.33. One way would have been to go straight down the road already explored by the third group in its response to the Criminal Law Revision Committee's proposals; that is to assume that some, not necessarily all, of the individual rights in the pre-trial procedure might be regarded as negotiable, provided that adequate compensatory safeguards could be found and that, similarly, some of the powers of the police might be increased, if their use was likewise subjected to reciprocal and stricter controls. We concluded, however, that this approach to finding a balance had limitations and was not altogether helpful. It presumes that the positions of the two main groups are capable of being reconciled by a series of compromises, involving concessions by each, and that the resulting proposals will be generally regarded as an improvement because the right solution is necessarily to be found somewhere in the middle ground. Consideration of the written and oral evidence given to us and the tenor of the public debate on it led us to conclude that neither presumption was likely to be fulfilled. More important, this approach assumes that the positions occupied by the two groups are solidly based on an objectively established body of knowledge about how pre-trial procedures work in practice, and on considered assessment of the likely effects of possible changes. That is certainly not the case; until recently there has been little objective research into the working of the system.

1.34. We decided therefore that we could not merely search for compromise between the two opposing schools of thought. We needed to supplement the experience amongst our members and the wealth of written and oral evidence submitted to us. We sought to do this by enlarging and deepening our knowledge of the workings of the existing system and our understanding of the possible effect of change through a programme of research and by personal visits by Commissioners to all police authority areas in England and Wales and to other jurisdictions outside.[1]

1.35. This would give the factual base enabling us to come to grips with our terms of reference. But in order to formulate proposals that would strike the proper balance, we still had to find and agree on a broad strategy of approach within which our factual material could be evaluated. It is the British tradition to assume that institutions can best be understood by the manner in which they are seen to emerge from their history, shaped by their relationships and other shared experiences; and that this texture of experience and practice, the

[1]For a more detailed account of the method of work adopted by the Royal Commission see the Appendix to this report.

product and push of history, ensures that institutions are soundly based and workable. Accordingly any proposal for change has to be justified by demonstrating that in a particular respect the institution is not working or is on the point of breaking down. On this approach each separate part of pre-trial procedure should be inspected to see if it is working and then a package of changes devised piecemeal to deal with any parts found to be defective, with the essential structure left untouched. But if this were done, how could it be demonstrated that such a package constituted an appropriate general response to the felt needs of today's society in respect of the arrangements as a whole? How could it be shown that change to one part of the arrangements took adequate account of its likely consequences for other parts? Or whether it would be calculated to strike a balance which would command public confidence? We realised that these questions were not capable of answer without the development of some generally acceptable standards for evaluating the arrangements for the investigation of offences and the prosecution of offenders. A framework of first principles needed to be formulated as a means of measuring the strengths and weaknesses, the adequacy of existing arrangements, of judging the merits of new proposals and of assessing their likely contribution to establishing a proper balance. The development of such an evaluative framework does not necessarily imply that the institutions will be found to be wanting or that piecemeal change is to be excluded. Nor could anyone be under the illusion that the evaluation of so complex a mixture of human and procedural relationships as is embodied in the pre-trial criminal process could be totally comprehended within any single framework. Nevertheless, we concluded that, if any acceptable balance within pre-trial procedures was to be found, the right strategy was to develop an approach which identified the main issues, constructed as firm a factual base as possible and undertook the analysis of existing procedures and proposals for change within a framework of general principles.

PART I

The Investigation of Offences

CHAPTER 2

The Commission's general approach

Introduction

2.1. Our search for the balance in pre-trial procedure starts with the investigative process. That comprises the powers and procedures available to the police for the detection and investigation of offences and for collecting evidence sufficient to charge a specific person: powers to stop and search people on the street, to search premises, to arrest suspects and to detain them in custody, and the procedures for questioning suspects during the course of investigation. Before examining them in detail we need to indicate the main elements of our approach. We shall first set out what seems to us to be the case for reviewing the investigative process at the present time. In order to set that review into its broad context we shall then describe how offences are investigated by the police and the essential part that the public plays in the process. Lastly we shall establish a framework of general principles for our detailed analysis of existing investigative powers and procedures and our proposals for change.

The changing context

2.2. There is, we believe, a theme that pervades the evidence submitted to us, although it is rarely explicitly mentioned. Put baldly, it is that the powers and procedures available for investigating offences need to be brought up-to-date. Our society has changed dramatically in the last century and a half; we need powers and procedures suited to the circumstances of the present day and the foreseeable future.

2.3. Some of the most fundamental social changes are reflected in the increased use made of criminal sanctions and the increased scope of the criminal law. No one measure is by itself a reliable measure of this change, but the trend is clear. In 1900 there were some 80,000 recorded indictable offences *per annum*; by 1950 the total was reaching the 500,000 mark; and in 1978 the figure was 2.4 million. In 1900 there were 36 high court judges whereas in 1979 there were 75 high court judges and 307 circuit judges; the Lord Chancellor's department estimates that a further 69 full-time judges are needed before the end of 1981. According to *Justice*[1] there were by 1975 over 7,000 separate criminal offences, more than half of which did not require any proof of criminal intent on the part of the offender. An analysis of the periods in which these offences were created shows the legislative trend:

[1]A Report by JUSTICE: *Breaking The Rules*, London, JUSTICE, 1980.

Before 1901	469
1901–1920	238
1921–1940	726
1941–1960	1,396
1961–1974	4,386

2.4. Crime has both increased and diversified. For example, persons found guilty of offences against the drugs legislation increased from about 150 in 1950 (UK figures) to about 13,400 in 1978. The development of the computer, new modes of transacting business like the cheque and the credit card, the photocopier, speedy travel and almost instantaneous communication have increased the sophistication of crime, particularly of major frauds. Criminal groups now operate not merely locally or regionally, but on a national and international scale. Hijacking, hostage-taking and terrorism add new dimensions of violence, fear and consequential security precautions.

2.5. In 1978 about five million people were dealt with for motoring offences of one sort or another. The private ownership of motor vehicles has spread throughout the population and has made potential offenders of all who own them, illustrating a major social feature of the changes in criminal justice. The younger age groups too have become increasingly involved and special provision has had to be made for them in criminal procedures. No longer does the law focus upon a particular section of the population. More than ever before, because of changing ways of life and the availability of legal aid, all citizens are in a position of equality before the criminal law. The mass media find in crime and in the police one of the richest sources of drama and their treatment of these issues helps to shape new public expectations, both for good and for ill.

2.6. In response to these changes the strength of the police has been increased from about 60,000 in 1945 to about 120,000 in 1980. Small police forces have been eliminated by a process of amalgamation. There were still over 150 separate forces in 1945; there are now 43. In 1945 one force consisted of ten officers and there were many with fewer than 50; now the smallest has a strength of about 880 officers. Growth of the size of forces has led to longer lines of command within them, with consequences for the nature of supervision. The decrease in the number of forces has meant that some degree of national uniformity of practice is, in theory at least, likely to be more readily achievable. The police have responded to the diversification of crime by the creation of specialist units and to its geographical spread by setting up regional crime squads. The last 20 years have seen a growing emphasis upon training. The police are now a well paid and trained body of men and women equipped with sophisticated equipment.

The need for review

2.7. Social patterns and expectations have been transformed but the law has lagged behind. This can be illustrated by brief reference to three key areas: stop and search; arrest and questioning; detention in custody. Police powers to stop and search people on the street for stolen goods, which are exercised by some of the large metropolitan forces, originate unchanged from the Metro-

politan Police Act 1839. Police powers relating to arrest and detention depend in the main upon two statutory provisions. The more modern is the Criminal Law Act 1967 which gives the police their present power to arrest for serious crimes. But, although the statutory provision is recent, it enshrines the common law powers which long pre-date the establishment of a paid and organised police service on today's lines. Detention in custody is regulated, somewhat obliquely, by s. 38 of the Magistrates' Courts Act 1952, which derives from the Summary Jurisdiction Act 1879 and may be traced back beyond that to the Metropolitan Police Act 1829, that is to the very beginning of an organised police force in this country. Procedures for questioning in custody are set out in a Home Office Circular entitled *The Judges' Rules and Administrative Directions to the Police*, which are based upon principles first developed in the nineteenth century. When the Judges' Rules were first formulated, in 1912, police practice on questioning in custody seems still to have been strongly influenced by the view, succinctly expressed by Lord Brampton in 1882, that a constable should keep his eyes and ears open and his mouth shut.[1] The Royal Commission on Police Powers and Procedure in 1929 said that the great majority of police forces followed Lord Brampton's advice as a matter of fundamental principle and concluded that it was desirable to avoid any questioning at all of persons actually in custody.[2] Some of the concepts in the Judges' Rules, for example the caution upon charging and the prohibitions on holding out hope of advantage and on threats, may be found in statutory form in the Administration of Justice (No 1) Act 1848 as injunctions to the justices examining the accused before he was committed for trial. Only comparatively recently does police questioning in custody seem to have become accepted practice.

2.8. While there has been piecemeal legislation giving the police much wider powers in some special fields (for example road traffic) than they possess generally, this legislation does not seem to have had any common rationale. It is therefore not surprising that tensions should now make themselves felt. It is perhaps more surprising that the arrangements have stood up so well for so long. That they should have done so is a tribute to the flexibility and adaptability of the common law, to the common sense of those who interpret and develop it and to the good judgment and discipline of those who work within it. These are qualities which every one would want to retain. Nonetheless our evidence and research confirm that the time has come for investigative procedures to be generally reviewed and for the provisions that regulate them to be reformulated and restated in clear and coherent terms that have regard to contemporary circumstances.

The context of our review

The role of the police in the investigation of offences

2.9. In the present arrangements for bringing suspected offenders before the criminal courts, the police have responsibility for the investigation of suspected offences and for the collection of evidence sufficient to charge a specific person.

[1]Quoted in the foreword to Sir Howard Vincent's *Police Code* (1882); see also Channell J. in *R v Booth and Jones* (1910) 5 Cr App R 177.
[2]London HMSO Cmd 3297, paras 162 and 165.

There has been no suggestion made to us that the police should not retain the primary responsibility for the investigation of crime; and there is no comparable jurisdiction where the police, or an equivalent body, do not have that responsibility. Our review of the elements of the investigative process assumes that they will and must retain it.

2.10. Methods of investigation and the interplay between the various powers of the police to arrest, search or question cannot be briefly described since they may vary with the crime, the suspect or suspects, the circumstances of the case and a variety of other factors. But consideration of particular powers and procedures must be undertaken on the basis of some understanding of the part they play in the process as a whole. We therefore consider it necessary to bring out at this point some of the essential elements in the investigative process.

2.11. Research has shown that only a small proportion of offences is eventually reflected in official statistics of reported offences.[1] Of that which does appear in the statistics the overwhelming majority (leaving aside motoring offences) is not discovered by the police, but by the public. Research suggests that only between 10 per cent and 20 per cent of offences are discovered initially by the police themselves.[2] But although the police discover only a small proportion of offences they are often of a special kind, for example some types of drug offences, which are unlikely ever to be reported by members of the public. Motoring and other regulatory offences are also of this kind. And in dealing with organised professional crime the police play a critically important role.

2.12. Recent research helps to fill out the picture of how offences are investigated by the police. In his study of the work of detectives in Thames Valley Steer showed that the majority of offenders were detected in circumstances that did not involve the exercise of detective skills. They were caught in the act, or were still at the scene of the crime when the police arrived there, or their identity was given to the police by the victim or a witness. About 40 per cent of offenders were detected following some kind of investigatory effort. In 17 per cent of cases offenders were detected because they were one of a small group of people who had an opportunity to commit the offence, or were found in possession of stolen property or trying to dispose of it, or were caught as the result of police observation or a trap. Eleven per cent were detected as the result of a stop/check, or of "information received", or from local police knowledge, or from a fingerprint search. And 12 per cent were implicated by an accomplice during interrogation.[3] Steer stresses the importance of interrogation in the detection and investigation of crime; one offence in four was detected when the police interviewed a suspect after his arrest for other offences.[4] This picture is broadly confirmed by other research. In a study by Mawby about 40 per cent of offences were detected as a result of interviews

[1]See, for example, Sparks R, Genn H and Dodd D: *Surveying Victims*, Chichester John Wiley and Sons 1977, p 219.

[2]See, for example, A Keith Bottomley and Clive A Coleman: "Criminal Statistics: The Police Role in the Discovery and Detection of Crime", *International Journal of Criminology and Penology* 4, 33–58, Table 1 and David Steer: *Uncovering Crime: The Police Role* (Royal Commission on Criminal Procedure Research Study No 7, London HMSO 1980), Table 3:3, p 67.

[3]Steer, *op. cit.*, Table 4:2, p 97.

[4]*Ibid.*, pp 74–5.

with suspects initially arrested for a different offence.[1] Mawby attributes about 10 per cent of detections to direct investigatory methods such as the use of special knowledge and techniques, or the questioning of all persons found near the scene of a crime, or seen acting suspiciously.[2] Likewise, Bottomley and Coleman found that information received from informants, through intelligence systems, or as the result of fingerprint searches or other forensic tests accounted for under 10 per cent of detections. In their sample, about a quarter of detections were made following the questioning of someone arrested for another offence.[3] Nationally, too, a quarter of detections result from this last method.[4]

2.13. Although they differ in their emphasis, these studies confirm the view that the business of criminal investigation is not the challenging and exciting task widely portrayed in the mass media. Although Steer comments that "the success of the police in the detection of crime depends for the most part on how much useful information the public is able to give the police about the circumstances of the offence",[5] it does not follow that the police have a merely passive role. They have to interview victims; they have to find and question witnesses, in order to elicit relevant information from them; and they have to locate, question, and sometimes search suspects and premises, either to remove the suspicion that a member of the public has cast upon the suspect, or to assemble sufficient information which will be admissible as evidence at trial to mount a prosecution. All of these can be difficult and time consuming tasks, requiring much skill, experience and local knowledge. Although we have not been able to test the importance at trial of evidence disclosed during the course of stops and searches and of searches of arrested persons and premises, it is clear from our research that the use of these powers can often lead to the detection of offences.[6]

2.14. The studies also indicate how important questioning can be in detecting offences, and the police clearly attach considerable importance to it. But it has been represented to us that the importance of police interrogation in the investigation and prosecution of offences has been greatly exaggerated. The research that we commissioned on police interrogation and on the substance of the case for the prosecution throws some light on these issues. In many cases, the police question suspects and obtain admissions when, judged in evidentiary terms, it is not necessary that they do so. In the study by Softley of police interrogation in four stations the great majority of suspects brought to the police station were interviewed there even though the existing evidence against them was strong.[7] In only a few cases (8 per cent) did the police feel

[1] Rob Mawby: *Policing the City*, Farnborough Saxon House 1979, p 109.
[2] *Ibid.*, chapter 5.
[3] A K Bottomley and C A Coleman: *Police effectiveness and the public: the limitations of official crime rates*, p 92, in R V G Clarke and J M Hough (eds): *The Effectiveness of Policing*, Farnborough Gower 1980.
[4] Statistical returns made by police forces to the Home Office showed that, in 1977, approximately 25 per cent of crimes cleared up by the police were taken into consideration for sentencing purposes.
[5] *Op. cit.*, p 122.
[6] *Ibid.*, Tables 3:4 and 4:2, pp 73 and 97 and see also paragraphs 3.17 and 3.35 below.
[7] Paul Softley: *Police Interrogation: An Observational Study in Four Police Stations* (Royal Commission on Criminal Procedure Research Study No 4, London HMSO 1980), chapter 6.

that questioning was essential if the case was to be brought to court, although in 70 per cent they judged that the information given by the suspect would help to secure a conviction. About 60 per cent of the suspects made either a full confession or a damaging admission, a similar proportion to that found by Irving in his study of Brighton CID.[1] Irving rates the importance of interviews rather more positively, suggesting that of all the purposes for which an interview can be used obtaining a confession to use either as the main evidence in the case or as important subsidiary evidence is the most important.[2]

2.15. There are difficulties in interpreting the results of these studies for it is not always clear what criterion the authors are using when judging interviews to be "important" or "helpful". In their study of cases heard in the Crown Court Baldwin and McConville made their assessment on an explicit basis: 13 per cent of cases would have failed to reach a *prima facie* standard without confession evidence and a further 4 per cent would probably have been acquitted.[3] Statements made by the accused formed part of the prosecution case in nearly all the cases examined and in half of them these statements amounted to a full confession.[4]

2.16. If confessions are not usually crucial to the prosecution case, why then are they sought? Irving suggests that to some extent the police seek confessions because they are regarded as the best evidence against the accused. A confession is sought to be on the safe side, even where there is other sufficient evidence.[5] The strong association between a confession and a plea of guilty lends support to this view.[6] A guilty plea reduces the time spent in preparing cases and in appearing in court. It is impossible to say whether there would be a decrease in the number of guilty pleas if confessions could not be obtained by questioning. But it has to be recognised that were there an increase in the proportion of cases being contested a lot more resources would have to be allocated to both the police and the courts (the Cranfield Institute of Technology has estimated for us that an increase of 1 per cent in the numbers of those pleading not guilty would cost an additional £3.7 million *per annum* on 1978/9 prices).[7]

2.17. Research based upon the examination of cases as they have been presented to the court tends to underestimate the importance of questioning in the investigative process. Establishing a good case is not the only purpose of questioning. A substantial minority of suspects who are arrested when suspicion falls on them are subsequently released because further enquiry fails to confirm or allays the suspicion. Irving, Softley and Steer all illustrate the extent to which interviewing may contribute to this effect. In each of their samples up to 20 per cent of persons arrested were not proceeded against. Steer in particular

[1]Barrie Irving: *Police Interrogation: A Case Study of Current Practice* (Royal Commission on Criminal Procedure Research Study No 2, London HMSO 1980), Table 8:3, p 150.
[2]*Ibid.*, pp 115–116.
[3]John Baldwin and Michael McConville: *Confessions in Crown Court Trials* (Royal Commission on Criminal Procedure Research Study No 5, London HMSO 1980), Figure 4:2, p 32.
[4]*Ibid.*, chapter 3.
[5]Irving, *op. cit.*, pp 115–116.
[6]Baldwin and McConville, *op. cit.*, p 19.
[7]J A Barnes and N Webster: *Police Interrogation: Tape Recording* (Royal Commission on Criminal Procedure Research Study No 8, London HMSO 1980), Table 3:10, p 16.

illustrates in detail how suspicion can be dissipated by questioning before and after arrest.[1]

The framework for our review

The standards to be applied to investigative arrangements

2.18. There is, then, a critically important relationship between the police and the public in the detection and investigation of crime. This alone makes it essential that the public should have confidence in the way the police go about the process of investigation, so that ordinary citizens will continue to cooperate in that process. The success of the police depends upon public support and this should be reflected in the arrangements for investigation. We suggest that there are three principal standards to be applied to these arrangements if they are to command public confidence. Are they fair? Are they open? Are they workable? The nature and application of these standards will emerge as we discuss our proposals for the use of police powers and for questioning. We offer here a brief preliminary explanation of what we have in mind. As will become clear, each standard is to some degree linked to the others.

2.19. By fairness we mean that if a suspect has a right he should be made aware of it. He should be able to exercise it, if he wishes, and waive it, if he wishes. If the right is to be withheld from him he should know not only that it is being withheld but why it is. If he is to be required to submit to a particular investigative procedure, he should be told under what power the requirement is made and how it can be enforced if he refuses. Rules should be equitably applied to all people, without unjustifiable variation in their application in different parts of the country or in respect of different groups of people, although additional provisions may be needed for particular categories, such as juveniles. Fairness applies equally to the police officer. He should not be required to try to work within a framework of rules which are unclear, uncertain in their application and liable long after the event to subjective and arbitrary reinterpretation of their application in a particular case. Both suspect and police officer should know where they stand, and the rules should be framed and promulgated in such a way as to enhance general awareness of them.

2.20. Openness relates not merely to the impact of procedures on the suspect but also to the operation of the procedures as a whole. Decisions, to the extent that it is possible, should be explained to the suspect. They should also be written down, together with a narrative of the events while a person is in custody. They can then be available for the record, for inspection and, if need be, challenge by supervisory officers, by the suspect or his legal adviser, and by the courts. This should also make possible general oversight of the process by the police authority, by central government through its inspectorate, and ultimately by Parliament. In the nature of things it is not possible for the cell block, charge office and interview rooms of a police station to be open to members of the public to come or go as they please. But the procedures should provide satisfactory means of supervision and review, in order that the suspicions of what goes on behind those closed doors can be diminished.

[1] *Op. cit.*, pp 83–96.

2.21. The notion of the police officer as the citizen in blue who is paid to do things that all citizens should do contains an element of truth. But it is far from reality. Society expects, indeed it places a duty upon, the police to detect and investigate crime and, if appropriate, to bring detected offenders before the courts. That expectation applies equally in respect of the petty thief, the burglar, the vandal, the drunken motorist, the bank robber, the rapist and the terrorist. Any rules to regulate investigation must be so framed that they enable the police to discharge their duty but ensure that the rights of the suspect are properly protected. They must enable the police to deal with experienced and dangerous criminals, and yet cover the circumstances of the great majority of suspects who are of a very different kind.

2.22. Another aspect of workability has already been partly touched upon in the discussion of fairness. Police officers should not be required to operate with unclear and uncertain rules; the content of the rules should be examined against the objective they are intended to achieve. Moreover they should take account of the physical circumstances and the patterns of work and command in the environment in which they are to operate. The way the police work is determined by such factors as work demand, manpower availability, the shift system and the processes of accountability, and these condition the way in which they are able to respond to the constraints the legal rules place upon them.[1]

2.23. Proposals for change should also take account of the resources available or likely to be available and of the most efficient ways of deploying them. We have tried in our research to estimate the likely resource requirements of change and to frame our proposals with those in mind. It is not always just a matter of money, equipment and buildings. Equally important is trained and experienced police and legal manpower, and this is harder to come by and impossible to obtain speedily.

2.24. These then are the standards we shall be applying in our evaluation of existing investigative powers and procedures and of proposals for change. We shall also be using similar standards when we come to consider the prosecution of offenders, where the public's confidence in the system is equally crucial. In the rest of this Part of our report we shall be concerned with the basis on which and the circumstances in which such powers and procedures are to be available to the police and the safeguards that are to be applied to their exercise.

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[1]See in relation to the CID Irving, *op. cit.*, pp 112–114 and p 152.

CHAPTER 3

Investigative powers and the rights of the citizen

Introduction

3.1. As we have indicated, most crimes are detected as a result of a report by a member of the public which contains information enabling the police to identify the suspect. But the police require investigative powers where no suspect has been identified, where suspects are not willing to cooperate and where suspicion needs to be dispelled or confirmed. The exercise of these powers necessarily involves encounters between the police and people who may turn out not to be suspects. For other people these encounters will mark their entry into the criminal justice system. Accordingly the issues before us are the nature and extent of the investigative powers which should be available to the police and the safeguards on their exercise that are essential to protect the rights and liberty of all members of the community.

3.2. If the police are to do their duty to investigate suspected crime they must continue in certain circumstances to stop and question people, to search them, their vehicles, or their premises, and to take them to the police station in the course of the investigation. In many cases they should and will achieve their objectives with the consent (which should be free and genuine) of the person concerned. But they need to be provided with powers to enable them to carry out such activities lawfully and, in the last resort, with application of reasonable force; such powers may be termed coercive. The use of this term does not imply that the police commonly rely on force or the threat of force in the performance of their duties.

3.3. Coercive powers involve either an intrusion upon someone's person or his property or a deprivation of his liberty. Such action, unless authorised or done with the consent of the person concerned, constitutes a criminal offence or an actionable wrong: search of the person, for example, being an assault, entry upon property a trespass, and arrest a false imprisonment. Upon what basis should society allow these acts to be made lawful? Our approach has been governed by the considerations which we discuss in the following paragraphs.

3.4. The use of coercive powers cannot be justified unless there is certainty or suspicion based upon reasonable grounds that a crime has been or may have been committed, is being or is about to be committed.[1] Generally coercive

[1] This cumbersome expression is required to cover all the circumstances (past, present and future). For ease of discussion, except where it is essential to be specific, we shall refer only to a crime having been committed and this should be taken to include the other circumstances.

powers cannot and should not be exercised against a person, his property or his liberty unless he himself is known to have committed or is suspected on reasonable grounds of having committed a specific crime. Further the exercise of a particular power in a given case must be capable of being justified as necessary in all the circumstances. Safeguards which offer the possibility of the immediate challenge and subsequent review of the exercise of the power must be provided to ensure that these criteria are being met in particular instances. These principles apply to the general powers, of stop and search, search of premises and arrest, which the police exercise in the normal run of cases.

3.5. But in our examination of the investigation of offences we came across some sets of circumstances in which these general principles could not be applied as they stood, and yet in which there is a clear need for a particular power to be available. Such powers may involve an intrusion upon the privacy of someone who is not necessarily suspected of a specific crime: the power to search for evidence or to use surveillance techniques. Additionally circumstances may arise requiring the application of a power which of its nature would be unacceptable in the normal run of cases: intimate personal searches, the taking of certain body samples, prolonged detention or detention without allowing access to legal advice. In assessing whether such powers should be available and the special safeguards to be applied to them if they are, we concluded that account must be taken of the effectiveness of the power in investigating the offence concerned and of the importance that society places upon bringing those suspected of it to trial. The seriousness of the offence is, accordingly, a critical consideration.

3.6. The seriousness of a crime as a criterion for the exercise of coercive powers has hitherto not been widely used in criminal procedure. Even where it is used it presents difficulties of application. For example, s. 38 of the Magistrates' Courts Act 1952 provides that someone taken into custody for a serious offence does not have to be released or brought before a court within 24 hours, but there has been no legal interpretation of seriousness in this context. Nor can seriousness easily be defined by reference to the maximum penalty imposable on conviction. In our discussion of arrest we shall be drawing attention to the old distinction between serious and other offences (the felony and misdemeanour) and its replacement in 1967 by the test of the maximum penalty on conviction for the offence, five years imprisonment. As we shall be pointing out, the difficulty with that test or any variation of it is that it can encompass both too much and too little (at present, for example, it confers a power of arrest for all forms of theft whether trivial or on a large scale). Serious crime for the purpose of intercepting communications is defined by the Home Office as an offence for which a man with no previous record could reasonably be expected to be sentenced to three years imprisonment, but that test would not be suitable for incorporation in a statute and would need to be elaborated if it were to be of any guidance to the police. Nonetheless, if the police are to have the necessary investigative powers to deal with very serious crimes, there must be some way of limiting the availability and controlling the exercise of those powers and this must include specifying the offences or type of offences to which they are to be applied.

3.7. Whether a particular coercive power should be available in respect of a particular offence will vary to some extent with the nature of the offence and the way in which it is likely to be investigated. However, in our view, the following broad categories of offence (including, where appropriate, attempts or conspiracies to commit those offences) should be covered: serious offences against the person or serious sexual offences (murder, manslaughter, causing grievous bodily harm, armed robbery, kidnapping, rape); serious offences of damaging property (arson, causing explosions); serious dishonesty offences (counterfeiting, corruption, and burglary, theft and frauds, where major amounts are involved); and a miscellaneous group (the supply, importation or exportation of controlled drugs, perversion of the course of justice, and blackmail).

3.8. In the rest of our discussion on the investigation of offences we shall use the term "grave offences" to refer to those offences which we have categorised in the preceding paragraph, in order to indicate where in respect of a particular power we are applying the principle that has been developed here.

3.9. If the criterion of seriousness is to be used in this way three points should be recognised. First we acknowledge that, if this approach is accepted, Parliament will wish most carefully to scrutinise the offences that would warrant the application of the enhanced powers to them, since here the balance between the liberty of the citizen and the interests of society is at its most delicate. The list we have given therefore can to some extent only be illustrative of the principle we are applying, but we would urge that any extention of its scope should be most rigorously tested. Secondly since society's perception of "seriousness" may well change over the years, any means of prescribing it should be flexible and capable of ready review by Parliament. Thirdly it is difficult to define the seriousness of dishonesty offences. Nonetheless the courts and the police cannot be left altogether without guidance, and we considered two possible ways of dealing with this. One might be to prescribe an exact sum, related to for example an average annual personal income, which could be adjusted periodically. Alternatively the seriousness of the property offence might be linked to the amount involved expressed in general terms (rather than as a precise amount), for example "major amounts", and to the nature of the offender, for example those suspected of repeated offences, or involved with others in systematic and organised crime. The former is a somewhat arbitrary criterion. It would have a precision that could cause practical difficulties, unless some flexibility were provided and it might exclude those involved in regular small scale burglary, which can be very distressing for the victim. Some of us, however, prefer the precision that this alternative offers. But the rest think that on balance despite the subjective element in the general reference to the value of the property involved, the latter is the better solution.

3.10. To sum up the Commission's general approach to the use of coercive powers for investigation, their availability requires general justification and their exercise in a particular case must be warranted by the specific circumstances of that case and be capable of immediate challenge and subsequent review. Only thus can adequate safeguards be provided against the arbitrary and indiscriminate use of such powers. Additionally, in exceptional

circumstances enhanced powers may be made available, but they can be justified only by the gravity of the incident or offence where they are to be used. As will become clear from the discussion that follows, we consider that the use of coercive powers should be placed upon a single statutory footing.

Search of persons or vehicles before arrest

3.11. We start our discussion of particular powers with those that involve intrusion upon the person or his property. These are usually associated with a power to stop the person or vehicle concerned. We shall first summarise the existing provisions and the main points to emerge from the evidence submitted to us.

Existing powers

3.12. Existing statutory powers of stop and search in general permit the police to ascertain whether the person stopped (and, possibly, searched) is, as they suspect, in unlawful possession of the article specified in the statute (we shall refer to these as prohibited articles). These range from the eggs of protected birds to dangerous drugs, firearms and ammunition.[1] There are more than a score of such powers exercisable on different criteria, in different circumstances and by different people. Sometimes they are restricted to a constable in uniform, or a constable who has a particular connection with the place designated in the statute (for example, ports police). There is no common rationale to the powers, which have been granted over a period of more than a century by Parliament to deal with specific problems apparently on an *ad hoc* basis. In addition, there are local powers available in certain parts of the country to stop and search for stolen goods. These are usually modelled on s. 66 of the Metropolitan Police Act 1839, which provides that:

> "[A] . . . constable may . . . stop, search and detain any vessel boat cart or carriage in or upon which there shall be reason to suspect that anything stolen or unlawfully obtained may be found and also any person who may be reasonably suspected of having or conveying in any manner anything stolen or unlawfully obtained . . . . "

3.13. Individual statutory provisions usually require some form of reasonable suspicion of possession of the specified article, although the wording varies. As the police interpret these powers and those under local legislation, this may in practice be a less stringent criterion than that required to exercise the existing power of arrest under s. 2 of the Criminal Law Act 1967.[2]

The main issues

3.14. A principal theme of the evidence put to us has been the need to place on a rational basis and bring into line with modern conditions these procedures and practices, some of which date at least from the last century and in which anomalies are apparent. There is a consensus in favour of codification and

[1]See Royal Commission on Criminal Procedure: *The Investigation and Prosecution of Criminal Offences in England and Wales: The Law and Procedure*, London HMSO 1980 Cmnd 8092–1, paras 20 ff and Appendix 1. For convenience of reference we shall refer to this hereafter as the *Law and Procedure Volume*.

[2]Cited in full at para 44 of the *Law and Procedure Volume*.

rationalisation of the provisions. It is argued further that the resulting clarification, if it could be achieved, would assist the police in preventing and detecting crime, because it would remove uncertainty both for them and the citizen. On the other hand, it is urged that any rationalisation of police powers should not incorporate any extension of those powers, because this might reduce public willingness to cooperate and thereby threaten the tradition of policing by consent.

3.15. The police favour clarification. They also believe that their powers to stop and search persons and vehicles should be increased in certain respects. They say that they frequently have to lay themselves open to the risk of civil action by stopping and searching in circumstances where they have no power to do so but where equally they will be criticised for failing to act. (One example cited is the carrying of offensive weapons by football supporters.) It is remarkable that powers to search vehicles should originate in laws drafted before the invention of the motor car. Although a constable in uniform has a general power to stop vehicles under the road traffic legislation, this is not accompanied by any power to search the vehicle which he has stopped. For this, he has to rely on local legislation such as the Metropolitan Police Act 1839 which relates to the conveying of stolen goods. And such powers are available only in a few parts of the country. On the other side it is argued that even existing powers are too wide and of their very nature give rise to abuse, such as random stops of particular groups of people. An example cited is the power to stop and seach for controlled drugs under the Misuse of Drugs Act 1971, about which allegations have been made for some time that the police stop and search on the basis of length of hair or style of dress; this is said to be particularly objectionable because searching for drugs can involve an extremely detailed examination of someone's body. It is also asserted that the police abuse their powers under the road traffic legislation by stopping vehicles merely because the driver is young or black, or in some way unconventional.

3.16. It has been contended that specific powers are unnecessary. If there is a reasonable ground sufficient to justify stopping and searching a person, so the argument runs, then there must also be grounds for arrest and the power to search on arrest is available; the other powers could therefore be abolished. But few of those who gave evidence to us argued for complete abolition. Rather most commented on the lack of control over the exercise of these powers and on the ineffectiveness of the remedies for those against whom they are used unlawfully.

The need for powers of stop and search

3.17. We accept the arguments for the retention and rationalisation of existing powers, for improving safeguards and for greater clarity and certainty. We believe that people in the street who have committed property offences or have in their possession articles which it is a criminal offence to possess should not be entirely protected from the possibility of being searched. The availability of powers to search is of use in the detection of crime and the arrest of offenders.[1] There seems to us no justification for the geographical variation in

[1]See for example the *Law and Procedure Volume*, para 26 and Appendices 2 and 3.

the power to stop and search for stolen goods. Nor is there any reason for the variation in the precise character and circumstances of exercise of these powers. We consider that there would be substantial advantage in creating a single and uniform power to stop and search for the whole of England and Wales. But the grounds for stop and search must be firmly based upon reasonable suspicion and the exercise of the powers must be subject to strict safeguards.

A possible approach to rationalisation

3.18. We have already mentioned the suggestion that the power of arrest on reasonable suspicion of an offence could form the basis of the power to stop and search, on the basis that if there is reasonable ground for suspicion, the power of arrest becomes available and, with it, the power to search a person and his immediate surroundings. Separate powers could be abolished with the result that the police would think more carefully before searching than they do now because it would have to be preceded by arrest.

3.19. There are, however, difficulties with this approach that lead us to reject it. Although the grounds for exercising the power to stop and search and the power of arrest may in some circumstances be the same, that is not necessarily always so, and the powers are exercised at distinct stages in the process of investigation. If this proposal were put into effect, it might lead to an increased use of arrest, and this is something which we wish to preclude, both because it can involve a more significant deprivation of liberty than that involved in stop and search and because of the consequences that flow from it. To guard against this it would be necessary to make the power to search depend upon the availability of the power to arrest and this would do no more than create by another means the power to stop and search. It would be a cumbersome expedient. We conclude that, provided better safeguards can be developed, it would be simpler and clearer to rely upon an explicit statutory power to stop and search prior to arrest.

The Commission's proposals

Rationalisation of powers to stop and search

3.20. Our own proposals for placing the powers of the police to stop and search upon a uniform and balanced footing put great weight upon the increased safeguards that we are proposing for their exercise. But before we consider these, we should describe our proposal for placing existing powers upon a uniform footing. What we are suggesting is a consolidation into one statute of existing powers and making available throughout England and Wales a power of stop and search for stolen goods. (The reference to unlawfully obtained goods in the Metropolitan Police Act 1839 and in other legislation based upon it seems to us to be unnecessary, although provision may have to be made to maintain the power of search in relation to offences against the Game Acts.) To achieve this, we recommend that a police officer should have power to stop and if need be search any person in a public place whom he on reasonable grounds suspects of conveying stolen goods or of being in possession of anything whose possession in a public place is of itself a criminal offence (for example prohibited drugs, firearms or house breaking implements). Once

this power exists, it will no longer be necessary for Parliament to make special provision for powers to stop and search whenever it creates any new offence of possessing a particular article. The new power should replace all the existing powers. In addition to widening the geographical application of the power to stop and search for stolen goods, its main innovation would be to fill a gap which at present exists in relation to search for weapons other than firearms. The Prevention of Crimes Act 1953, which makes it an offence to carry an offensive weapon in a public place without lawful authority or reasonable excuse, empowers the police to arrest on suspicion of commission of the offence only if the suspect's name and address cannot be ascertained or to prevent an offence in which an offensive weapon might be used. The new power will enable the police to search an individual whom they on reasonable grounds suspect of possessing an offensive weapon.

3.21. Some of us consider that because of the wide range of articles that can be classified as "offensive weapons" and the necessity to prove intent this extension of the stop and search power brings with it a risk of random and discriminatory searches, which could further worsen the relationship between the police and young people, particularly black youth. The majority of us, however, considers that the safeguards that we are proposing in paragraphs 3.24 ff and the fact that search will not be possible on a criterion less than reasonable grounds for suspicion should reduce the risk of search at random or arbitrarily. They take the view that if Parliament has made it an offence to be in possession of a particular article in a public place, the police should be able to stop and search persons suspected on reasonable grounds of committing that offence. The police have a duty to protect members of the public from violent attacks. If there is imprecision in the definition of the offence, the remedy for the difficulty perceived by our colleagues lies in removing that imprecision rather than in refusing the police the power to search.

3.22. We considered whether the power to stop and search persons should be available only to a constable in uniform, and one of us favours this. Clear identification as a police constable is necessary to avoid misunderstanding, friction, and, later, disputes. We accept this as a principle but do not believe the wearing of uniform essential to its attainment in practice.The police officer should take the necessary steps to ensure that the person whom he has stopped has his name and number.

3.23. We have considered whether these proposals take account of "stops" which are sometimes made by the police when a gang of youths turns up at a seaside town on a Bank Holiday or football supporters are on their way to a match. Where the police, from experience, believe that criminal offences are likely to result from a group's activities, because, for example, one or more of them may be carrying offensive weapons, the power of stop and search which we propose should be available. Where submitting to a search can be made the condition of entry to a particular place, for example a football ground or an airport, no problems seem to us to arise. However we wish to distinguish between the use of stop and search powers to detect criminal offences and the use of powers to stop as a means of controlling potential threats to public

order. Powers should exist to protect public order but this question is outside our terms of reference.

Safeguards on use of the powers to stop and search persons

3.24. We have proposed putting police powers to stop and search in a public place in connection with crime on a uniform footing and a limited extension of these powers to enable the police to perform their proper functions of detecting crime and protecting the public. We recognise that even the limited extension proposed may give rise to concern that the powers will be improperly used, and we acknowledge that, without stringent controls, such abuse is possible. There must be safeguards to protect members of the public from random, arbitrary and discriminatory searches.

3.25. Clarification of powers will help but the principal safeguard must be found in the requirement for and stricter application of the criterion of reasonable suspicion. Some have complained that the police interpret this too loosely at present and that the courts are not as a matter of course required to test it; this increases the risk of random stops. We acknowledge the risk that the criterion could be loosely interpreted, and have considered the possibility of trying to find some agreed standards which could form the grounds of reasonable suspicion and could be set out in a statute or in a code of practice. Like others before us we have concluded that the variety of circumstances that would have to be covered makes this impracticable.[1] We have therefore looked for other means of ensuring that the criterion of reasonable suspicion is not devalued. We consider that the notification of the reason for the search to the person who has been stopped, the recording of searches by officers, and the monitoring of the records by supervising officers would be the most effective and practical ways of reducing the risk.

3.26. The grounds for search should be given to the person stopped and searched and they should be recorded. The only practical way that this can be done is in the police officer's notebook. We do not consider it would be desirable, practicable or necessary to require the police to record every time they stopped or were stopped by a member of the public for an informal conversation. It is a search following upon a stop and based upon reasonable suspicion that is the main intrusion upon the person and it is that and the reason for it which should be recorded. A copy of the record should be made available within a reasonable period on request by the person who has been searched. Supervising officers should have a specific duty to collect and scrutinise figures of searches and results. They should watch for signs that searches are being carried out at random, arbitrarily or in a discriminatory way. And HM Inspectors of Constabulary should give attention to this matter on their annual inspections of each force. Numbers of stops and searches should be contained in the chief constable's annual report, which will make the broad extent of the application of the powers subject to scrutiny by the police authority

[1]See for example the reports of the Advisory Committee on Drug Dependence on *Powers of Arrest and Search in relation to Drug Offences*, London HMSO 1970, and of the Thomson Committee on *Criminal Procedure in Scotland (Second Report)*, Edinburgh HMSO 1975 Cmnd 6218.

3.27. We consider that searches on the street should be limited to fairly superficial examination of a person's clothing and baggage. It seems to us improper for anything very thorough to occur in a public place. We understand that in some forces it is the practice to offer to conduct even a superficial search at the police station if the person who is to be searched would prefer it (there is obviously some embarrassment involved in being searched in public). That might become a general practice.

3.28. The record of the reasons for the stop and search and the availability of a copy on request will increase the effectiveness of controls after the event, since they will be produced if the legality of the action is challenged, or if civil proceedings or a complaint against the police ensue. Following the analogy of the existing law on wrongful arrest, failure to give the reason for a search should render it unlawful. An officer attempting to carry out an unlawful search, which may properly be resisted, is and will be afforded no protection from an action for assault. We considered whether to make the lawfulness of the stop and search a pre-condition of the admissibility in evidence at trial of anything found during the course of it, but have not been attracted to the use of an exclusionary rule of evidence as a means of enforcing the rules on stop and search. We develop our arguments on the use of such a rule fully in chapter 4[1] and would remark here only that it does not appear to have worked particularly effectively for controlling police searches in the USA. The proper sanctions for unlawful searches or for failure to give reasons are the appropriate civil remedy and disciplinary action.

Searches of vehicles

3.29. If there is to be a power to stop and search people on reasonable suspicion of conveying stolen goods or prohibited articles in public places, it seems to us to be right that the power should also operate in respect of vehicles when it is suspected on reasonable grounds that these contain such articles. To enable the driver at a glance to know whether he should stop, the power actually to stop the vehicle should be exercisable only by a constable in uniform, as is the power to stop under the Road Traffic Act.

3.30. We considered whether the creation of such a power was necessary in view of the provisions of the Road Traffic Act permitting random stops of vehicles for the purpose of that legislation (for example construction and use regulations). The existence of that power runs contrary to our general principle that infringement of a person's liberty to go about his business should be allowed only on suspicion of his involvement in an offence. There may be a case for allowing random powers where the purpose is to provide a system of inspection. Nonetheless the random powers which are granted specifically for those purposes should not be used to undermine the criterion we believe to be appropriate and necessary for stop and search in connection with the investigation of crime under the general provision which we are recommending. In our view the use of any continuing power of random stop of vehicles under the road traffic legislation should be confined to the purposes of that legislation.

[1] See in particular paras 4.125 ff.

3.31. We would expect therefore that where any power to stop vehicles under the Road Traffic Act is exercised for regulatory or enforcement purposes under that Act the reason for the stop would immediately be made clear to the driver. Such a stop could not be used as a subterfuge for exercising the power of search upon suspicion which we now propose. Where a constable in uniform stops a vehicle for the latter purpose he would, as we have already suggested, make known to the driver and to the other occupants of the vehicle the nature of his suspicions and the reason for the stop. There are however two circumstances in which the police currently use their powers to stop vehicles in connection with criminal offences but where they have no reasonable grounds for suspicion that the particular vehicle is being used to convey stolen or prohibited goods. The first is where a person whose arrest is sought in connection with a serious offence may be known to be moving in a particular area. Secondly it sometimes happens that there is a spate of crime, such as housebreaking, in a specific area, which is regularly committed over weekends or at other identifiable times. In order to detect such crimes the police find it necessary to check the occupants and contents of vehicles passing in and out of the area at particular periods. We understand and acknowledge the potential value of such a procedure to the police when a clear pattern of serious crime is observable. But we do not think that in these instances the consequent infringement of the liberty of the subject can usually be justified by applying the "reasonable suspicion" criterion. If such checks are to be allowed, they should be confined to particular types of serious crime and should be regularised by the introduction of a measure of supervisory control. Similar considerations apply when a wanted criminal is at large.

3.32. We therefore propose that a police officer of rank not less than assistant chief constable should be empowered to authorise in writing the setting up of road checks for a limited and specified period in the following circumstances: when a person whose arrest is sought in connection with a grave offence[1] is believed on reasonable grounds to be moving in a particular area; and when there is reason to suppose that a grave offence (the obvious examples are arson, sexual attacks upon women or children, the importation, exportation or supply of controlled drugs or burglary of major amounts) may be committed in a defined area over a specified period. The reason for the check would be incorporated in the written authorisation and should be explained to persons whose freedom of movement has been temporarily restricted at a check point. There should be no general or consequential power to search the vehicle; that would have to be justified in each case by reference to a suspicion on reasonable grounds that there was evidential material in the vehicle. The exercise of the power to stop vehicles in connection with systematic crime should be subject to regular outside scrutiny to avoid its arbitrary and indiscriminate use. To this end we recommend that the issue of such authorisations of road checks should be reported periodically to the police authority, be included in the chief constable's annual report, and be the subject of scrutiny by HM Inspector of Constabulary.

3.33. One of our number takes the view that in relation to this and a number of other powers the police should be required to obtain the authorisa-

[1]See para 3.7.

tion of a magistrates' warrant, so that the use of the power could not become too common. The police should not be able to undertake such activity on their own authority and without outside scrutiny. The rest of us consider that for operational matters such as this the magistrates can do little other than endorse a police request, so that they would provide no real safeguard. Rather, the authority of the magistrates' warrant has the effect of protecting the police from a civil action if the exercise of the powers turns out to be unjustified. In their view it is preferable that the police should take responsibility for such operational decisions and accept the consequences of an improper decision.

Entry and search of premises (other than following arrest) and seizure of goods

The existing provisions and practice

3.34. We turn now to the powers of the police to intrude on to private premises in order to enforce the law and to investigate crime. The police are given power to enter and search premises, and to seize evidence, by statute and common law.[1] The purposes for which entry may be effected include the arrest of offenders, search for and seizure of illegally possessed property, discovery of evidence, and the prevention of breach of the peace.[2] Some of the powers require the authority of a search warrant or other form of written authorisation (for example the written order of a superintendent under the Official Secrets Act 1911); others may be exercised without warrant.

3.35. There is no centrally recorded information about the extent of entry and search of premises, whether under warrant or not, and little is known about it. A survey which we mounted with the cooperation of ten police forces and which is fully reported in the *Law and Procedure Volume* throws some light on this.[3] (It deals with search both before and after arrest.) Most searches were carried out in connection with property offences but there was a wide range of other offences involved. Over half took place after arrest without warrant or before arrest with the suspect's or householder's consent. Apart from in one force, scarcely any use was made of the superintendent's warrant. Only a small proportion of searches were to effect arrest. The authority for the search varied according to type of offence, warrants being used most frequently for drugs offences. Search without warrant after arrest was most common in relation to property offences. Just under half of searches were succcessful in uncovering evidence against the suspect of some offence or linking other persons with offences.

The main issues

3.36. Present police powers are said to be too limited, particularly when compared with the vast number of powers of entry which other officials have been given by Parliament. Powers of entry for the purposes of search relate to an apparently haphazard selection of offences, there being some surprising omissions. There is no power, even under warrant, to enter and search the scene of a murder or a kidnap. Most of the powers to search under warrant

[1] See the *Law and Procedure Volume*, paras 30–41 and Appendix 5.
[2] There are numerous powers of entry available to constables for purposes other than the detection of offences (*ibid.*, para 39). This section is not concerned with these.
[3] *Op. cit.*, Appendix 7. See also Steer, *op. cit.*, pp 73 and 97.

relate to the proceeds of crime rather than evidence of offences. Another gap is identified in relation to fraud offences; the power to inspect bank accounts arises only after a charge has been preferred or summons issued.

3.37. Criticism of the powers centres on the manner of their execution rather than on their extent. It is said that entry under a warrant issued for one purpose is used as a pretext for the ransacking of premises for any evidence. Whatever is found may be used as evidence and this encourages general searches. There is comment that magistrates may exercise insufficient care in ensuring that a warrant is necessary; and that too often they merely rubber stamp police requests. It is suggested that warrants are not specific as to area. There is no check on the outcome of warrants, which may remain in force for some time, and can be used on more than one occasion.

The Commission's proposals

The common law powers

3.38. The common law powers to enter, without consent or a warrant, seem to us essential to deal with the situations for which they exist: to effect an arrest under warrant where the subject of the warrant is known to be on the premises, to deal with or prevent a breach of the peace, to save life or limb or prevent serious damage to property, and in fresh pursuit of a person who has escaped after a lawful arrest. We have received no evidence suggesting they should be altered in scope. We recommend that they should continue but, in line with our general approach, they should be placed on a statutory basis.

Search under warrant for prohibited goods

3.39. We have received little evidence arguing for coercive powers of entry and search before arrest to be available without warrant or other written authorisation. In our view such an intrusion upon the citizen's privacy should always require some form of prior and formal authorisation, whatever the purpose of the search. The existing powers are mainly confined to entry and search for items which it is an offence knowingly to possess (we refer to these as prohibited goods): for example, stolen goods, drugs, firearms, and explosives. We reaffirm the principle of the present law that such powers are justified and should be retained. This applies even where the owner or occupier of the premises to be searched is not himself suspected of knowingly possessing the prohibited goods, the justification being the need to restore stolen property to its rightful owner or to remove from circulation potentially dangerous weapons and substances. Warrants for these items should be issued only if it is shown to the issuing authority that there is suspicion based on reasonable grounds that the object of the proposed search is on the premises specified.

Search for evidence: a new procedure

3.40. The suggestion that the police should be enabled to apply for warrants to search for evidence of crime in a wider range of circumstances than at present raises more complex issues. We deal later[1] with the right of the police to search premises controlled or occupied by an arrested suspect. We are here

[1]See paras 3.114 ff.

concerned with other premises. Evidence of crime in such places can cover a very wide field; it extends beyond the mere subject matter of an offence to items which may constitute only a remote link in the chain of proof. As well as more obvious objects such as murder weapons or blackmail notes, it may include personal diaries or papers, business records, or other sorts of stored information. This kind of evidence may be property belonging to quite innocent individuals or organisations, and its removal might cause serious interference in their personal or commercial lives. The property may also be in the hands of the person holding it on a confidential basis for another person (a banker, solicitor or teacher for example).

3.41. It is only rarely that the police do not receive consent to enter when looking for evidence, since people are often anxious to cooperate and allow the police every facility. However where property or information is held on a confidential basis the holder may be unwilling to disclose it for fear of being sued for breach of duty by the person from whom he received it. Where consent is not immediately forthcoming there may be some temptation for the police to resort to bluff or trickery to obtain the evidence. At present there are few statutory provisions allowing the police to search for evidence during an investigation. The Bankers' Books Evidence Act 1879 provides a procedure for obtaining access to bank records when proceedings have started, that is, in a criminal case, after charge or the issue of a summons. A citizen may be required to attend a trial as a witness by means of a witness summons issued by the court on application either by the prosecution or the defence and may be ordered to bring to court specified items of evidence in his possession; but he cannot be required to provide these in advance for inspection, and so this provision is of little use in the early stages of an investigation. We consider that there will be rare circumstances where a compulsory power is needed, and should be available to the police before charge. But in the light of the considerations we have set out above we think that it should be a limited power and one subject to stringent safeguards.

3.42. A compulsory power of search for evidence should be available only as a last resort. It should be granted only in exceptional circumstances and in respect only of grave offences.[1] The seriousness of the intrusion could also be marked by making the issuing authority a circuit judge. The procedure for obtaining access to evidence might have two stages. The appropriate initial step would be for the police to apply for an order of the court on a procedure analogous to the witness summons under the Criminal Procedure (Attendance of Witnesses) Act 1965 or to the orders for the discovery and production of evidence available in civil proceedings. The order, if the court were satisfied of the conditions set out in the next paragraph, would operate to require the person to whom it was addressed to provide or to allow the police to inspect or have access to the items specified in the order (if they were in the form of documents, this might be done by providing copies or taking photographs). It should be provided that the person could appeal to the court against the order, in the same way as a witness summons can now be objected to. If the court were not satisfied with the grounds of appeal and if the person still refused

[1] See para 3.7.

access, a warrant to search and seize could be issued on proof of deliberate refusal to comply with the order. It would also be necessary to provide for the order procedure to be dispensed with and for a warrant to be issued forthwith where there is reason to believe that the evidence will disappear, or be disposed of if the person concerned is alerted to the police interest in it.

3.43. We consider that the issuing authority should have to satisfy itself that the following conditions are met before making an order:

(a) other methods of investigation have been tried and failed, or must in the nature of things be bound to fail;

(b) the nature of the items sought is specified with some precision;

(c) reasonable grounds are shown for believing that the items will be found on the premises; and

(d) reasonable grounds are shown for believing that the evidence will be of substantial value, and not merely incidental; that it will enable those responsible for a particular crime to be identified or the particulars of offences thought to have been committed by particular individuals to be determined.

For the issue of a warrant the following additional criteria should apply:

either *(a)* a final order, after appeal, has been made and disobeyed,

or *(b)* there is reason to believe that the evidence sought will be disposed of or disappear if there is delay or if the interest of the police in it becomes known.

The position after charge

3.44. Once a suspect has been charged, the period of preliminary detection and investigation by the police is concluded. The enquiry is no longer at large; the suspect has been identified and accused of specific offences. At this stage enquiries are, in normal circumstances, confined to the pursuit of evidence for production at trial. For this purpose the limited power of the witness summons is already available both to the prosecution and to the defence. The Bankers' Books Evidence Act 1879 also permits either party to inspect bank records on warrant from a judge or magistrates' court. If our proposals for obtaining access to evidence before charge are accepted, we see no need to extend these provisions.

The issuing authority for orders and warrants to search

3.45. As we have already said, we consider that search of premises prior to arrest can amount to so serious an intrusion that prior authority is always required. The existing law provides for three levels of supervision, by a senior police officer, by a magistrate and by a higher judicial authority. We would recommend that in general the appropriate supervision, under the improved procedures proposed in the following paragraphs, can be provided by the magistracy. Where there is particular urgency in searching for prohibited goods, in the view of all but one of us, a police officer of rank not lower than uniformed superintendent should be able to authorise search of premises. And

the seriousness of the intrusion to obtain or search for evidence might be marked by making the issuing authority for that purpose a circuit judge.

Safeguards on use of powers to enter and search premises

3.46. Many witnesses have suggested means whereby procedures for the issue of warrants could be improved in order to provide more effective monitoring of the use of warrants. We recommend a new statutory scheme to be applied generally to the issue of all warrants and orders for production of evidence which should incorporate the following features. Fairness requires that the issue of a warrant should be a judicial act by the issuing authority. To provide for greater openness and subsequent accountability where the application is to a magistrate or judge the applicant for a warrant should make it in the form of a deposition. This should be written down and lodged at court. It should give sufficient information to enable the issuing authority to assess the justification for the warrant, although it should not be necessary to name an informant if the police officer has good grounds for concealing his identity. The decision should be recorded in writing. The appropriate court clerk should be responsible for the keeping of depositions for a specified period, and these should be available for inspection by the occupier of the searched premises. The occupier could use the deposition to support any allegation that there was an unlawful search (or that it went beyond the terms of the warrant). A record of warrants should also be kept by the police, as we understand is now done in some forces.

3.47. Warrants should specify the object or objects of the search, and the premises to be searched, in as precise detail as possible. This is of particular importance to avoid difficulties where entry has to be gained through other persons' property or where some parts of buildings with multiple tenancy require to be searched. There should be a time limit placed upon the execution of a warrant (we suggest a validity for seven days or such longer time, up to 28 days, as the issuing authority may decide in the circumstances of the case) and the warrant returned to the court if unexecuted when the time limit expires. A further formal application could then be made if it were necessary. The manner of execution of the warrant should be related to the object of the search; search for large items of property should not, for example, require floorboards to be taken up. We understand that it is good police practice, where possible, to invite an independent person to be present as witness of a search, both as protection for the person whose property is being searched and for themselves against allegations of improper behaviour. We do not think this should be prescribed practice but it should be encouraged. Finally we recommend that the property taken in a search should be fully recorded and a receipt given, as, we believe, is general practice; and that the warrant should be endorsed with the result and returned to the court when executed.

Restrictions upon seizure for evidential and other purposes

3.48. Restriction on seizure of goods provides another method of controlling the execution of warrants. We do not think it desirable to limit seizure only to prohibited goods or to the evidence specified in the warrant. It defies common sense to expect the police not to seize such items incidentally found during the

course of a search. At the same time the risk that premises may be ransacked as soon as a warrant is granted in respect of any offence must be minimised. The present law seems to us to be uncertain and of little help in this respect.[1]

3.49. We wish to preclude a specific warrant being used to legitimise general searches. Accordingly when the police have lawful authority to enter premises upon one of the warrants proposed in paragraphs 3.39 and 3.42, they should be entitled to seize the items specified in that warrant and any other prohibited goods or evidence of a grave offence (that is items for which they could have obtained a warrant) which they find incidentally in the course of a lawful search, that is one conducted in accordance with the terms of the warrant and in the manner appropriate to the items being searched for. The procedure for giving a receipt should apply to such additional material that is seized and the receipt should specify the suspected offence in respect of which the material has been seized. Items seized otherwise than in this way may not be used in evidence. We appreciate that the obligatory exclusion of evidence at trial may appear an inflexible restriction, but the right of members of the public to be free from general searches must be respected.

Searches by consent

3.50. There will no doubt continue to be circumstances when premises are searched with the occupier's consent, where, for example, no arrest has been made and in the course of general police enquiries. For the protection of the officers concerned we consider it would be advisable for them always to try to get the occupier's written consent rather than relying on oral consent. Such consent could be recorded in the officer's notebook and signed by the occupier.

The enforcement of the rules on search and seizure

3.51. For the reasons which we develop later,[2] all but one of us think that it would not be an effective means of control nor provide a satisfactory safeguard against abuse automatically to exclude evidence obtained when the procedural rules have been breached, with the exception of the circumstances that we discussed in paragraph 3.49. The rules should be placed upon a statutory basis. Breaches of the rules should give rise to the remedy of civil action or the appropriate disciplinary measures.

The powers of other officials

3.52. We consider that it would be illogical to rationalise and regulate in this way the powers of entry and search of the police, who have to deal with the most serious offences, and leave those of other officials completely unexamined.[3] Our terms of reference do not extend to them. But we take the view that, in principle, the justification for each of the powers of entry and search should be related to the gravity of the offence or other special feature of it which makes such powers essential for adequate enforcement of the law. We note that an examination of one area has already been set in hand[4] and we

[1]See the *Law and Procedure Volume*, paras 34 and 35.
[2]See paras 4.125 ff.
[3]See the *Law and Procedure Volume*, Appendix 4.
[4]Committee on Enforcement Powers of the Revenue Departments set up in July 1980 under the chairmanship of Lord Keith of Kinkel.

express the hope that our review of police powers will be available in time for it to be taken into account in the course of that examination.

Surreptitious surveillance

3.53. The use by the police of methods of surreptitious surveillance such as telephone tapping, eavesdropping by electronic means and long range observation may, when it is directed against persons in their own homes or business premises, be regarded as an invasion of privacy akin to a search of the premises. So far as interception of communications by post or telephone is concerned, this has long been recognised, and the use of these methods by the police is regulated by the system of warrants issued by the Home Secretary.

3.54. The Government's White Paper issued in April 1980 on the *Interception of Communications in Great Britain*[1] gives details of the number of warrants issued, but does not distinguish between those concerned with national security and those relating to the investigation of crime. We are concerned only with the second category, but we were unable to obtain from the Home Office separate figures of their numbers. It is, however, clear from the totals given in the White Paper that the use of warrants for criminal investigation is at present on a very limited scale. Other forms of surreptitious surveillance are not subject to any formal statutory regulation, but guidance on their use has been given to the police by the Home Office and there are provisions in police force orders controlling their use.[2]

3.55. The general question of the intrusion by electronic surveillance into a person's privacy was considered by the Younger Committee[3] but not in the context of criminal investigation, which was outside its terms of reference. Nonetheless the Younger Report provides for our purpose a useful definition of surveillance devices. They encompass devices which enable one to overhear or see a person who believes that he has taken adequate measures to protect himself from surveillance. This definition has the advantage that it will take account of new forms of surveillance as technology develops.

3.56. The use of telephone tapping and other methods of surveillance is a subject on which we did not receive a great deal of evidence, and we have not been able to carry out a detailed study of the present practices, or of the possibilities for future technological developments. But although we have no evidence that the existing controls are inadequate to prevent abuse, we think that there are strong arguments for introducing a system of statutory control on similar lines to that which we have recommended for search warrants. As with all features of police investigative procedures, the value of prescribing them in statutory form is that it brings clarity and precision to the rules; they are open to public scrutiny and to the potential of Parliamentary review. So far as surveillance devices in general are concerned this is not at present so. There is the further consideration that, as a party to the European Convention for the Protection of Human Rights and Fundamental Freedoms, the United Kingdom is required by Article 8 of the Convention to bring these matters under statutory control.

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[1]London HMSO Cmnd 7873.
[2]See the *Law and Procedure Volume*, paras 57–59 and Appendix 10.
[3]*Report of the Committee on Privacy*, London HMSO 1972 Cmnd 5012.

3.57. We therefore recommend that the use of surveillance devices by the police (including the interception of letters and telephone communications) should be regulated by statute. The specific practices subject to regulation should be set out in secondary legislation to enable new techniques to be incorporated as they are developed. Each occasion for the use of a device should require specific authority, in the form of a warrant issued by a magistrates' court (by which we mean magistrates sitting formally with a clerk). Application for a warrant, which would have to be *ex parte* and heard in private, should contain reasons for the intrusion; and the evidence should be recorded in writing. A warrant should be issued only if the court is satisfied that other methods of investigation have been tried and proved ineffective; if there are reasonable grounds to believe that the evidence will be of substantial value, and that its use will enable those responsible for a particular crime to be identified, or the particulars of offences thought to have been committed by particular individuals to be determined; and if the matter under investigation involves a grave offence.[1]

3.58. As with search warrants, authorisation should be specific, limited in place and duration and should contain the reasons for the intrusion. At the hearing of the application the interests of the person subject to surveillance should be represented by the Official Solicitor or a similar body; we see this as necessary as a means of securing consistency in practice. Unless judicial authority to the contrary is obtained, the person subjected to the surveillance should be told of the surveillance after the event, as is the requirement in a number of other countries. By these means, it should be possible for the justification of surveillance to be challenged, and, if not justified, for redress to be obtained. These proposals would enable the police to use evidence obtained by surveillance in court, which they are at present unable or unwilling to do in relation to telephone tapping.

3.59. We do not consider that the application of such controls will cause any substantial hindrance to the police in their work, especially against the background of the apparently stringent control exercised by the Home Secretary over the issue of warrants for telephone tapping. Some provision should be made for the police to act initially without judicial authorisation in an emergency, provided that they apply for retrospective authorisation.

3.60. We consider that these matters should be placed upon a statutory footing. But we recognise that our proposals provide no more than a schematic description of the system of control which we would like to see, and we are unable to take the matter further without more detailed knowledge of the present practices. It will, moreover, be necessary in devising a new system to take account of the findings of the European Court in the case of *Malone*, in which it has been alleged that the present controls over telephone tapping fall short of the requirements of Article 8 of the European Convention for the Protection of Human Rights and Fundamental Freedoms.

[1]See para 3.7.

Chapter 3

Arrest

Existing powers of arrest and their rationale

3.61. We consider in the rest of this chapter those coercive powers which involve depriving a person of his liberty (arrest) or which are exercised when a person has been lawfully deprived of his liberty, that is, when he has been arrested (detention upon arrest).

3.62. In brief, the power of arrest can derive from one of the following sources: the common law; a warrant issued by a magistrate; and without warrant from a specific statutory provision.[1] The common law power is for dealing with breaches of the peace. A magistrate may issue a warrant for the arrest and production at court of anyone suspected of committing an offence which is triable on indictment or for which the penalty is imprisonment, or if the address of the suspected person is not well enough established to enable a summons to be served on him. Arrest on warrant for a criminal offence, as opposed to fine default or failure to answer bail, is now relatively rarely used.

3.63. By far the most commonly used power of arrest is that under s. 2 of the Criminal Law Act 1967.[2] This put into statute the ancient common law power to arrest without warrant for a felony which had to be replaced when the 1967 Act abolished the distinction between felonies and misdemeanours. The Criminal Law Revision Committee, upon whose recommendation the Act was based, sought only to find a reasonable basis for producing a statutory power of arrest. They recognised that it was outside their terms of reference to consider the rationale of powers of arrest in general.[3] The salient elements of s. 2 are that for an arrest under it to be lawful the offence must be one carrying a penalty of five years imprisonment (an "arrestable offence"); and there must at the minimum be suspicion on reasonable grounds that the person to be arrested either has committed, is committing or is about to commit the offence.

3.64. The other powers of arrest under statute are multifarious.[4] They fall outside the definition of "arrestable offence" in the 1967 Act and come broadly into four categories: arrest where the person is committing the offence, arrest where there is reasonable suspicion of an offence, arrest where the offender's name is not known or he is likely to abscond, and arrest of someone who is unlawfully at large (for example an escaped prisoner). Why some and not other offences carry these powers of arrest is impossible to discern.

3.65. Such rationale as may be perceived in the existing powers of arrest seems to us to be broadly as follows. The ultimate purpose of arrest is to bring before a court for trial a person who commits a criminal offence or is reasonably suspected of so doing. But because arrest deprives the citizen of his liberty its use is to be restricted generally to offences that carry the penalty of imprisonment (there are some exceptions in the case of offences of causing a public nuisance, for example being drunk and incapable) and to persons

[1] A fuller account will be found at paras 42–56 of the *Law and Procedure Volume.*
[2] Set out in full at para 44 of the *Law and Procedure Volume.*
[3] *Seventh Report of the Criminal Law Revision Committee on Felonies and Misdemeanours*, London HMSO 1965 Cmnd 2659.
[4] See the *Law and Procedure Volume*, Appendix 9.

against whom the summons procedure will not be effective. Arrest may also be used to prevent or terminate the commission of an offence. The general power of arrest without warrant is further restricted to more serious offences.

3.66. The period of detention upon arrest[1] may be used for certain purposes, and the power of arrest is also related to these. Indeed the purposes for which the existing powers of arrest are used in practice can be put in the following terms. It may be used to prevent the suspect destroying evidence or interfering with witnesses or warning accomplices who have not yet been arrested. Where there is good reason to suspect a repetition of the offence, especially but not exclusively offences of violence, it may be used to stop such an occurrence. Finally, the criterion of having reasonable grounds for suspicion sufficient to justify arrest is not necessarily sufficient to justify a charge; hearsay evidence, for example, may be sufficient grounds for reasonable suspicion, but it is not sufficient for a person to be charged, since it will not be admissible as evidence at trial. Accordingly, the period of detention may be used to dispel or confirm that reasonable suspicion by questioning the suspect or seeking further material evidence with his assistance. This has not always been the law or practice but now seems to be well established as one of the primary purposes of detention upon arrest.[2]

3.67. The point is clearly made by Lord Devlin in the case of *Shaaban Bin Hussein v Chong Fook Kam*[3]. "'Reasonable cause' is a lower standard than information sufficient to prove a *prima facie* case. Reasonable cause may take into account matters that could not be put into evidence at all or matters which, although admissible, would not on their own prove the case. The circumstances of the case should be such that a reasonable man acting without passion or prejudice would fairly have suspected the person of having committed the offence. It is important that hasty or ill-advised police action should be avoided. If on the other hand the police hesitate too long to arrest a person when they have proper and sufficient ground for suspicion against him, they may lose the opportunity of arresting him or may enable him to destroy evidence . . . Suspicion arises at or near the starting point of an investigation of which the obtaining of *prima facie* proof consists of admissible evidence. Suspicion can take into account matters that could not be put in evidence at all."

The main issues

3.68. As is readily apparent from this and the more detailed account in the *Law and Procedure Volume*[4] and as has been strongly pressed in the evidence to us, there is lack of clarity and an uneasy and confused mixture of common law and statutory powers of arrest, the latter having grown piecemeal and without any consistent rationale. In this area the main concern of many of our witnesses is for clarification, rationalisation and simplification of the law. The task of the police is said to be made more difficult because of the complexity of

[1]See para 3.94.
[2]See the *Law and Procedure Volume*, paras 68 ff.
[3](1969) 3 All ER 1626.
[4]*Op. cit.*, paras 42–56.

the law under which they operate. And it is scarcely surprising if the citizen is uncertain of his rights.

3.69. The lack of clarity in the law and the uncertainty of its effect are said to give rise to a variety of problems: it is argued that too many people are arrested and not subsequently prosecuted; there are complaints that people are arrested without being told of the fact of and grounds for the arrest; people are wrongfully arrested solely for the purpose of questioning them, where there is no reasonable ground for suspecting them of a specific offence. Where the offence involved carries a power of arrest, arrest is varyingly used by different police forces as a means of bringing suspects into the criminal process.[1] Some of our witnesses believe that the use of summons should be increased so that people can be brought to court without being deprived of their liberty, and it is said to be a cheaper way of initiating proceedings. The variation in practice is however claimed to be justified by reference to the characteristics of the area to be policed, for example the anonymity and floating population of the large metropolitan area presents particular problems in identifying and locating offenders and getting them before the courts. Attention is also drawn to the lack of an arrest power in respect of some quite serious offences, for example indecent assault, and it is suggested that the definition of arrestable offence should be widened to cover at least such offences. It has also been put to us that someone who refuses to give his name and address can effectively prevent the police enforcing the law in respect of offences which do not carry a power of arrest, since a summons cannot be served upon him.

3.70. The law about the circumstances in which someone can be arrested, as we have noted, is complicated but in general only someone who has been seen to commit an offence or who can reasonably be suspected of committing an offence can be arrested. Representations have been made to us that this restriction can hamper the police in solving crimes in circumstances where an offence has clearly been committed and where a number of people are involved some of whom may be witnesses and one or more may be suspects; an example is an affray in a public house. Without a power to hold them all, or at least to detain them long enough to take names and addresses, the police cannot isolate the suspects and may have difficulty in securing witnesses. It has been suggested that there should be a power to demand the name and address of witnesses to an offence, even where the suspect is known.

The relevant factual material

3.71. The general pattern of the use of arrest may be seen from the criminal statistics and from statistics on the operation of s. 62 of the Criminal Law Act 1977.[2] In 1978 of the 486,000 people proceeded against for indictable offences nearly 370,000 (76 per cent) had been arrested; 116,000 (24 per cent) were brought to court by summons. But just over 300,000 of those who had been arrested were released by the police on bail to appear at court. Thus about

[1] See R Gemmill and R F Morgan-Giles: *Arrest, Charge and Summons: Current Practice and Resource Implications* (Royal Commission on Criminal Procedure Research Study No 8, London HMSO 1980), chapter 3 and Appendix A.

[2] *Criminal Statistics England and Wales 1978*, London HMSO 1979 Cmnd 7670, Table 8.1, p 156 *Home Office Statistical Bulletin* 18 March 1980 Issue 5180.

67,000 (14 per cent) were held in custody by the police after arrest and up to their first court appearance. In the same year, of the 415,000 proceeded against for non-indictable offences other than motoring offences, 230,000 (55 per cent) were brought to court by summons and 185,000 (45 per cent) had been arrested. Of those arrested 153,000 were released on bail to appear at court. Thus about 32,000 (8 per cent) were held in custody by the police after arrest and up to their first court appearance. Additionally, people are arrested on suspicion and then released without any proceedings being brought. National figures are not available on this but our research suggests that somewhere between 10 per cent and 20 per cent of all arrested persons may be dealt with in this way. Many people are also arrested on warrant, for fine default, failure to answer a summons, or for breach of bail. In 1979 the total of persons arrested was about 1.4 million.

3.72. These general figures conceal a variety of practices. The national figures on the use of arrest do not distinguish between adults and juveniles but it is worth noting that juveniles (persons under 17) constituted 36 per cent of those found guilty or cautioned for indictable offences in 1978. This suggests that many juveniles are liable to have been arrested, whereas our research indicates that juveniles are on the whole less likely to be arrested than adults and, if arrested, are less likely to be detained in custody.[1] There are marked differences between police forces in the use of summons and arrest for indictable offences. The 1976 figures (the latest year for which such figures were available in this form) showed for example Cambridgeshire, Cleveland, Greater Manchester and the Metropolitan Police District bringing 1 per cent or less of adults accused of indictable offences to court by summons and Derbyshire, Thames Valley, Warwickshire, West Yorkshire, Wiltshire, Dyfed, Powys and North Wales bringing 40 per cent or over of such persons to court by this means.[2] Our research also indicates that some of those proceeded against by way of summons will at some stage have been arrested.[3] But only a minority, although a substantial one, of defendants are kept in custody after charge and up to their first court appearance.

3.73. Our research does not bear out the assertion that proceeding by way of summons is less expensive than by way of arrest. For straightforward offences where there is a guilty plea the use of arrest and charge makes possible economies of preparation which are not possible where summons is used under existing procedures. It is therefore cheaper.[4] For cases where the defendant is expected to plead not guilty, this advantage disappears and there appears to be little difference on cost grounds between summons and charge followed by bail after arrest.

3.74. How the period of detention following arrest is used is clearly shown by our research. It is used not only to confirm but also to dispel suspicion. Softley, for example, in his study of interrogation at four police stations showed about a tenth of suspects in his sample being released unconditionally at the end of their first appearance at the police station and about a fifth

[1]See Gemmill and Morgan-Giles, *op. cit.*, Tables 3:1, 3:2, 3:3 and 3:6, pp 16 ff and Appendix A.
[2]*Ibid*, Appendix A.
[3]*Ibid*, Tables 3:3 and 3:6, pp 18 and 20.
[4]*Ibid.*, chapter 4.

against whom no formal action was finally taken.[1] The cases Steer cites in his study of the police role in uncovering crime[2] give a picture of the way in which investigations are conducted after reasonable suspicion has been aroused and of the kinds of circumstances in which it may be dispelled or confirmed.

The Commission's proposals

Restrictions upon arrest: the necessity principle

3.75. Our proposals on arrest without warrant have two main and interrelated objectives: to restrict the circumstances in which the police can exercise the power to deprive a person of his liberty to those in which it is genuinely necessary to enable them to execute their duty to prevent the commission of offences, to investigate crime, and to bring suspected offenders before the courts; and to simplify, clarify and rationalise the existing statutory powers of arrest, confirming the present rationale for the use of those powers. In attempting to limit the power of arrest, we have no intention of inhibiting the police from fulfilling their functions of detecting and preventing crime. But we do seek to alter the practice whereby the inevitable sequence on the creation of reasonable suspicion is arrest, followed by being taken to the station, often to be searched, fingerprinted and photographed. The evidence submitted to us supports the view of the Police Complaints Board, expressed in their triennial report, that police officers are so involved with the process of arrest and detention that they fail at times to understand the sense of alarm and dismay felt by some of those who suffer such treatment.[3] However efficient and speedy the procedures are (we know from our research that some forces are quicker with this than others[4]) arrest represents a major disruption to the suspect's life. That disruption cannot, in our view, be justified if it is not necessary to take him to the station for one or more of the following reasons: to find out his name and address; to prevent the continuation or repetition of the offence; to protect persons or property; to preserve evidence in connection with that offence; to dispel reasonable suspicion or to turn it into a *prima facie* case (as indicated by Lord Devlin in *Shaaban Bin Hussein*[5]); or to ensure that the accused gets to court. We know that many forces use summons more readily than arrest for indictable offences. We are well aware that the conditions of policing in the large anonymous urban areas may create particular problems but we do not consider that they justify arrest followed by a period of more or less protracted detention in every circumstance in which arrest is technically possible.

3.76. We recommend that, as under the present law, arrest of a person by a constable without a warrant should be possible only where that person is committing, has committed[6] or is about to commit an arrestable offence, or is suspected on reasonable grounds by the constable of any of these acts. Our

[1] *Op. cit.*, chapter 7.
[2] *Op. cit.*, chapter 4.
[3] *Police Complaints Board Triennial Review Report 1980*, London HMSO Cmnd 7966, para 47.
[4] See Gemmill and Morgan-Giles, *op. cit.*, pp 23–25.
[5] Cited at para 3.67.
[6] The constable should also, as is now the case, be able to exercise this power not only where an offence has been committed but also where he suspects on reasonable grounds that an offence has been committed.

proposals on the definition of an arrestable offence are at paragraphs 3.82 and 3.83. But in order to limit detention upon arrest to those cases where the circumstances indicate it is necessary ("the necessity principle"), and by that means to diminish the use of arrest and to produce more uniform use of such powers, we recommend that detention upon arrest for an offence should continue only on one or more of the following criteria:

(a) the person's unwillingness to identify himself so that a summons may be served upon him;

(b) the need to prevent the continuation or repetition of that offence;

(c) the need to protect the arrested person himself or other persons or property;

(d) the need to secure or preserve evidence of or relating to that offence or to obtain such evidence from the suspect by questioning him; and

(e) the likelihood of the person failing to appear at court to answer any charge made against him.

3.77. We considered whether these criteria should be applied statutorily at the point of arrest, so that an arrest made and detention continued when one or more of them did not apply would thereby be rendered unlawful. But we think that it would not be practicable to place so stringent a requirement upon police officers in the street. Often decisions will have to be taken urgently and in the midst of disturbances or otherwise confused situations. The earliest point at which the criteria should be applied by statute is when the arrested person is brought to the police station. At that point the officer receiving the suspect into his custody[1] should be required by statute to enquire not only into the validity of the arrest, as is done now, but also whether it is essential to keep the arrested person at the police station on the basis of the criteria that we have set out above. His decision to keep the person in custody and his reasons for it should be recorded on the new custody sheet.[2] In applying these criteria he should have regard to the nature and seriousness of the offence, the nature, age and circumstances of the suspect, and the nature of the investigation that is required. It is not always necessary to detain a person in custody in order to question him or to carry out other enquiries, or, if he has to be detained, to lock him up; and the current police practice of dealing with juveniles without resorting to the use of custody, for example by questioning them at home, should be encouraged. The continuation of detention upon arrest solely for the purpose of clearing up other offences would not be permitted by these provisions.

3.78. These provisions have broadly the same effect as and could be put in terms similar to those set out in Schedule 1 to the Bail Act 1976 for the purpose of the court's decision not to grant bail. We considered the possibility of using that Act as the basis for our own proposals. However the rather different circumstances of arrest and the need to make provision for the police to be able to detain a person on arrest for the purposes of investigation suggest that a separate and distinct set of criteria should be devised to deal with detention upon arrest.

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[1]We discuss this officer's identity at para 3.112.
[2]See para 3.113.

3.79. We believe that the application of these criteria on arrival at the police station should and will affect the decisions of arresting officers. Indeed we recommend that the Home Office should issue guidance to the police so that these criteria are applied to the arrest itself. Where an officer on the street has grounds for arrest and the offence carries a power of arrest, he should consider whether it is necessary for him to detain and take the arrested person to the police station or whether he can dispose of the case in some other way, for example by telling the person that he will be reported for prosecution.

Notice to appear at the police station

3.80. To help to reduce the use of arrest we would also propose the introduction here of a scheme that is used in Ontario enabling a police officer to issue what is called an appearance notice. That procedure can be used to obtain attendance at the police station without resorting to arrest provided a power to arrest exists, for example to be fingerprinted or to participate in an identification parade. It could also be extended to attendance for interview at a time convenient both to the suspect and to the police officer investigating the case. The use of an appearance notice in this way can be regarded as a procedure analogous to the present power to bail for further enquires under s. 38(2) of the Magistrates' Courts Act 1952, but without the need for prior arrest and attendance at the police station. Failure to appear in response to a notice should be made an offence, as is failure to answer to bail.

The arrestable offence

3.81. The exercise of any power of arrest should be restricted as we have proposed. To what offences should the power of arrest without warrant apply? The present line for general powers of arrest, with warrant, is drawn at imprisonable or indictable offences (which are not necessarily the same) and, without warrant, at offences liable to five years imprisonment on conviction. The latter criterion, as we have noted, owes its origin to an attempt to convert the old common law power of arrest for a felony to statutory form. It has no deeper rationale than that (the multitude of other statutory powers of arrest do not depend upon any similar notion of seriousness). Neither the Criminal Law Revision Committee, who recommended the provision, nor Parliament gave any consideration in this context to the principles that should be the basis for the general powers of arrest. The five year criterion catches the armed bank robber and the first time shoplifter alike, but it misses some serious offences (indecent assault upon a child of 13 for example). Some have suggested raising the threshold in order to avoid having the power of arrest for comparatively trivial incidents. However, unless the threshold was placed so high as to exclude all but the gravest offences, it would still leave problems with offences which can range from the trivial to the serious and which because of that have a very high maximum penalty. (Theft, which carries a penalty of ten years, is the prime example.) Further, as this solution would exclude an additional number of serious offences from being arrestable it would be likely to increase difficulties in the enforcement of the law and the prosecution of offences. On the other hand to lower the threshold in order to bring in offences like indecent assaults upon children of 13 and over will bring in many more (of a wide ranging variety, which might be regarded by many people as less serious), and

which might be seen as an excessive increase in police powers. Furthermore the application of a threshold of, for example, two years imprisonment provides no more logical a cut off point than that of five years imprisonment.

3.82. This presents an awkward dilemma which we have not found it easy to resolve. There seem to us to be a number of possible ways out of it. One might be to abandon the present five year criterion, to establish an altogether different criterion of seriousness which does not rely upon the penalty available on conviction of the offence concerned, and then to examine the statute book and give a power of arrest in respect of the particular offences which meet the new criterion. In view of the number of offences on the statute book this would be a mammoth task, even if the alternative criterion of seriousness could be generally agreed, and a task that would have an uncertain legislative outcome, since Parliament would not only have to agree the new criterion but also its application to each individual offence. We do not think this a practical approach. Another approach would be to leave the existing statutory provisions broadly as they are; this approach maintains the present confusing array of statutory powers and the anomalies created by the criterion of five years imprisonment, but it avoids the difficulties of trying to produce an alternative criterion and then applying it to offences across the whole statute book and also the possible risks of giving the police a wider power of arrest than they have at present. If a case can be made for creating a power of arrest in respect of an offence for which it does not currently exist, for example in relation to sexual assaults upon children, then there should be specific statutory provision made for it. Conversely some existing powers of arrest need close scrutiny. This is the approach that three of us favour on the grounds that five years imprisonment is the appropriate measure of the seriousness of offences for which the police should have a power of arrest, and that the case has not been made for change. They consider that the alternatives might alter but would not remove the anomalies presented by the existing law and they see grave risks in increasing police powers of arrest, because, in their view, it would give a strong incentive to the police to use arrest more extensively at a time when the trend should be in the opposite direction.

3.83. The majority of us considers however that the need to place the existing powers on a consistent and rational footing cannot be ignored. Their approach is based upon the following considerations. Parliament has established as the criterion of seriousness of offence for arrest on warrant that the offence is either indictable or imprisonable.[1] The power of arrest without warrant is required to deal with situations where it would not be practicable or reasonable to require a warrant to be obtained. But the purposes for which arrest is used, whether on warrant or not, and to which we have referred in paragraph 3.65, are the same. Accordingly the same criterion of seriousness of offence can and should apply to both types of arrest, with the exception that the police should not as a general rule have a power to arrest without warrant for offences which do not carry the penalty of imprisonment. The majority of us, therefore, proposes that an arrestable offence for the purposes of any arrest without warrant should be defined as an offence which is punishable with imprisonment;

[1]Sections 24 and 104(4) of the Criminal Justice Act 1967.

but the exercise of the power of arrest should be subject to the "necessity principle".[1] This will make it possible to remove the present distinction between general and particular statutory powers of arrest. Those of us who take this position do not think that redefinition of the arrestable offence in this way will in practice result in an increase in the total number of arrests. Rather they believe that the restrictions upon arrest and detention upon arrest proposed in paragraph 3.76 are such as to ensure that arrest will be less frequently and widely used even if the definition of arrestable offences is widened. The most prevalent offences either already carry a power of arrest or are non-imprisonable and will not be affected by the redefinition of the arrestable offence. Accordingly it would, in their view, be misleading to represent the extension of the power of arrest to other less frequently committed offences as a significant increase in police powers.

3.84. If the proposal of the majority of us for altering the definition of arrestable offences is adopted, consideration will need to be given to whether a particular power of arrest will be required for certain offences which are at present arrestable but not imprisonable on first conviction. These are mainly offences involving some form of public nuisance; street betting, gaming in a public place, drunkenness offences, breach of the peace, wilful obstruction of the highway and soliciting as a common prostitute are examples. Whether special provision should be made for a statutory power of arrest in respect of these offences will need to be reviewed in the light of the restrictions we have proposed upon the exercise of the general power of arrest, particularly those applying to the prevention of continuing offences and the identification of the offender.

3.85. There will also be a consequential change for the power of arrest without warrant by someone other than a police constable (a matter which takes us beyond our terms of reference). However, if the activities of other law enforcement agencies, such as HM Customs and Excise, are left out of account, we would observe that this power of arrest is at present, so far as we are aware, used mainly by store detectives or shop owners in respect of shoplifters, and the proposed alteration in the definition of arrestable offence would not affect the power they exercise. It seems doubtful whether anyone other than a constable will take advantage of any increased power of arrest which he might theoretically be given by the proposed change in the definition of an arrestable offence. A person who made such an arrest is required to deliver the person whom he has arrested directly to a constable or to a court. As soon as the constable received the accused person into his custody he would be required to have regard to the proposed criteria for prolonging detention upon arrest.

3.86. Where there is no power of arrest without warrant for an offence, generally the police are able to proceed by way of summons, or by application for a warrant to arrest (the provisions for which we recommend should be retained). But where a person refuses to give his name and address and the police do not know it, that person can in effect prevent the law from being enforced because it is not possible to serve a summons upon him. Two of us

[1] See para 3.76.

take the view that this problem is not such as to justify making available the power of arrest, that is the power to deprive a person of his liberty, for offences which cannot carry a prison sentence. The majority accepts that this may be a very rare occurrence, but considers that the police should have some means available to them of dealing with the situation when it arises, since othewise the law can be openly flouted. Accordingly they recommend that if a police officer actually sees an offence being committed for which he has no power of arrest without warrant and if he does not know the offender and the offender positively refuses to give his name and address (or an address where a summons may be served upon him), the officer should have the power to arrest for the offence concerned (there should not be a separate offence created of refusing to give name and address). Detention upon arrest for this reason should terminate immediately the person gives the particulars that he has refused to give or they are otherwise ascertained. If the particulars are not forthcoming he should be brought before a magistrates' court immediately, charged with the offence he has committed, as is required of a person arrested upon a warrant. We recognise that the existence of this power could possibly cause friction between the police and members of the public, and this is an additional reason why our two colleagues are concerned about the proposal. There must therefore be restrictions and adequate safeguards upon its use. For the arrest to be lawful the officer must actually see the person committing the offence, and the person must positively refuse to give his name and address. The officer must make it clear that he is a police officer; he must indicate what offence has been committed and explain that he has a power to request name and address and to arrest and detain the offender for so long as he positively refuses to supply them. To minimise dispute over whether the offender knew that the officer was in fact a police constable and whether name and address were actually given, the offender should be invited to write his name and address in the officer's note book.

Notification of grounds of arrest

3.87. The case of *Christie v Leachinsky* outlines the conditions that have to be met if an arrest is to be valid. Viscount Simon's judgment in that case set out the position.[1] In brief, the person who is being arrested has to be told that he is being arrested and why. We recommend that this should be put upon a statutory footing. The person who is being arrested should be told in clear and unambiguous terms, preferably using the word "arrest", that he is being arrested and why. Those reasons should be recorded in writing upon the custody sheet.[2]

Arrest under the Vagrancy Act 1824

3.88. Before we began work and during the course of our enquiry there was considerable controversy over the offence under s. 4 of the Vagrancy Act 1824, colloquially known as "sus", which carries a power of arrest under s. 6 of the Act; and we received a substantial amount of evidence on the matter. We were deeply concerned about the friction between certain sections of the community and some police forces which the use of the provision undoubtedly causes, but

[1][1947] AC 578–579. Quoted at para 52 of the *Law and Procedure Volume.*
[2]See para 3.113.

the offence itself, being part of the substantive criminal law, is, strictly speaking, outside our terms of reference. Our consideration of the matter has, however, been overtaken by events. The subject has been examined in detail by the Home Affairs Sub-Committee of the House of Commons on Race Relations and Immigration.[1] We welcome the Government's announcement of its intention of bringing forward legislation which will include the repeal of the suspected person offence,[2] and we hope that this will contribute to the improvement of relations between the police and young people, particularly those from minority groups.

The position of witnesses

3.89. The powers of arrest which we propose should apply only to persons suspected of committing an offence. We do not propose that the present position should be overturned and that the police be given specific power to detain for enquires whether in the street or in the police station on a criterion other or less than the present one. We do not consider that so fundamental an infringement of the freedom of the citizen to go about his business would be warranted by the potential advantages for the control of crime. One exception might be made to this principle, which we shall discuss in paragraphs 3.91–3.93. We should make it clear, however, that the application of the criteria limiting detention upon arrest proposed in paragraph 3.76 will give statutory recognition to the right of the police to question in custody, if necessary, arrested persons who are reasonably suspected of an offence. The controls that are to be placed upon such questioning we shall discuss in chapter 4.

3.90. It follows that we do not accept the suggestion of some of those who gave evidence to us that there should be a power to ask witnesses of an offence, as opposed to suspects, their name and address and to arrest on refusal. If such a power were given, we have no doubt that it would generally be used with sense and discretion. But there is a risk that it might be misapplied and the results of that could be damaging to police relations with the public, particularly in areas where those relations tend generally to be delicate. We doubt if having such a power would solve the problem of the reluctant or obstreperous witness, who is, in any event, unlikely to be particularly reliable if he is acting under compulsion. The traditional and accepted principle is that the public have a social or moral duty to assist the police but not one that goes beyond that. Equally traditional is the view that the police should and do police by consent. We believe that there would have to be more compelling reasons than have been put to us for society to consider abandoning either of these principles. We note that even the police service does not unanimously support the proposal for coercive powers against witnesses. We reject the idea.

Power of temporary detention

3.91. There is one set of circumstances, however, where the police could be given power temporarily to detain persons who are not suspects on the precise

[1] *Race Relations and the "Sus" Law*, Second Report from the Home Affairs Committee Session 1979–80, London HMSO 1980, HC 559.

[2] *Her Majesty's Most Gracious Speech to Both Houses of Parliament* delivered on Thursday 20 November 1980

definition we are using or to stop vehicles. Circumstances do from time to time occur where the police must respond immediately to an incident where there is reason to believe that a grave offence has been committed or is imminent and where temporarily detaining people in the immediate vicinity of the incident will assist in identifying or apprehending the offenders, preventing or terminating the offence or securing or recovering property or a person. An example was the murder in 1979 on a Glasgow to London express carrying football supporters. The train was stopped en route and no-one was allowed to leave it until the police had made sufficient enquiries to identify a suspect. It could not be said that every person on the train could be suspected on reasonable grounds of having committed the murder. But in the eyes of the public the police would have been failing in their duty if they had not taken some such action to deal with the situation. We considered whether it would be desirable to regularise by legislation the exercise of such a power in exceptional circumstances, so that the police are not at risk of a claim for wrongful arrest should someone exercise his undoubted right under the present law to try to walk away.

3.92. The availability of such a power would have to be restricted to the immediate vicinity of a grave incident. The incidents we have in mind fall into four broad groups: those where people's lives are at risk (there has been a death, or grave personal injuries inflicted or there is good reason to believe that they will be; there has been the use or threatened use of firearms); those involving serious sexual attacks on women or children; those where there is risk of grave damage to or loss of property (there has been an explosion or the discovery of an explosive device, or a serious fire or the discovery of an incendiary device, or articles of national importance or of exceptional value have been lost); and those where someone is missing and is himself at risk or is putting others at risk (there has been a kidnapping or hostage-taking, or a child is missing and believed to be at risk, or a person has escaped from lawful custody and his continued liberty presents a threat to persons or property). Where such an incident occurred, the police could be given a power to detain persons within the immediate vicinity or to stop vehicles within a distance reasonable in the circumstances. The exercise of the power would have to be justified, should it be challenged subsequently, on the grounds that its exercise was reasonable in all the circumstances and that it assisted in identifying or apprehending suspected offenders, preventing or terminating an offence, or securing or recovering property or a person. Its exercise should be confined to no longer than necessary to achieve the purposes for which it was used.

3.93. We are aware that when incidents of this type occur members of the public generally cooperate most willingly with the police. Two of us fear that the effect of legislating for this situation would be that where previously the police would have sought and obtained the cooperation of the public they will in future resort as a matter of course to their statutory powers. This would inevitably, in their view, have a bad effect upon relations between the police and the community. They think that it would be difficult to provide satisfactory safeguards for the exercise of such a power or to ensure that it was used only in exceptional circumstances. They do not think the case for breaching the principle that a person should be detained only if reasonably suspected of an arrestable offence has here been made out. Notwithstanding these arguments,

the majority of us considers that the police should not be left without guidance and at risk of an action for wrongful arrest in these circumstances. They further believe that prescribing a specific and strictly limited power provides more protection to the public than if the matter were left unregulated and that this will diminish the possibility of the police being able to proceed by the use of bluff. They, therefore, propose that the police should be given a power to detain people in the circumstances set out above while names and addresses are obtained or a suspect identified or the matter otherwise resolved. Once that had been done or a person gave his name and address he would be free to leave the incident. Failure to give name and address would not be an offence and a person would be detained only as long as was reasonable in all circumstances of the case. Similar provisions would apply to the stopping of vehicles.

Detention upon arrest

3.94. Once an arrest has occurred and not immediately been terminated by the application of the proposed limitations, how long should the police have power to detain the suspect? What should be the safeguards upon such detention? We are here concerned with the period after the officer taking charge of the suspect at the police station has satisfied himself that there are grounds for keeping the suspect in custody at the police station. We refer to this as "detention". There are two complementary elements to developing safeguards. The first is to provide for overall limits upon the length of the detention. The second is to secure proper arrangements for the care of the suspect and the protection of his rights so long as he is detained.

The existing provisions and criticisms of them

3.95. Powers and procedures relating to detention in custody after arrest are covered in paragraphs 61–67 in the *Law and Procedure Volume*. Briefly, the law on the permitted period for which a suspect may be kept in custody after arrest without being charged or brought before a court is uncertain in its effect, but such detention is allowed by the law and is common police practice. The relevant statutory provision is concerned primarily with police bail, the principle of which dates back to the Metropolitan Police Act 1829. Many of our witnesses press for curtailment and precise definition of the period of detention prior to charge or presentation before a court. Examples of substantial periods of detention have been cited to us. And the ineffectiveness of *habeas corpus* as a remedy for lengthy detentions has been frequently referred to. On the other hand too short a period or too inflexible a time limit is seen by some as certain to hamper the investigation of crime.

The relevant factual material

3.96. We have been able to build some picture of the time which suspects spend in police custody prior to charge and release on bail or retention for court. Over all, about three-quarters of suspects are dealt with in six hours or under and about 95 per cent within 24 hours. It is very rare for persons to be held for much longer than this without charge. The detailed studies of police interrogation found none who were held for more than 48 hours.[1] But a survey

[1]Softley, *op. cit.*, Table 2:2, p 61 and Barnes and Webster, *op. cit.*, Table A:10, p 62.

done for us by the Metropolitan Police between 1 October and 31 December 1979 showed 212 persons (0.4 per cent) out of 48,343 held for 72 hours or more before charge or release without charge. Juveniles appear to be more speedily dealt with.[1] The length of detention appears to vary slightly with the type of offence; Softley found that those suspected of burglary for example were on average held substantially longer than those suspected of shoplifting.[2] But the length of time that people are held both before charge and before being brought to court varies from force to force, possibly according to the procedures used.[3]

The Commission's proposals

"Helping police with their enquiries"

3.97. We would begin by emphasising that, with the exception of the circumstances mentioned in 3.93, there must be no half way house between liberty and arrest upon the terms which we propose. When we use the words "detention" and "detain" we refer only to action taken after a lawful arrest. But people often go voluntarily to the police station to help the police in the investigation of crime and there may sometimes be a doubt about whether they are free to leave. We therefore recommend that, as is already the practice in some forces, when the conditions for arrest exist or come into existence the police should tell the person who has been voluntarily at the police station that he is now under arrest and not at liberty to leave. At this point a custody sheet for him must be started.[4] Other rights will then come into operation, although the right to go free has, for the time being, been removed.

The need for change

3.98. The existing law is, in our view, inadequate to regulate length of detention. It provides in effect for a person taken into custody for a "serious" offence to be brought before a magistrates' court "as soon as practicable" and, for any other offence, within 24 hours, if he has not been released on bail or otherwise before then. (There are slightly different provisions in respect of juveniles, but they do not affect this point.[5]) The lack of definition of the terms "serious" and "as soon as practicable" gives flexibility but produces uncertainty both for the police and the suspect.

3.99. As we have noted, our research shows that detention beyond six hours occurs only in a quarter of cases and for beyond three days only in a tiny percentage. There is already some guidance on time limits; 24 hours for other than serious cases for all suspects and 72 hours for juveniles in certain limited circumstances.[6] But these do not lead to all people being detained up to these limits. Rather, the demands and pressures of police work appear to condition how long people are detained, a view that is confirmed by Irving's study in

[1]Softley, *op. cit.*, Table 2:4, p 62.
[2]*Ibid.*, Table 2:3, p 62.
[3]Gemmill and Morgan-Giles, *op. cit.*, pp 23 ff.
[4]See para 3.113.
[5]See the *Law and Procedure Volume* paras 90–91.
[6]Section 38(1) of the Magistrates' Courts Act 1952 and s. 29(5) of the Children and Young Persons Act 1969; see *Law and Procedure Volume*, paras 65 and 91.

particular.[1] It is not only the type of offence that affects this, although it may play some part.[2] There is great variation in the circumstances in which suspects come into police custody, in the condition of the suspect when he arrives, in the pressures of work on the investigating officers, and in the nature of the case to be investigated. All are factors that can affect the time that it takes to decide whether the suspect should be charged or if and when he can be released.

3.100. These factors seem to us to militate against short and absolute time limits. Four and six hours have been most commonly suggested, but those who have suggested them do not appear to have based their proposals upon any close study of police work in this country but to be using proposals from elsewhere, for example, those of the Australian Law Reform Commission. (We note the six hour detention period in the recent Criminal Justice (Scotland) Act 1980 but believe that rather different considerations are to be applied in that jurisdiction where arrest must be followed immediately by charge and where the police have very limited powers to release suspects on bail.) Any time limit must, in our view, enable the police to do their job properly but must have due regard to the rights of the person detained. An absolute limit established by reference to some arbitrarily imposed mathematical norm would require so many exceptions as to render it virtually useless as a control upon unwarrantably long detention. Conversely a relatively long period, for example 48 or 72 hours, would give no guidance for cases that do not warrant such lengthy detention, while still being subject to the objection that exceptional cases will occasionally require extension (even the present 72 hour limit in s. 29(5) of the Children and Young Persons Act 1969 allows for extension where a juvenile cannot be brought before a magistrates' court by reason of illness or accident).

Definition of the period of detention

3.101. Although we see objections to absolute time limits, we believe that there must be some statutory means of regulating the time that suspects can be held in custody. What should be the starting and terminal points of any such period? Regarded strictly, since the liberty of the subject is at issue, the time should run from the moment of arrest to the moment of release from police custody or into the control of the court. Yet there are serious operational difficulties about using arrest as the starting point, if the arrest takes place outside a police station. The purposes of arrest and of detention upon arrest may be achieved immediately upon or soon after arrest (the prevention of the offence for example) but other purposes may be achievable only after the person has been taken to a police station where the case can be further investigated. From the point of view of the police, time taken in travelling or in waiting to be moved from one police station to another where the matter is to be investigated may not be useful for the achievement of those other purposes. That time may be considerable, particularly if a suspect is arrested in one part of the country and has to be taken to another. Furthermore if there are to be, as we shall propose, fixed points during a suspect's time in custody at which a supervising officer must enquire into the need for his continued detention,

[1] *Op. cit.*, pp 112–114.
[2] See para 3.96.

provision will be necessary to overcome the difficulties that prolonged travelling might cause for such supervisory arrangements; the means of doing this must not be so complicated as to be impracticable or so imprecise as to render the arrangements for supervision ineffective. However, from the point of view of the suspect a time limit running from the time when he arrives at the police station where the matter is to be investigated ignores waiting and travelling time and what may happen in it.

3.102. In the generality of cases there will be little problem. Offences are investigated locally. Travelling time is, on average, short.[1] And investigations do not take long.[2] It is the unusual case that will cause problems and there are real difficulties in finding a practicable solution which has due regard to the rights of the suspect. It should be a requirement that arrested suspects, if they are to be detained and are not already at a police station, are taken to one immediately so that their detention may become subject to the general supervisory measures which we shall be proposing. Where possible that should be the station at which the enquiry is to be to undertaken. On balance, having regard to the practicalities of the matter, we consider that any time limit should begin to operate from the time that an arrested suspect arrives at the first police station to which he is taken and that any travelling time should be discounted. The custody sheet will, as it does now, record the time of arrest, and times of arrival and departure from any particular station. Accordingly it will be possible for supervising officers, the suspect, if he is released uncharged, and ultimately the courts to review and challenge unreasonably prolonged travelling time.

3.103. Obviously release (either on bail or unconditionally) brings detention to an end. But should the point at which someone is charged (or told that he will be prosecuted) or the point at which he is brought before a court (charged with an offence[3]) be used as the limit which is deemed to end police detention? There are difficulties with either. Magistrates' courts do not sit every weekday in all parts of the country; they sit rarely on Saturday and scarcely ever on Sunday. If the police were required to bring an arrested person before a court within 24 hours or to release him, the only option for a person who is arrested on a Saturday afternoon would be to release him. Using the point of charge places no restriction upon the length of custody after charge and before presentation at a court. What we propose is a combination of these approaches, but one which seeks to minimise the difficulties each presents.

Length of detention

3.104. Our own proposal, while retaining some of the flexibility of the present arrangements, is designed to bring greater certainty to them, to provide continuous and accountable review of the need to retain a suspect in custody, and in the case of longer periods of detention to ensure that some form of outside and independent scrutiny of the police discretion is possible. The provisions of the Children and Young Persons Act 1969 and of the Magistrates'

[1]Gemmill and Morgan-Giles, *op. cit.*, Appendix C.
[2]Softley, *op. cit.*, Table 2:2, p 61 and Barnes and Webster, *op. cit.*, Table A:10, p 62.
[3]This is how s. 38 of the Magistrates' Courts Act 1952 is interpreted. It is not what it says, and it may not even have been the intention of the original nineteenth century provision.

Courts Act 1952 to which we have referred provide the model,[1] but with some significant modifications and additions. We rely upon the limitations to be placed upon arrest as the basis for continuing review of the need to detain the suspect. Once the need to detain the suspect on the grounds set out in paragraph 3.76 is removed, the presumption should be that the suspect is to be released (either on bail for further enquiries or charged, or unconditionally). It should be the statutory duty of the officer who takes charge of the suspect when he is brought into the station to satisfy himself immediately whether the criteria for detaining the suspect apply.[2] If one or more apply, that should be recorded upon the custody sheet and the suspect should be informed orally of the specific grounds for his continued detention. After six hours at the station, if the suspect has not yet been charged, an officer not connected with the investigation and, if possible, of the rank of uniformed inspector or above should be required to enquire into the case, to satisfy himself that grounds for detaining the suspect still exist, and to record those grounds in writing and inform the suspect of them. Beyond this, with the exception discussed in paragraph 3.106, persons suspected of an offence for which they have been arrested and detained must within 24 hours be released unconditionally, released on bail for further enquiries, charged and released on bail to appear at court, or charged and brought before the court that day, if there is a court available, or, if not, the next day (Sundays excluded). Although six hours and 24 hours will be the statutorily fixed review points in the process, we would expect that, as now, investigating and supervisory officers will keep a case of detention prolonged beyond six hours under close review. The existing statutory provisions on time limits on custody for adults and juveniles should be repealed; and consideration will need to be given to the consequences of this in respect of other relevant provisions of the Children and Young Persons Act 1969.

3.105. We see the statutory requirement for reviews on arrival at the police station, at six hours and at 24 hours as providing formally the necessary and progressive measure of internal and external supervision of the police discretion to detain an arrested suspect. Obviously there is room for argument over the points at which such reviews should be required. On the basis of the evidence available to us from the detailed research we commissioned on police practice and of our own study of police procedures on the ground, we have concluded that these strike the right balance between fairness to the suspect and workability. Requiring a review on arrival is essential and does no more than formalise existing arrangements. To set the second review much earlier than six hours (by which time about three quarters of suspects are released under present arrangements) runs two risks. It might so increase the number of cases to be reviewed where the reasons for the detention are perfectly proper that the review would become a mere formality and therefore of little protection to the suspect; and because it would increase the number of cases to be reviewed, it might have the effect of actually prolonging detention for those who would otherwise have been released before six hours by interrupting and delaying the natural course of the investigation. We do not believe that it will operate to

[1]Section 29 of the Children and Young Persons Act 1969 and s. 38 of the Magistrates' Courts Act 1952.

[2]See paras 3.77 and 3.112.

produce a norm, so that people will tend to be kept for six hours even if they could be released earlier. As we have indicated, the existing 24 hour time limit does not produce that effect, nor do similar time limits in other countries. The pressures of work upon the police, and the demands that having a suspect in custody place upon them, coupled with good general supervision, seem to us likely to be far stronger constraints. We would not, however, favour going beyond six hours before the second review takes place.

3.106. The exception to the requirement to release a suspect within 24 hours or to bring him before a court the next day will be for those suspected of grave offences.[1] We accept that there are circumstances which prolong an investigation and delay charging beyond 24 hours (the need to check forensic evidence, for example); and where the police should not release the suspect, because, for example, he is likely to abscond. Such cases are a small minority, but provision must be made for them if the police are to be able to solve grave offences and bring persons accused of them before the courts. We consider, however, that the provision for detention beyond 24 hours uncharged can be justified only in respect of serious crimes, and that not later than 24 hours after a person is brought into a police station under arrest there should be some form of outside check upon the way that the police are exercising their discretion to detain. We therefore propose that where a suspect has not been charged within 24 hours the police should be required to bring him before a magistrates' court sitting in private (as the person will not have been charged). Provision should be made for the suspect to be legally represented, although one of us considers that the police should be able to apply to the court for refusal of legal representation. They do not necessarily need to wait 24 hours before doing this. It may be clear from an early point in the investigation that detention beyond 24 hours will be necessary, for example because forensic checks have to be carried out on a weapon or because the suspect will have to be taken some distance to another police station where the offence is to be investigated. The court should be empowered to authorise a further limited period in custody, to release on bail or to release unconditionally. In making that decision the court would use the same criteria as the police will be using to justify continuing detention upon arrest. The magistrates should be able to fix a period of not more than 24 hours in which the person should be charged or, if still uncharged, brought before them again. At any subsequent appearance they should have the same power but subject to a right of appeal.

3.107. There will be circumstances where at the elapse of a 24 hour period of detention a magistrates' court will not be available, for example at night or, as court sittings are currently arranged, on a Sunday. In some cases the police, realising their enquiries will not be complete within 24 hours, may have been able to anticipate this and get the suspect before a court earlier, but on occasion, for example where an unforeseen delay in completing enquiries occurs or where someone is arrested very late on a Saturday evening, this will be impossible. What is to be done then? One possibility is simply to require the suspect to be brought before the next available court. But at weekends that could result in suspects being held for two days or more before they are

[1]See para 3.7.

brought before a court; and both to allay public unease about suspects being held uncharged for protracted periods and for the protection of the suspect's interests we consider that it is desirable to find some means of giving an outsider access to him if he cannot be brought before a court at or before the 24 hour point. People to make visits of this kind could come from panels of magistrates, lay people, social workers or solicitors. We recommend they should be solicitors. The duty solicitor schemes and legal aid list are a starting point for providing national coverage of solicitors available to perform this function (we discuss fully in chapter 4 the general question of the provision of legal advice to suspects); any other scheme would have to be organised from scratch. The primary function of the visit will be to ensure that the suspect's welfare and interests are being attended to, thus bringing a measure of openness at this stage of the process. The visit by the solicitor would, therefore, not be to give legal advice, but he has the knowledge and experience to give it if requested. This visit would not remove the requirement for the suspect to be brought before a court on that or the next day, and we recommend that consideration should be given to providing facilities, particularly in cities, for magistrates' courts to sit on Sundays if required for this purpose.

Habeas corpus

3.108. Application for a writ of *habeas corpus* has been represented to us as ineffective as a remedy against prolonged detention under the existing law; it seems to be infrequently used in connection with detention by the police now, but this may derive from the imprecision of the law as much as from any defects in the procedure. Our proposals for internal and outside review of police detention should provide improved supervision and a statutory framework within which it can be more readily ascertained than at present whether an arrest or detention upon arrest is lawful or not. Where an arrest has been unlawful or detention unlawfully prolonged the possibility of a writ for *habeas corpus* will remain available.

Police bail

3.109. Existing police powers to release persons on bail are to be found in s. 38(1) of the Magistrates' Courts Act 1952—bail to appear at court after charge—and s. 38(2)—bail to return to the police station after further enquiries. Our evidence indicates no major concern about how the police exercise these powers, except that it is suggested that the existence of the powers is used as an inducement to a suspect either to talk or to comply with other police requirements, for example for fingerprinting. Irving's research suggests that the inducement does not have to be explicitly offered (which would be contrary to the Judges' Rules) for it to be present as a factor operating on the suspect's mind. We shall discuss one aspect of this problem further when we deal with the issue of voluntariness. But we envisage that the risk of improper pressure being brought to bear upon a suspect to be fingerprinted or to do something else which he is not legally required to do will be substantially removed if our proposals are implemented so that there is a presumption in favour of release and that reasons for refusing release are recorded.

3.110. Some changes of detail to provide rather more flexibility in police bail and in consequence to encourage its use have been suggested to us. We consider that it should be possible for the police to impose conditions when, after charge, they grant bail to appear at court, and for them to renew the period of bail if they have to undertake further enquiries. If either of those powers were given, it would be necessary to allow the person concerned to appeal against the police decision; such an appeal should be to a magistrates' court. We see no need for an appeal against police refusal to release on bail, since the matter will in the nature of things be as speedily before a court as the bail appeal could be. We recommend accordingly.

The care of the detained suspect and the protection of his rights

3.111. The second main element of our proposal is to secure proper arrangements for the care of the suspect and the protection of his rights so long as he is detained. Arrangements to these ends already exist in all forces. They give effect partly to the provisions in the Administrative Directions to the Judges' Rules (for example on refreshments), partly to statutory and non-statutory requirements on, for example, legal aid and bail, and partly to Home Office circulars of guidance to the police, which cover a miscellany of matters about dealing with suspects in custody, for example on the accommodation of juveniles. They also reflect practices that have grown up over the years in individual forces, which do not derive from central guidance. A survey of the practice in seven forces which was carried out for us showed that, in consequence, although the main features of the way suspects are looked after in custody are the same, the arrangements differ in detail between forces. The differences are most marked in the way that suspects are made aware of their rights while they are in custody and in the extent to and manner in which a record is kept in one place of decisions made about the suspect's exercise of his rights. We believe it is possible to determine the best practice in notification and documentation in these respects and we recommend that it should be adopted throughout the country.

3.112. We consider that what is the general practice needs to be reaffirmed, namely that, as soon as a suspect is brought into a police station under arrest, accountable responsibility for his welfare, for seeing that he is aware of his rights, for answering enquiries about his whereabouts and for decisions on his detention passes out of the hands of the arresting or investigating officer and into the hands of another officer. Who should this be? The answer to that question clearly depends upon the nature of the police station concerned and the volume of business done at it. We take the view that where the number of suspects dealt with at a police station warrants it there should be an officer whose sole responsibility should be for receiving, booking in, supervising and charging suspects. He should be of no less rank than sergeant and should be of the uniformed branch. He should be responsible to the sub-divisional commander. At other stations, it should be one of the responsibilities of the officer in charge of the station to deal with arrested suspects. Usually that officer will be of the rank of uniformed sergeant or above. In one or two man stations that cannot be so. In those circumstances the strict demarcation between the responsibilities of the arresting or investigating officer and of the officer who

has the duty to look after suspects cannot be maintained. However, we do not think that should affect the general position; indeed only in unusual circumstances will suspects be detained for any length of time at small stations. We suggest that it should be required practice for suspects who are to be detained in custody for longer than six hours to be taken to a station which has the facilities of staff and accommodation to deal with them. It has been put to us that where the arresting officer or officer in charge of the investigation outranks the officer who has responsibility for the suspect in custody, in effect the latter will lose his independence and his ability adequately to secure the suspect's welfare. We think that force orders should make it absolutely clear that the position is as we have proposed, namely that responsibility and, therefore, accountability for the suspect lie with the station or charge officer and through him to the sub-divisional commander. Any officer attempting to override that authority would be in breach of force orders.

3.113. We have already mentioned the desirability of producing a document that is uniform throughout the country and upon which the events of a suspect's time in custody are recorded. We have suggested some matters for inclusion and as our proposals develop in the chapter on questioning shall be suggesting additional items for inclusion on that sheet. Many of these are already recorded by some forces (for example, notification of the Judges' Rules rights) and some are recorded by all forces (for example, the timing of provision of refreshments). So far as we are aware, all the matters of record that we are proposing are recorded in one force or other but practice is variable. The novelty of our recommendation is not therefore in the content of the custody sheet but in the fact that it should have a uniform content throughout the country. A custody sheet should be started as soon as an arrested suspect is brought to a police station, even though his detention is not to be prolonged, and as soon as any person who has come to the station voluntarily is put under arrest. It, or a copy of it, should accompany him if he is transferred to another station, and a copy should be available to the suspect when he is released, if he requests it.

Search on arrest

Existing powers

3.114. The first of the coercive powers consequent upon arrest and detention is search. This is usually undertaken for somewhat different purposes from stop and search and different considerations apply to it. There is at present a power at common law to search an arrested person and his surroundings. It is available only where there are reasonable grounds for believing the person arrested has a weapon which he could use to escape or injure himself or others, or evidence material to the offence with which he is charged (by implication, the offence for which he was arrested). Arrest has to occur before the power to search becomes available. The police cannot search simply because the right to arrest exists.

The Commission's proposals

Search of the person on the street

3.115. We start with search in the street of a person (or his immediate surroundings, including a vehicle). Under the limitations we propose on arrest,

the police officer will inform the person of the grounds and then will decide whether to detain the person and take him to the police station in accordance with the criteria set out at paragraph 3.76. What should be the extent of his power to search at this point? The present situation, in which an arrested person is routinely but superficially searched for evidence material to the offence for which he is arrested or for a weapon, does not from the evidence submitted to us appear to have given rise to any substantial difficulty. We have received no proposals which command any significant measure of support for restriction or extension of this power as a consequence of arrest. We recommend that for the sake of certainty and clarity it should be put upon a statutory basis.

Search of the person at the police station

3.116. On an arrested person's arrival at the police station any more thorough search that is required for evidence can take place. There is also the current practice of searching a person, listing and placing in safe keeping all his possessions on his reception under arrest at the station, and taking anything from him which he might use to harm himself or others. There is no statutory authority for this procedure. Once a person is in custody at the police station, the police are responsible for him and his possessions and the procedure is undertaken for administrative reasons related to that responsibility (safe-keeping of the property, prevention of subsequent allegations of misappropriation by police officers and for the protection of themselves and of the suspect while he is in custody). We recognise that the process can be humiliating and disturbing, particularly for the person who is experiencing custody for the first time. At the same time risks are involved if people are left with their property or are not carefully searched; escapes, suicides and attacks upon police officers have occurred. We therefore consider that it is proper for such searching to be authorised if a person is to be detained at the police station, and we recommend that the procedure should be placed on a statutory footing, subject to the following qualifications.

3.117. We share the view expressed by the Police Complaints Board in their Triennial Review Report 1980 and by the Divisional Court in a recent case that it should not be applied routinely in every case.[1] We further consider that the full search procedure should not occur until the officer taking charge of the suspect has satisfied himself that the grounds for continued detention exist. In other words, the justification for detention must be established before procedures consequential upon detention are set in hand. A superficial search for weapons and for evidentiary articles, if the circumstances of the case require it, should be sufficient at this stage. We see that there may be practical difficulties and risks in making exceptions after this point. We doubt if it is practicable to lay down all encompassing guidelines on the circumstances in which people should or should not be deprived of their property or of articles of clothing which they might use to harm themselves or others or to effect an escape. Station officers will have to be left to use their discretion sensibly, but if that is so they should not be blamed or be liable to an action if something goes wrong. Other than in exceptional cases we suggest that a person should

[1] *Op. cit.*, para 48 and *Lindley v Rutter* reported in The Times, 1 August 1980.

not be deprived of his watch. Our proposals on the length of detention make it desirable that an arrested person should know what the time is. Clearly it will be necessary to record that a watch has been left with a suspect.

3.118. An extreme and manifestly disagreeable form of search is that for illegal drugs, colloquially called "strip search". We recognise that such searches may be necessary if the law, for example in relation to the importation and supply of prohibited drugs, is to be effectively enforced. We consider that strip searches should take place only at a police station, so that they are supervised and monitored. If they involve examination of intimate parts of the body they should be carried out only by a medical practitioner, and only in respect of the most serious offences. We would suggest that such searches should be confined to grave offences.[1] The nature of the places of concealment will limit the range of such offences in respect of which intimate searches will be necessary. One consequence of this approach is that search of body cavities for drugs will be permitted only when the offence suspected is one of supplying, importing or exporting drugs. In view of the nature of this intrusion, the justification for each search should be reviewed by a subdivisional commander and the fact of and reasons for the search should be recorded, before the search takes place, on the new custody sheet.

Search of premises

3.119. The common law power of search of an arrested person extends to his "immediate surroundings" but it is not clear whether it extends to the premises of a person arrested elsewhere. It appears, however, that such a search will be unlawful if there is no connection between it and the offence for which the arrest took place.[2] Submissions to us agree that this uncertainty should be resolved one way or the other. Such powers should be subject to statutory prescription to enable both the police to know their powers and suspects to be aware of their rights. Without clear prescription there is, it is suggested, too much scope for abuse; the police may be tempted to arrest someone on one charge in order to search his premises for evidence of some completely different offence. Searches with the consent of the arrested person are said to be uncontrolled; and that it is easy for the police to obtain consent which is not genuine, for example by holding out the prospect of bail. But whatever the uncertainty in the law, the police do search the premises of an arrested person and the practice is well established. Indeed, this seems to have been so when the Royal Commission on Police Powers and Procedure looked at the matter in 1929. That Royal Commission recommended the practice should be "regularised".[3]

3.120. We think there is a need for some power to search premises on arrest (and vehicles, which seem to us to raise the same sort of issues), since such searches can and do contribute to the investigation and detection of offences.[4] If the police need to conduct such searches, they should be statutorily empowered to do so subject to suitable safeguards. The questions to be

[1]See para 3.7.
[2]See the *Law and Procedure Volume*, para 29.
[3]*Op. cit.*, para 121.
[4]See, for example, Steer, *op. cit.*

addressed are what form the power should take and how its use should be regulated.

3.121. The criterion for search on arrest should be similar to that for any other lawful search, being based on suspicion on reasonable grounds that there are on the premises (or in a vehicle) occupied by or under the control of the arrested person articles material to the offence for which the person has been arrested or a similar offence. Search of any other premises at this stage should be under warrant. It has been suggested that all search of premises on arrest should be subject to the warrant procedure on the grounds that unjustified searches do take place; one of us would support this proposal. The majority of us has concluded however that for the reasons given earlier it is preferable to put the responsibility on the police.[1] They are also concerned that requiring the police to obtain a warrant could delay the suspect's release from custody, and also that this would place considerable pressure on suspects to consent to searches. In order to minimise the risk of "fishing expeditions", there should be some police procedure for ensuring that the decision to search premises and the reasons for it are recorded prior to the search. Responsibility for recording this could be placed upon the station officer. In order to avoid subsequent disputes, this procedure should be used in every case even if the arrested person consents.

3.122. The safeguards on statutory search after arrest will and should be similar to those on search before arrest.[2] The approval of a police officer will replace the magistrates' warrant. But apart from that there will be the same basis of reasonable grounds for suspicion, the decision should be recorded and be available if there are disputes afterwards. We recommend the same approach to exclusion of evidence as we propose for search on warrant. Material evidence found in a search on arrest for a specific offence will be admissible at trial if it relates to that or a similar offence; if it does not but is found incidentally to the search it will be admissible if a warrant could have been obtained in order to search for or obtain it. There should be monitoring and review of the records of searches by supervising officers. When premises are searched in the absence of the arrested person, any other person occupying them should be informed of the reasons for the search, where possible; the search should be conducted in a manner appropriate to what is being searched for; and an independent person should be present, if available. Receipts should be given for anything seized.

The enforcement of the rules on arrest, detention, and search upon arrest

3.123. The powers of arrest and the criteria restricting detention that we have proposed should be set out in a single statute, and the various procedures surrounding them and for dealing with the treatment of persons in custody should be controlled by subordinate legislation. Any failure by the police to meet these standards should occasion disciplinary review. The remedy of action for wrongful arrest or trespass or assault in the cases of wrongful searches should continue to be available. Additionally, when an arrested person is at the police station, failure to pay due regard to the statutory criteria should

[1]See para 3.33.
[2]See paras 3.46 ff.

constitute the grounds of an action for wrongful imprisonment. But in line with our general approach to the automatic exclusion of evidence, all but one of us would think it inappropriate for a wrongful arrest alone to be a sufficient basis for the exclusion at the trial of the arrested person of evidence obtained subsequently.

Other procedures during custody

3.124. When a person is in custody there is a variety of procedures which he may be requested or compelled to undergo, in addition to being questioned. These are being fingerprinted or photographed, the taking of body samples and participation in identification parades. We have received submissions upon all of these matters and deal with them at this point because in various ways they raise issues similar to those raised by the use of the coercive measures discussed in this chapter.

Fingerprinting

Its uses, the present law and the issues

3.125. Most of the evidence submitted to us on these topics focuses on fingerprinting. The major use of fingerprinting, some would say the primary use, is to fix the identity of an accused person with certainty, so that when he is brought before the court and if he is convicted the court can be aware, for sentencing purposes, of his previous record. But fingerprints can also play an important part in the detection of certain types of crime. A print found at the scene of a crime or on a weapon can be shown to be that of a particular person, who may be identified in a number of ways. He may be suggested as the likely offender by the officer in the case, and if his fingerprints are on record, a comparison is possible. A suspect may be in custody for the offence or a similar offence and once his fingerprints are taken he can be linked with the crime or weapon where the original print was found. Finally, where the crime is sufficiently serious, a detailed search in the records (still a time consuming process) may eventually reveal the identity of the offender. Our research suggests that the general value of these aids in the process of investigation can be overstated. For example, in his study Steer says that fingerprints were the main source of information which first established the suspect in the mind of the investigating officer in about 2 per cent of detected indictable crime.[1] Similarly Baldwin and McConville suggest that important forensic evidence (of any kind, not just fingerprints) directly implicated the defendant in only 5 per cent of the cases they examined.[2] That is not to say that the taking and comparison of fingerprints is not valuable in the investigation of certain kinds of crime. In addition fingerprints are used to confirm suspicion that has arisen from other methods of investigation. Finally, fingerprints are an investigative aid in that they can establish innocence as well as guilt. Where fingerprint evidence is available, it will frequently be conclusive and therefore provide hard evidence leading to conviction and lessen the need for reliance upon interrogation. The value of the detailed search for prints at scenes of crime (a technique that has been considerably developed in recent years and will no doubt continue to be improved) should not be impaired.

[1] *Op. cit.*, Table 3:4, p 73.
[2] *Op. cit.*, p 19.

3.126. The present law is that people can be fingerprinted voluntarily or, if aged 14 or over, by order of a magistrates' court after charge.[1] Fingerprinting without consent or the authority of a court is an assault. It is alleged that at present consent to be fingerprinted is not freely given because the police withhold bail until it is forthcoming. It is also asserted that the police take fingerprints as a matter of routine and in many cases where there is no real necessity for it. Even the need for taking fingerprints to identify the offender to ascertain his previous convictions (if any) is questioned: does this really have to be done in relation to minor offences or where the accused is already well known to the police? On the other side, it is argued that the police need to take fingerprints, sometimes before charge, to identify an offender, or to link a suspect with a particular offence. Fingerprints are also necessary, it is said, to enable the court to be certain about the accused's previous convictions when it comes to sentencing him after conviction.

3.127. We have received few representations that the use of fingerprinting should be restricted, although some people see this as the only way of ensuring that fingerprints are not taken with purely nominal consent. A small number seek extension of the powers to the period before charge. An extension is also sought in relation to those over the age of criminal responsibility but under 14 (the 10–13 age group). Further, some police representatives have recommended that they be given powers to fingerprint all people in a particular area and there was a proposal for compulsory fingerprinting of the whole population.

The Commission's proposals

3.128. We reject national fingerprinting as of very doubtful value as a general investigative aid, and as contrary to our position that intrusions upon the person should be allowed, in general, only if there is reasonable ground to suspect the person concerned of involvement in crime. For that reason also we are not disposed to recommend giving powers to fingerprint everyone in a particular area. So far as we are aware people agree voluntarily to being fingerprinted when a major enquiry is in progress.

3.129. In most cases, both for the purposes of identification and investigation, fingerprints are given voluntarily. In line with our general approach fingerprints should be taken only where necessary and not as a matter of routine. At present it seems to have become so much a matter of a routine which the police expect the suspect to go through that disputes do arise about whether consent is genuine and this can be a source of complaint. A person from whom fingerprints are being sought should be told the circumstances in which his fingerprints can be taken compulsorily. We endorse the recommendation of the Police Complaints Board that the person being fingerprinted should signify his consent in writing (a space could be provided upon the custody sheet).[2] This should assist in removing a potential source of disputes, and our proposals for a presumption in favour of release from custody should provide a further safeguard against pressure to consent. Refusal to be

[1]Or after summons for an imprisonable offence. There is an additional provision in respect of juveniles but it has not yet been brought into force. See the *Law and Procedure Volume*, paras 95–99.

[2]*Triennial Review Report 1980, op. cit.*, para 50.

fingerprinted will not of itself constitute grounds for continuing detention, and if the police are well aware of the identity of the suspect, they will not need to fingerprint him compulsorily for identification purposes.

3.130. For the purpose of identifying the accused with certainty after charge the police need a power to take the fingerprints of a person who refuses to give them voluntarily and that power is available under the present law. We recommend that it should be retained, subject to the modifications and safeguards we propose in the following paragraphs. We would envisage that the power should also apply for the purposes of criminal records in respect of a person who has been convicted, who has not so far been fingerprinted and who refuses at that stage to be fingerprinted. For the purpose of investigation we accept that the police may need on occasions, which are unlikely to be frequent, to be able to fingerprint a suspect against his will before charge. It also may be of use to them to take palm and footprints for investigative purposes.

3.131. So far as safeguards are concerned, where consent is not given, the need for fingerprinting in any particular instance should, as with the application of other coercive powers, be specifically justified. For the purposes of investigation the criterion should be reasonable grounds for believing that fingerprinting would go towards confirming or disproving a suspect's involvement in a particular crime. For the purposes of identification, the criterion should be reasonable grounds to doubt whether the accused's identity has been sufficiently established in order to prove his antecedents to the court of trial. Fingerprints taken in connection with a particular offence if the person is not proceeded against or if he is not convicted of that offence should be destroyed. This should not be confined as at present to fingerprints taken under court order. A person whose fingerprints are being taken should be informed at the time of this, and that he has the right if he wishes to witness the destruction. We have considered whether a fingerprint order after charge should continue to have to be made by a magistrates' court. One of us believes that the magistrates' authorisation should be required for all purposes. Fingerprinting is an invasion of privacy and can involve the use of force. The majority of us, however, doubts whether the magistrates can bring an adequate degree of supervision to compulsory fingerprinting; the police are in many cases unable to reveal to the court why fingerprints are being sought, since the information necessary to prove this will be prejudicial to the suspect. They take the view that in this matter also the police should be accountable for their decision.[1] And as with search of premises on arrest, a requirement to wait until the authority of the magistrates has been obtained could both delay a suspect's release and constitute considerable pressure on him to give consent. They therefore recommend that the power to take fingerprints, palm and footprints should be exercisable upon the written and reasoned authority of a sub-divisional commander.

3.132. All aspects of the proposals we have made in the preceding paragraphs should apply equally in respect of adults and of juveniles aged 14 years and over. In addition fingerprints should be taken from a juvenile

[1] See para 3.33.

voluntarily only with the consent of his parent or guardian. On the minimum age for being fingerprinted, some of us feel the case for fingerprinting 10–13 year olds has not been made out. The lack of power to fingerprint offenders in this age group does not appear to lead to difficulties for the police in investigating crime; nor will it often be necessary to fingerprint such offenders for identification purposes. Those of us who take this view also believe that it is wrong in principle to make offenders aged under 14 the subject of this type of formal criminal record and thus to mark them out as criminals. They do not consider that they should be subjected to the indignity of being fingerprinted. Most of our number disagree with the objection of principle and doubt whether being subjected to fingerprinting is the ordeal which it is represented as being. Such children should be included in any provisions for fingerprinting because they form a high proportion of those involved in committing indictable offences, 14 per cent of all indictable offences cleared up by the police in 1978. The proportion of young offenders involved in such offences has not only greatly increased over the last 20 years but so has their involvement in more serious thefts and burglaries. Most of us, therefore, recommend that the minimum age for being fingerprinted should be lowered to ten, the same as that for criminal responsibility.

Photographing

3.133. Photographing raises broadly similar issues as fingerprinting, although it will not generally prove useful in the detection of crime as distinct from the identification of the offender. We recommend that compulsory photographing should be permitted on the same basis as for fingerprinting, and subject to the same authorisation procedures, safeguards and arrangements for destruction as will apply for compulsory fingerprinting. Photographing the suspect with his consent should continue to be possible, but consent should be genuine and recorded in the same way as we have proposed for voluntary fingerprinting.

Medical examination and the taking of body samples

3.134. Medical examination and the taking of body samples can constitute very serious intrusions upon the person and raise particularly difficult questions, both of principle and of practice. The Commission has considered whether the present situation should remain under which no examination may be undertaken without the person's consent and there is no sanction for refusal to be examined or to give samples, however unreasonable.

3.135. There is a case in some circumstances for the police to be able to take samples from a suspect or to submit him to medical examination without his consent. But in respect of certain kinds of body sample, for example blood, semen and urine, it is difficult to see how procedures for these purposes could be made effective, or are even acceptable, whether with or without judicial authority. Physical compulsion is unlikely to be effective, because it is difficult to take such body samples by force from a person who is determined to resist, and the use of such force is inherently objectionable. It may well be, as has been suggested to us, that the existence of a judicial order coupled with a sanction would secure a suspect's cooperation, but this is doubtful in the case

of the most serious offences where a guilty suspect might have so much to lose by giving a sample or submitting to examination.

3.136. At present the only provision for sampling coupled with a sanction for failure is that in ss. 5–12 of the Road Traffic Act 1972, which make it an offence unreasonably to refuse to supply blood or urine samples and, in the case of unfitness to drive, permit such refusal to be corroborative of the prosecution case. This is not, however, a particularly helpful precedent in relation to the taking of body samples for other offences. The likelihood is that many offences requiring body samples to confirm or disprove the suspect's involvement will be particularly serious offences, such a murder or rape where blood or semen could establish a person's innocence or be highly suggestive of guilt. Unless an offence of refusal were to be created carrying the same maximum penalty as the substantive offence under investigation, which in these cases would be life imprisonment, it would always be in the guilty suspect's interest to refuse to give a sample. We do not think it feasible or proper to provide sentences up to life imprisonment for mere refusal to give a sample, however unreasonable the refusal may be. The alternative, of allowing refusal to be corroborative of the prosecution's case, may be of some use where there is other, admissible, evidence against the suspect; it will not solve the problem where there is only reasonable suspicion against the suspect and refusal to supply the sample prevents the prosecution from taking the matter to court.

3.137. The use of physical compulsion to obtain intimate body fluids, such as blood or semen, seems to us to be objectionable, and none of us would recommend that it should be made lawful to obtain such samples in this way. If such samples are taken with the consent of the person concerned, they should be taken only by a medical practitioner. But where the intrusion is not so intimate, for example the examination of the finger nails for forensic purposes, or the taking of samples of hair, or even of saliva, we consider that such physical examination or the taking of such samples should be permitted under compulsion, where evidence is sought tending to confirm or disprove the suspect's involvement in any grave offence.[1] We do not see this as being any more serious an intrusion on the suspect' person than the type of body search to which we have referred in paragraph 3.118. All but one of us consider that authority to take such samples from or to make such examination of a suspect should be given by a sub-divisional commander and the reasons for it recorded. It may be appropriate that they should be taken only in the presence of or by a medical practitioner.

Identification procedures

3.138. Pre-trial identification procedures (showing photographs of suspects to potential witnesses and the arrangements for identification parades, for example) were examined shortly before we began work by a committee under the chairmanship of Lord Devlin.[2] Most of the substantive recommendations of the Devlin Committee have been implemented by one means or other, but not

[1]See para 3.7.
[2]*Report to the Secretary of State for the Home Department of the Departmental Committee on Evidence of Identification in Criminal Cases*, London HMSO 1976 HC 338.

by statute. It is a subject on which we received some evidence, although little that was relevant to the situation after the Devlin Committee's recommendations were substantively implemented. The Government during the course of our enquiry reviewed the effect of the practice direction issued by the Attorney General following the case of *Turnbull*,[1] which implemented, though in a different way from that proposed by Devlin, the Committee's recommendations on evidence on identification. The review concluded that the operation of the *Turnbull* guidelines was satisfactory and the Government has stated that no further action will be taken for the time being. We have noted this statement. After so detailed and prolonged a review by others of this area of pre-trial criminal procedure, we do not make any proposals of detail. We would, however, comment that, in accordance with our general approach, there is a case in principle for regulating by statute identification procedures as well as other aspects of pre-trial criminal procedure. We therefore recommend that when the Government is considering legislation in the field of pre-trial criminal procedure it should examine the possibility of making identification procedures subject to statutory control as well.

[1] *R v Turnball* (1976) 63 Cr App R 132:

CHAPTER 4

Questioning and the rights of the suspect

Introduction

4.1. The evidence submitted to us, our knowledge of other countries and the results of our research[1] all lead us to the conclusion that there can be no adequate substitute for police questioning in the investigation and, ultimately, in the prosecution of crime. Since the police must continue to be allowed to question suspects, we must consider the following critical and related questions: what, if anything, needs to be done about the suspect who refuses to answer some or all questions (the "right of silence")? How best to safeguard this and other rights of a suspect who is being questioned (the Judges' Rules)? And how most effectively to secure that statements made to the police are reliable and accurately recorded?

The accuracy of the record

The main issues

4.2. We start with the potential for improving the accuracy of the record of the suspect's statements to the police which the court will hear, because to a degree this conditions the possible solutions to the problems presented by the right of silence and the Judges' Rules. Questioning in custody takes place behind closed doors in the police station. Generally, for adult suspects, the only witnesses of what went on are the suspect and the police themselves. And yet the product of questioning may be the vital evidence against the suspect. The frequency of challenges to the police record of interviews is said to make it essential to have some sort of independently validated record in order, in the eyes of some, to prevent the police from fabricating confessions or damaging statements, or, in the eyes of others, to prevent those who have in fact made admissions subsequently retracting them. It is the "verbals" which give rise to most concern, that is the remarks which are attributed to the suspect in the police officer's subsequent note of the interview but which the suspect is not prepared to endorse by making a written statement under caution. Indeed it is argued by the Circuit Judges that the present methods of recording interviews are in themselves the cause of a substantial number of acquittals of apparently guilty defendants. Many of our witnesses also point to the waste of court time caused by disputes about statement evidence. The most commonly proposed solution is the use of tape recording. The police point to the practical

[1]See the discussion of the role of the police in the investigation of offences at paras 2.9–2.17.

difficulties and the cost of this, and to its possible inhibiting effect upon obtaining criminal intelligence.

The relevant factual material

4.3. The material presented in the following paragraphs relates generally to all the issues discussed in this chapter but has a particular relevance to the problems of improving the accuracy of the record. The study carried out for us by the Cranfield Institute of Technology to assess the resource implications of tape recording interviews found that about 50 per cent of crime suspects were interviewed outside the police station.[1] Of nearly 1,200 suspects interviewed 15 per cent were interviewed only outside the police station, 35 per cent were interviewed both outside and inside and 50 per cent only inside the police station. In their study of confession evidence in Crown Court cases Baldwin and McConville found that in about 10 per cent of the Birmingham cases and 22 per cent of London cases the verbal statements which formed part of the prosecution's case had been made outside the police station.[2] Cases heard in the Crown Court are, of course, a minority and, in any event, not representative of all persons who are questioned. It should also be noted that the majority of statements in the Crown Court sample did not contain admissions, and there were few cases where the prosecution was greatly assisted by evidence of conversations held outside the police station.

4.4. Softley found that 80 per cent of initial interviews at the police station took under half an hour and that only 5 per cent lasted for more than three quarters of an hour.[3] Barnes and Webster reported that a suspect was interviewed on average for about five minutes outside the police station and about 35 minutes in the station[4] (this excluded the taking of a statement). Interviews lasting for up to one hour were exceptional and for more than two hours very rare.[5] The majority of suspects are interviewed once only (60–70 per cent) and 10 per cent or fewer are interviewed more than twice.[6]

4.5. The accuracy of the recording of police interviews is very difficult to assess objectively. The methods generally employed certainly militate against absolute accuracy. As far as we have been able to determine from our discussions with police officers and from our research it is comparatively rare for full verbatim notes to be made. In serious cases extensive written notes are usually taken. But in the great majority of cases notes seem to be confined to the relevant factual material and an attempt to reproduce the exact words used if admissions were made. Statements are generally compiled after the completion of an interview.[7]

4.6. The Judges' Rules make provision for suspects to make statements in writing (the voluntary written statement under caution).[8] These are not necessarily confessions or damaging statements. Our research suggests that

[1] *Op. cit.*, Table 3:1, p 9.
[2] *Op. cit.*, Table 3:3, p 21.
[3] *Op. cit.*, Table 5:1, p 78.
[4] *Op. cit.*, Table 3:1, p 9.
[5] Softley, *ibid.*, and Irving, *op. cit.*, Table 4:4, p 104.
[6] Barnes and Webster, *op. cit.*, Table A:6, p 56 and Softley, *op. cit.*, p 76.
[7] For a detailed account of practice in one police station see Irving, *op. cit.*, pp 128–129.
[8] See the *Law and Procedure Volume*, para 72.

written statements are made in a substantial minority of cases. Softley and Barnes and Webster, using samples of suspects interviewed by the police, found respectively about 30 per cent and about 40 per cent of suspects making written statements.[1] Of those who are subsequently prosecuted the Baldwin and McConville Crown Court samples show about one in three in London and almost one in two in Birmingham making written statements.[2]

4.7. The proportion of court time spent on challenges to police evidence does not seem to be as great as is supposed. It has of course to be remembered that the great majority of persons plead guilty so that they make no challenge to any statements that they are alleged to have made. A study of trials relating to Class IV offences (the less serious) in four Crown Court Centres in 1978 discovered that all legal submissions, which included trials within trials on the admissibility of statement evidence, occupied less than 5 per cent of trial time.[3] The survey did not cover time spent in cross-examination for the purpose of challenging statement evidence. Barnes and Webster found that about 5 per cent of the total time hearing contested cases at the Crown Court was spent on challenges to the authenticity or accuracy of police interrogation evidence, including 1 per cent on trials within trials and 4 per cent on cross examination.[4]

4.8. In a sample of contested trials at magistrates' courts examined by Vennard incriminating statements were adduced in evidence in just under a third of cases and about half of them were challenged. Nearly all challenges to verbal statements were on their accuracy, only 2 per cent of them being challenged on their alleged voluntariness. With written statements the position was reversed, fewer than 10 per cent being challenged for accuracy, whereas nearly 40 per cent were attacked on their alleged voluntariness.[5]

The Commission's proposals

4.9. The written voluntary statement made under caution plays an important part in the investigative process and in the preparation of cases. The accuracy of these statements does not seem to be challenged often and we would not support any change that might diminish their use; nor do we recommend any change to current practice set out in the Judges' Rules and Administrative Directions for the taking of such statements. The difficulties arise mainly when notes are made up after interview and the suspect becomes aware of their content only at a later stage. Even though challenges to the record of such interviews do not take up a large proportion of total court time, their frequency and duration should be reduced. The simplest way of doing so is to improve general police practice in recording interviews.

4.10. At present, evidence of oral statements, especially those made in the course of prolonged interviews, can invite dispute which faces the court with the problem of having to determine the accuracy of the record on the basis only of assertions by the two sides. Part of the difficulty is that this evidence,

[1] *Op. cit.*, respectively at p 81 and p 103.
[2] *Op. cit.*, Table 3:1, pp 13 and 14.
[3] Made available to us by the Lord Chancellor's Department.
[4] *Op. cit.*, Table 3:2, p 10.
[5] Julie Vennard: *Contested Trials in Magistrates' Courts: The Case for the Prosecution* (Royal Commission on Criminal Procedure Research Study No 6, London HMSO 1980), chapter 4.

even though it may be prepared on the basis of notes taken contemporaneously, has been written out afterwards. The accuracy of statements written or dictated by the person interviewed, as we have said, seems less likely to be challenged. There are other difficulties of a practical nature. Sometimes interviews have to be conducted by one officer and in conditions which prevent note taking at the time. Moreover, some suspects are inhibited by note taking or refuse to speak if a note is taken. Even very experienced minute takers will not get down a verbatim record of conversations. That can be done only by highly proficient shorthand writers. No written record after the event can be more than a good summary of the salient points made, unless the interview was conducted in so slow and stilted a way as to allow an almost verbatim record to have been written in longhand. And yet it has been put to us that police officers tend to assert when giving their evidence of interviews that the record they have is verbatim—it is often presented in question and answer form—and a precisely accurate record of all that was said. If two officers are involved their notebooks, and therefore the record of the interview, will usually be identical. Confident defence of accuracy of the record and the exact coincidence of two officers' record can give force to the police evidence. On the other hand it can strain the common sense of the jury or magistrates and therefore often becomes a point of attack.

4.11. How is the accuracy of the record to be improved? Over the last decade discussion of possible solutions to this problem has focused almost entirely upon the value of tape recording at the expense of other possibilities. And yet, as we shall show, experience with tape recording suggests that in the very nature of things it cannot provide a complete answer. We shall first discuss the possibility of improving general standards in the taking of statement evidence from suspects.

Improving note taking practice

4.12. Our proposals build on existing practice and procedures. We are aware that the use of the prepared questionnaire is practicable only in certain types of case and that it is not always possible to have two officers available at an interview, so that one of them can have the responsibility for taking a contemporaneous note. Nonetheless present experience indicates that where prepared questionnaires can be used or contemporaneous verbatim notes taken there are fewer difficulties over challenges at trial to the police record of the interview. We recommend that these techniques should be developed uniformly and to their fullest practicable potential.

4.13. We suggest that in all cases where it has not proved possible to take a verbatim record or full contemporaneous note of the interview or where the suspect does not make a written statement under caution, the product of the questioning (if given in evidence) should be represented to the court as what it is: a minute of the salient relevant points made at the interview. To facilitate this we recommend a new approach. If some sort of contemporaneous record has not been made or if a suspect does not elect to make a written statement under caution, it should become the practice for the interviewing officer at the end of the interview and in the suspect's presence to note down in writing the main relevant points made during the interview. These should be in summary

form and should contain not only admissions or damaging statements but also denials; the summary might also include any remarks made to the police officer outside the police station or before caution. The summary should be read over to the suspect, who should be invited to offer corrections and additions to it if he wishes and also to sign it. If there were another independent person present, as, for example, when a juvenile is interviewed, or the suspect's legal adviser is available, as, on our proposals, it is more likely he will be than at present, that person might also be invited to sign it, if he accepts it as a fair and accurate summary. We recognise that if a suspect has chosen not to make a written statement he may very well be disinclined to sign such a summary. Nonetheless we believe that what we propose represents an improvement over the present practice. Under this the suspect neither signs the officer's record of the interview which is made up after the event nor knows, until sometime afterwards, precisely what goes into it; and the note tends to be represented as a verbatim account rather than as what it is, the officer's recollection of and report on the main relevant points made. Making the summary should generally take no more time than taking a written statement and would replace the time taken on making up the note of the interview after the event. It would have the advantage for both the police and the suspect of being written much closer than at present to the time of the interview and with both parties to the interview present and aware of its content.

4.14. This may at first sight be thought a novel procedure. However we understand that some detectives sum up the interview in this way as a matter of general practice, especially in serious cases, and we observed during our visit to Australia that some forces there have developed a similar procedure of making typewritten summaries. Furthermore it is procedurally not very different from and unlikely to be more time consuming than taking a written statement, which could be made in any case where a suspect so wishes. We therefore think that the novelty is more apparent than real and that such a procedure is workable. But it will need careful preparation and a substantial training programme to introduce. In order to establish it as a general and uniform practice, it may be desirable to include details of the procedure in the code of practice regulating questioning which we shall be proposing.[1]

Improving note taking skills

4.15. There may also be scope for improving the performance of police officers as note takers. So far as we are aware, although officers are instructed on how to keep their notebooks, they are given little training in note taking, which has to be learnt on the job. There are, however, skills that can be taught. We recommend that consideration should be given to including some elementary instruction on this in basic training and to making it and summary writing of the kind we propose an essential feature of CID training and refresher courses. We think there is also a case for giving courses either in shorthand or speed writing to CID officers who are going to specialise in types of job where long interviews are frequent.

[1]See paras 4. 109 ff.

Tape recording

4.16. It will be asked whether it is necessary to bother with these ways of improving the record when the tape recorder is there, almost infallibly, to do the job. Unfortunately the answer is not that simple. There are some very real practical and technical difficulties, as has been shown by the limited trial of tape recording that we mounted, by our examination of foreign experience and by the research done for us by the Cranfield Institute of Technology into the organisational and resource implications of introducing a general system of tape recording.[1] We shall here summarise only briefly the main arguments for and against the use of the tape recorder and discuss them in the light of the salient findings of our research. Since that had to be conducted against a very tight deadline and on limited resources, it could not explore all the problems, such as, for example, the likely incidence of challenges to taped evidence and the grounds for challenge. Its findings have to be read with that in mind.

4.17. Late in our work we also had the opportunity to study the experiment in tape recording being conducted by the Scottish police. But there are differences in the extent to which the police in England and Wales and in Scotland may question suspects on arrest, and these, taken together with the Scottish law on corroboration and the different arrangements for the prosecution of offenders, make it difficult, in our view, to draw useful lessons from the Scottish experience for the taping of interviews in England and Wales.

Tape recording: the main issues

4.18. The proponents of tape recordings believe that it has two major advantages. A tape would provide not only an accurate record of all that was said at an interview but also a monitor upon the way the police conducted the interview. The court would not have to rely upon a police officer's often inadequate memory but would be able to hear the suspect's tone of voice and to determine whether inducements were given or threats made. The savings on lengthy trials within trials would offset the cost of taping.

4.19. Against this, opponents point to the cost, particularly of tamper-proof equipment and of editing and transcribing. They are concerned about the inhibiting effect of the tape recorder on the suspect in relation not only to admissions about the offence concerned but to the gathering of criminal intelligence generally. They foresee attempts to compromise interviewing officers by feigning assaults or false allegations of inducements given before the recorder was switched on; there might also be allegations of tampering. These would give rise to as many trials within trials as occur now. Untaped evidence, it is feared, would be regarded as inferior and there would be problems over the audibility and intelligibility of the recordings.

Tape recording: the practical experience

4.20. The use of a tape recorder to monitor all exchanges between the police and members of the public, both inside and outside the police station, and thus

[1]Throughout this section citations are from Barnes and Webster, *op. cit.* unless otherwise cited. See also *The Feasibility of an Experiment in the Tape Recording of Police Interrogations*, HMSO London 1976 Cmnd 6630.

to record all interviews that are to be used in evidence is, in our view, impracticable. The cost, estimated at about £24 million for the first year and over £13 million annually thereafter, is one consideration.[1] There are also overwhelming operational difficulties. All officers on duty would need to have a recorder immediately available. Recordings made in the open or in public places using a small pocket recorder would often be of poor quality because of background noise; our study has shown that interview rooms in police stations will need acoustical treatment if recordings made there are to be audible when they are played back in court. The problems of non-verbal responses, inaudible replies, and of dialect will all be exacerbated outside the more controlled situation of the formal interview at the police station. In any event, even if non-taped interviews were to be made inadmissible—an approach which, for reasons we shall develop later, we reject—the possibility of improper police behaviour can never be entirely removed; and so long as that is so, no system of recording could eliminate challenge to evidence about what has been said in interview.

4.21. So, if tape recording is to be used, it will in our view have to be confined (other than in unusual circumstances) to interviews in the police station. This is the general practice in the other countries which we have studied. To obtain recordings of adequate quality interviews ought, wherever possible, to take place in rooms which have been brought up to the required acoustical standard.[2] This will undoubtedly cause difficulties. We suspect that there are few police stations in the country which at present have an interview room of an acceptable acoustical standard. Many of the older stations do not even have interview rooms as such. If taped interviews are to take place only in rooms of the specified standard, queuing and delays will inevitably occur at busy times or when, as quite often occurs, a number of suspects are arrested in connection with a particular offence. Nonetheless these difficulties are not insuperable.

4.22. The second major practical problem that has to be faced is that of transcripts. It is difficult to work from the tape itself in the preparation or presentation of the prosecution or defence case. The court, the prosecution and the defence will almost certainly need transcripts if there is a not guilty plea while the prosecution and defence may well want them for pre-trial preparation even where the case is not going to be contested. Experience in the United States supports this conclusion.[3] To equip police stations with recording equipment, to tape-record all interviews inside the station with suspects arrested for indictable offences and to transcribe the tapes in those cases which are subsequently prosecuted would cost £6.5 million annually.[4] Transcription costs would constitute the major component of this cost. Transcription is boring, time consuming and not particularly enticing work. There might be recruitment difficulties if audio-typists are in short supply. Lack of transcription facilities could lead to delay in pre-trial preparation. There are also substantial problems in transcribing accurately the unstructured conversation of which

[1] *Ibid.*, Table 3:5, p 13.
[2] *Ibid.*, pp 82–83.
[3] *Ibid.*, Table 5:7, p 38.
[4] *Ibid.*, Table 3:9, p 15.

many interviews consist. We are advised that the present state of technology does not encourage the view that automatic voice transcription will be available in the foreseeable future. Our conclusion is that if tape recording is to be adopted, some means will have to be found to keep transcription to a minimum.

4.23. In our visits to the USA and to Sweden we gave particular attention to two other objections, that the presence of the recorder would hamper investigation and would enable false allegations of inducements or violence to be fabricated. On the basis of our visits we consider that there is less force in these points than has been supposed. The experience and views of very experienced United States investigators to whom we spoke suggest that the advantages of having admissions on tape far outweigh the drawbacks. While the presence of a recorder inhibits some suspects from talking this cannot constitute a weighty objection since the suspect has a right not to answer questions. And even if that point of principle is overlooked, the objection loses much of its force either if taping is not mandatory or if it is so only for part of the interview. We consider that a routine response could be developed and taught for the purpose of countering any attempt by a suspect to compromise an investigating officer. Police officers in the United States and Sweden could not recall any incidents in which suspects had tried to use the recording to compromise them.

4.24. Similarly we consider our research indicates that the problem of tampering has been exaggerated. Cassette recorders (as opposed to open reel recorders) diminish the possibility of undetectable tampering except with access to expensive and sophisticated equipment whose operation would be beyond the capability of anyone without technical knowledge. Carefully developed routines which rely on officers other than those who are responsible for the case should be sufficient to maintain the security of the tapes. Although there have been defence challenges to the authenticity of taped evidence in this country, they have been in cases such as blackmail and corruption where the tapes have been of recordings made covertly of conversations held outside a police station where the tape may well have passed out of the control of the police. Once tape recording became a routine matter and the novelty wore off, we imagine that the United States and Swedish experience would be borne out here and that challenge to the authenticity of recordings would seldom, if ever, arise. If that were so, special anti-tampering measures would not be needed.[1] But if the experience proved to be otherwise, we are advised that with the recent rapid advance in micro-processor technology it would be possible to develop an electronic tamper-proof device which would be relatively inexpensive but simple to operate.[2] Equally important is to produce simply operated and reliable equipment.

Tape recording: the Commission's proposals

4.25. In formulating our proposals we have had regard particularly to considerations of cost and workability. We concluded from the experience in other jurisdictions and from our own experiment that tape recording of police

[1] *Ibid.*, p 39 for experience in the USA.
[2] *Ibid.*, p 86.

interviews at the station is feasible and that it can produce at a not exorbitant cost a more accurate record of important statement evidence. The need to find and modify interview rooms, to develop and provide simply operated equipment and the necessary transcription facilities, and to train interviewing officers must be faced and points to the flexible and gradual introduction of tape recording.

4.26. Because of the amount of material that would be produced from some interviews that is irrelevant to the purpose of proving the case against the suspect or is inadmissible as evidence (it may relate to previous criminal offences) and because of the problems of transcription, we consider that a scheme for the tape recording of whole interviews with all persons suspected of offences of all kinds is not yet practicable or desirable on a cost and benefit basis. Experience should first be gained through a less ambitious approach. That may show the practicability and value of recording whole interviews in appropriate cases, and we expect that the technique will then be exploited accordingly. In the meantime we would not wish to discourage the police from tape recording the whole or relevant parts of an interview in cases where they can foresee that the evidence will be crucial or that challenge to its authenticity can be expected.

4.27. We base our recommendations upon our proposal that it should become general practice for an interview to be concluded (if there is no written statement) with the officer summarising orally the main points made and at the same time recording them in writing; this could and should include any points made outside the police station.[1] We recommend that that process and, where there is one, the taking of a written statement, should be recorded on tape, with the consent and knowledge of the suspect. He should also be invited to offer his comments upon how he has been treated and, if there is a summary, his comments upon it. The offer made to him and his refusal or acceptance should be recorded. All this would be done openly. Because we had learnt of the use of covert tape recordings by some United States forces and saw the procedure being used in Australia we considered the possibility of testing this in our own experiment. It has the obvious advantage of removing the difficulty that the suspect will be inhibited by the presence of the recorder. Experience has, however, suggested that that difficulty should not be given great weight. There seemed to some of us to be objections of principle to the surreptitious use of recorders and we did not use covert recording in the experiment.

4.28. One of the principal advantages of what we suggest is that it will enable the gist of an interview or the taking of the written statement to be got onto the record without the need for transcription. The officer's written summary and the written statement itself will, in effect, be the transcription of the major part of what is on the tape. The tape should be available as an exhibit, to be played either to the defence lawyer or in court at trial in order to validate the officer's written summary or the written statement if there is a dispute over their accuracy. We would propose that ultimately the requirement should be for the recording of all summaries of interviews and taking of written statements at the police station with persons suspected of indictable offences

[1]See para 4.13.

(whether triable only on indictment or either way). This would mean that all sub-divisional headquarters will have to be equipped for the purpose. On our present costing basis it has been estimated that this would involve a capital cost of £1.35 million and an average annual cost of £800,000. The net cost might be lower if the procedure led to savings at trial. Although conclusions about savings have to be speculative, we note that the main potential saving could be in a change in plea-mix, that is in an increase in guilty pleas, rather than in reducing trials within trials.[1] If that did occur, there could be important and worthwhile benefits in reducing delays in waiting for trial. We believe that our proposal would be as likely to change the plea-mix as a proposal to record whole interviews, and it will involve a smaller gross cost.

4.29. We have already indicated why we think that the introduction of tape recording even on the lines we recommend will have to be gradual. Nevertheless the time for further experiments to test feasibility is past. Equipment trials and the development and sharing of experience for training purposes will be necessary, but tape recording could start now on the basis of administrative guidance from the Home Office. Since it is desirable in the longer term to ensure uniform standards of equipment, interview rooms and procedure, we recommend that the Home Secretary should be empowered to make subordinate legislation to regulate these matters. Consideration will also have to be given to the provisions of adequate facilities for the playing of tapes in court, when there is a challenge to the accuracy of the written record.

4.30. Finally, we reject any suggestions that there should be automatic exclusion as evidence at trial of summaries or of the taking of any written statements which have not been taped. There may be a variety of quite proper reasons why oral evidence has not been recorded: the suspect's refusal, equipment unavailability or failure, the unavailability or temporary unsuitability of the designated interview room. We consider that it would be highly undesirable if untaped evidence came to be seen as necessarily suspect or inferior. But an officer who had not taped in circumstances where he might have been expected to have done so should be required to provide a reasonable explanation of this. The requirement to tape record will be incorporated in the code of practice regulating questioning which we shall be proposing.[2]

The possibility of video recording

4.31. We have also given some consideration to the video recording of interviews on the basis both of United States experience and of a small number of interviews that were recorded on video during our experiment. Video recording is technically feasible; it has the advantages over audio recording that it enables the demeanour of the suspect to be observed and that it can protect the police officer from some false allegations of violence or threats of violence. These advantages may in due course be thought great enough to warrant the use of video recordings here, and we would not want to discourage the police from using video when they felt that the circumstances warrant it. But for the present at least the cost rules out its general use for the limited recording policy we propose (the capital costs are of the order of three times

[1] *Ibid.*, p 10 and pp 15–17.
[2] See further paras 4.109, 4.110 and 4.133.

and the average annual costs twice as great).[1] We do not recommend its introduction at present, but the possibility should be kept under review. Any subordinate legislation should be drafted in such a way as to leave the possibility open.

Other means of validating statements

4.32. Two other means of validating statements have been put to us: by making admissible only statements made in the presence of a solicitor who signs them as true, or only statements made in the presence of or otherwise validated by an examining magistrate. We do not accept these proposals but our reasons for rejecting them can be more conveniently developed when we are discussing other aspects of the control of questioning.[2]

The right of silence

4.33. We have indicated our view that the quality of recording police interviews can and should be improved but that it is impossible to get before the court an entirely accurate record of everything that passed between the accused and the police. Against that background we turn now to the vexed issue of what right the suspect should have not to answer police questions. There is here a series of interrelated issues which are commonly referred to as the right of silence. Since different people understand different things from this expression, its use can sometimes impede rather than assist discussion. But it is impossible to avoid using it. We shall first describe how and why this privilege against self-incrimination plays so central a part in the criminal process in England and Wales and our understanding of how it operates in practice.

The theoretical considerations

4.34. The right of silence, in the sense of the absence of obligation upon the defendant at his trial to respond to the charge with which he is faced, derives from two factors, the nature of an accusatorial system of trial and the impossibility of compelling someone to speak or in speaking to tell the truth.

4.35. In the accusatorial system of trial the prosecution sets out its case first. It is not enough to say merely "I accuse". The prosecution must prove that the defendant is guilty of a specific offence. If it appears that the prosecution has failed to prove an essential element of the offence, or if its evidence has been discredited in cross-examination, there is no case to answer and the defence does not respond. There is no need for it to do so. To require it to rebut unspecific and unsubstantiated allegations, to respond to a mere accusation, would reverse the onus of proof at trial, and would require the defendant to prove the negative, that he is not guilty. Accordingly, "it is the duty of the prosecution to prove the prisoner's guilt",[3] which is, in Lord Sankey's words, the "golden thread" running through English criminal justice.

4.36. The second element in the right of silence is that no one should be compelled to betray himself. It is not only that those extreme means of

[1] *Ibid.*, Table 3:7, p 14.
[2] See paras 4.58 ff and 4.99.
[3] *Woolmington v DPP* [1935] AC 462.

attempting to extort confessions, for example the rack and thumbscrew, which have sometimes disfigured the system of criminal justice in this country, are abhorrent to any civilised society, but that they and other less awful, though not necessarily less potent, means of applying pressure to an accused person to speak do not necessarily produce speech or the truth. This is reflected in the rule that statements by the accused to be admissible must have been made voluntarily, a matter which we shall be discussing later.[1]

4.37. These factors provide the theoretical justification of the right of silence at trial. But at a theoretical level they have no less force at earlier stages, because the trial conditions the way in which investigations are conducted and the prosecution's case is developed. There is during investigation the same impossibility of compelling truthful answers by the use of physical force. An attempt could be made to compel reply by, for example, the threat to use a suspect's refusal to answer police questions as evidence of his guilt at the trial. But because this would require the suspect to answer questions in relation to a suspicion that might as yet be unsubstantiated and unspecified, such an attempt would in effect be subverting that principle of the accusatorial system itself to which we have referred in paragraph 4.35.

4.38. Although the right of silence conditions the task of the police and prosecutor in this way, it does not follow that there is absolutely no duty upon citizens to assist in the investigation of crime. But what is its extent? A constable investigating a crime may question members of the public. Rule 1 of the Judges' Rules states that

> "When a police officer is trying to discover whether, or by whom, an offence has been committed he is entitled to question any person, whether suspected or not, from whom he thinks that useful information may be obtained."

But though the constable is permitted to question, the citizen is under no duty to reply. According to the leading case, while there may be a moral or a social duty to assist the police, there is no legal duty; a citizen may refuse to answer questions put to him by persons in authority.[2] So, unless the police officer has reasonable ground for arrest, the person need not stay to listen to him.

4.39. Yet the absence of any legally enforceable duty on citizens, particularly those suspected or accused of an offence, to assist in the investigative and prosecutorial process does not eliminate the possibility that consequences disadvantageous to the suspect or the accused may result from a failure to put his case. However innocent a person may be, if he is found in suspicious circumstances by a police officer and then refuses to explain himself, he will inevitably attract increased suspicion and may find himself being arrested. A person who when arrested refuses to identify himself may find that he is held in custody for a longer period while his identity is verified. A refusal to answer questions or the evasion of such questions before the caution is administered may also have consequences at any subsequent trial. It cannot of itself constitute proof of guilt but it may form part of the circumstances which the court has to take into account when assessing the evidence. As Professor Sir

[1]See paras 4.68 ff.
[2]*Rice v Connolly* [1966] 2 QB 414.

Rupert Cross says of these circumstances, "Although the accused's silence may be treated as something which has a bearing on the weight of evidence, it is not something which can support an inference that the story told by him in court is untrue; still less can it amount to the corroboration of the evidence given against him."[1] However once a person has been cautioned, that is, told by the police that he need say nothing, the law is that it must be unsafe to use his silence against him for any purpose whatever. Even so, whatever the legal position at this stage, if the jury or the magistrates are aware that a person refused to answer questions under caution or was evasive, that may have some effect upon the way they interpret the evidence before them. Accordingly, although the law may give a person the right to say at all stages of the process "Ask me no questions. I shall answer none", in relying upon this right, he would be wise to have regard to how people are likely to interpret his conduct.

The main issues

4.40. One of the areas of sharpest debate in the evidence to the Commission relates to the right of silence. Those who have made submissions to us have responded to the issue in a variety of ways. Categorising them as either in favour of or opposed to modification of the right is an oversimplification. Broadly, however, the police and some others would follow the Criminal Law Revision Committee and others before it[2] in recommending that the court, once a *prima facie* case has been made, should be allowed to conclude, where appropriate, from the suspect's silence under police questioning that his refusal to answer is indicative of guilt. They would do so on the grounds that it is in the interests of an innocent man to clear himself at as early a stage as possible and that the right of silence or privilege against self-incrimination is a protection only for the guilty. The effect of such a change, it is argued, would be that the innocent would be encouraged to answer and the guilty suspect would keep silent in the police station at his own risk. It would not be an offence for him to do so. Some would want evidence of such silence to form part of the prosecution's case. They follow the often quoted view of Jeremy Bentham: "Innocence claims the right of speaking, as guilt invokes the privilege of silence."[3] The police are not alone in arguing that "sophisticated" or "professional" criminals are able to exploit the right of silence to escape prosecution and conviction.

4.41. There is on the other hand a strong body of opinion which holds to the principle that permitting such inferences from silence, before a specific charge has been formulated and the accused understands what it is, runs counter to the presumption of innocence and the requirement that the prosecution bears the burden of proof. The right of silence is seen by those who take this position as an essential safeguard for the weak, the immature and the inadequate, since its removal could increase the risk of false confessions by those unable to withstand police interrogation.

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[1] *Cross on Evidence*, Fifth Edition, London Butterworth 1979, p 548.
[2] *Eleventh Report Evidence (General)*, *op. cit.*; see, for example, Glanville Williams: "Questioning by the police: some practical considerations", *Crim L R*, 1960, 325–346, p 325.
[3] *Treatise on Evidence*, p 241.

4.42. Some witnesses to us have sought a middle way between these opposing positions. They are prepared to allow the court to draw an inference of guilt from a failure to answer questions but only if two conditions apply. First the suspect must be made fully aware of the case against him and secondly there must be strict safeguards upon the conduct of the interview (the interview should, for example, be tape recorded, and a solicitor be present, or it should be supervised by a magistrate).

The relevant factual material

4.43. The issues on the right of silence need to be discussed against the background of what is known about the way suspects react on being questioned by the police. A significant number of those arrested and taken to the police station (of the order of 20 per cent) are not subsequently prosecuted. A proportion of these appears to offer an explanation which satisfies the police.[1] Of those questioned most make a response of some kind. Softley found that six out of ten of those interviewed made a confession or an admission.[2] Only 4 per cent of those interviewed refused to answer all questions of substance and 8 per cent refused to answer some questions. Those suspects with a criminal record appeared from Softley's study to be more likely to exercise their right of silence and less likely to make a confession or admission when questioned.[3] Irving's comment is pertinent: "To remain silent in a police interview room in the face of determined questioning by an officer with legitimate authority to carry on this activity requires an abnormal exercise of will. So uncommon is it for a person to remain silent while being questioned, that when it does occur, any observer would be forgiven for making the fallacious assumption that the abnormal behaviour is associated with some significant cause (in this context guilt as opposed to innocence). The innocent . . . do not exercise their right of silence; they talk, usually volubly."[4] But it does not follow from that that those who talk necessarily incriminate themselves.

4.44. So far as those who are prosecuted are concerned, the research into summary contested trials showed that about a third of defendants had made an incriminating statement, and a further third had made some form of denial.[5] It has, of course, to be remembered that the overwhelming majority of those who are prosecuted plead guilty. At the Crown Court only a very small proportion of defendants had evidence against them which did not contain a statement of any kind (less than 4 per cent in the Birmingham sample and 7 per cent in London).[6]

4.45. The importance of confession or statement evidence to the prosecution case at trial was examined for us by Vennard and Baldwin and McConville.[7] The former suggests that the availability of a full confession can be an important factor in securing conviction in summary trials, particularly where

[1]See para 2.17.
[2]*Op. cit.*, Table 6:1, p 85.
[3]*Op. cit.*, p 75 and Table 6:2, p 86; but in relation to those who are actually prosecuted in the Crown Court Baldwin and McConville, *op. cit.*, found the opposite (see p 24).
[4]*Op. cit.*, p 153.
[5]Vennard, *op. cit.*, Table 2:2, p 10.
[6]Baldwin and McConville, *op. cit.*, Table 3:1, pp 13 and 14.
[7]*Op. cit.*, respectively at chapter 3 and chapters 3 and 4.

the evidence implicating the defendant is circumstantial. Baldwin and McConville, examining the full range of cases heard in the Crown Court, point to the extremely high probability of conviction, whether by plea or by jury verdict, where the defendant had made a full written confession to the police. This is not to say, however, that a statement made to the police is necessarily crucial to the prosecution's case. It may amount to less than a full confession, it may only indirectly implicate the defendant if at all, or the other evidence may be so decisive as to point to the defendant's guilt. Vennard found that in fewer than one in five contested summary charges did the case against the accused contain a full confession; yet the majority ended in conviction. In the Baldwin and McConville study, the accused's statement (of whatever kind) was considered by independent assessors to have no real bearing on the strength of the prosecution's case in almost half the cases they examined. In about a fifth of cases the assessors considered that the prosecution case would have been fatally weakened if the accused's statement had not been available. Among this minority offences of burglary and robbery were strongly over-represented.

4.46. To summarise, the research indicates that the privilege not to incriminate oneself is not used by suspects in the great majority of cases and keeping silent altogether is very rare. Even in cases where the accused pleads not guilty he will in most cases have made some statement or other (of admission or denial) in the face of police questioning. The rarity of complete silence may not be altogether surprising in view of the psychological pressures that custody in the police station generates. In present circumstances the right of silence is not a right which the generality of suspects choose to exercise.

The Commission's proposals

The right of silence before arrest

4.47. We draw a distinction between the questioning of witnesses or other members of the public who are not under suspicion and the questioning of suspects. Witnesses, as we have made clear, should not be subject to any obligation to submit to police questioning or to answer questions.[1] For suspects we adhere to the decision in *Rice v Connolly*[2] that the duty to assist the police is a social one and not legally enforceable. Someone who is suspected of an offence upon reasonable grounds exercises his right not to answer reasonable police questions, as now, at his own risk. This does not imply a general duty to reply to police questions at this stage, even though questions put and any responses to them are admissible in evidence at any subsequent trial. The rule that actively hindering police investigations (by supplying false information for example) amounts to obstructing the police should be preserved.

The right of silence after arrest and before charge

4.48. Once the suspect has been arrested the position changes. He is not free to walk away; he must submit to being questioned. No one has suggested to us that refusal or failure to answer should be an offence nor has it been proposed that silence in the face of questioning should form the sole basis of

[1] See para 3.90.
[2] [1966] 2 QB 414.

the prosecution's case. What is suggested is that some inference might be drawn at the trial from the accused's lack of response to questions put to him by the police; this would have to be in addition to other evidence presented by the prosecutor. The present law is that no inference whether of guilt or anything else adverse to the accused may be drawn from the accused's silence in the face of police questioning under caution, but decisions of the Court of Appeal have clearly recognised that juries may well draw inferences from an apparently unjustified refusal to offer an explanation or answer questions.[1] For this reason it has been argued that changing the rule of evidence to allow some inference to be drawn would not in practice constitute a fundamental change, whatever the law on the matter now is. And since the proposal of the Criminal Law Revision Committee[2] and those who follow it is that inferences could be drawn against the accused only if he offers a defence at trial which he could reasonably have offered under questioning, the practical effect of this change would be minimal. For such inferences would be drawn only in that very small minority of cases in which the accused does not plead guilty, has not made a damaging admission or confession to the police, and attempts for the first time to offer a defence at trial which he could have offered earlier.

4.49. But although the possibility of drawing inferences from an accused person's silence at the investigative stage might arise in only a small proportion of cases, all persons who were being questioned by the police would need to be warned about it. The Criminal Law Revision Committee recognised this.[3] It proposed the abolition of the caution required by the Rule II of the Judges' Rules,[4] when an officer has evidence affording reasonable grounds for suspecting a person has committed an offence:

> "You are not obliged to say anything unless you wish to do so but what you say may be put into writing and given in evidence."

and suggested a modification of the Rule III caution on charge from:

> "Do you wish to say anything? You are not obliged to say anything unless you wish to do so but whatever you say will be taken down in writing and may be given in evidence."

to

> "If there is any fact on which you intend to rely in your defence in court, you are advised to mention it now. If you hold it back till you go to court, your evidence may be less likely to be believed and this may have a bad effect on your case in general. If you wish to mention any fact now and you would like it written down this will be done."

4.50. Two main difficulties would arise if the right of silence during the investigation were to be modified in this way. The modified caution proposed by the Criminal Law Revision Committee would have been required to be given only when the suspect was charged or told that he might be prosecuted, that is when there is notionally, at least, sufficient admissible evidence available to the police to enable a prosecution to be mounted. But it is difficult to see

[1]See the *Law and Procedure Volume*, para 83.
[2]*Op. cit.*, paras 28–52.
[3]*Op. cit.*, paras 43 and 44.
[4]See the *Law and Procedure Volume*, paras 68 ff.

how the fact that silence at the point of charge would lead to damaging consequences for the suspect would not in practice affect the attitude of the police in their conduct of interviews prior to charge and the way that suspects would respond to questioning. It might put strong (and additional) psychological pressure upon some suspects to answer questions without knowing precisely what was the substance of and evidence for the accusations against them; and in consequence what they needed to tell the police in order to allay the suspicion against them. This, in our view, might well increase the risk of innocent people, particularly those under suspicion for the first time, making damaging statements. The risk may be small, but these things do occasionally occur. On the other hand, the guilty person who knew the system would be inclined to sit it out. If his arrest had been on reasonable suspicion only and this were not enough to make a *prima facie* case, he would lose nothing and gain everything by keeping silent, since he would not be prosecuted if no other evidence emerged. If the police had got sufficient evidence to mount a case without a statement from him, it would still be to the guilty suspect's advantage to keep to himself as long as possible a false defence which was capable of being shown to be such by investigation. It might just be believed by the jury despite the fact that the prosecution and the judge would be able, under the Criminal Law Revision Committee's proposals, to comment.

4.51. The second difficulty is that any attempt, whether as proposed by the Criminal Law Revision Committee or otherwise, to use a suspect's silence as evidence against him seems to run counter to a central element in the accusatorial system at trial. There is an inconsistency of principle in requiring the onus of proof at trial to be upon the prosecution and to be discharged without any assistance from the accused and yet in enabling the prosecution to use the accused's silence in the face of police questioning under caution as any part of their case against him at trial. A minority of us considers that that inconsistency is more apparent than real since it is at present possible in certain circumstances to use an accused's silence as part of the prosecution's case if he was silent in the face of questions put to him by anyone before he was cautioned. And they think that it is right for a person to be expected to answer reasonable questions during an investigation, that is before charge, and that the caution in its present form introduces an artificial barrier into the investigatory process, which can be tolerated by a system which stresses the importance of police questioning only because the right of silence is so rarely exercised. In their view any provision to protect the suspect and ensure the reliability of any statement should be more firmly based than informing the suspect of a right which research suggests is virtually impossible for him to exercise. What is required to protect the suspect at this stage are the various safeguards to ensure the reliability of the suspect's statements which will be developed later in this chapter. They do not accept that the right to refuse to answer questions needs any additional protection apart from that provided by the current law as to questioning before caution.[1] They think that this would not unfairly prejudice the accused nor affect the nature of the trial and they do not therefore accept the theoretical argument set out in paragraph 4.37.

[1]See the *Law and Procedure Volume*, paras 77 ff.

4.52. The majority of us does not accept that this would not unfairly prejudice the suspect. Quite apart from the psychological pressures that such a change would place upon some suspects it would, in their view, amount to requiring a person during investigation to answer questions based upon possibly unsubstantiated and unspecific allegations or suspicion, even though he is not required to do that at the trial. Such a change could be regarded as acceptable only if, at a minimum, the suspect were to be provided at all stages of the investigation with full knowledge of his rights, complete information about the evidence available to the police at the time, and an exact understanding of the consequences of silence. But that could be done only if the critical phase of investigation, that is the phase at which silence could be used adversely to the accused, was to become more structured and formal than it is now; in effect responsibility for and conduct of this phase of the investigation, close to charge, would have to become a quasi-judicial rather than a police function.[1] That would seem to those of us who take this view to have radical consequences for the trial. If an investigation were to be conducted in what would, in effect, be an inquisitorial mode, they do not think that the present accusatorial system could remain. And there are further difficulties. They relate to the problem of proving at a subsequent trial that a defence relied on at trial had not been mentioned to the police, or that a person had not in fact answered questions. This would place upon the police the burden of proving a negative. Even if it were possible to tape-record all exchanges between the police and the suspect (and this, in our view, is impracticable), it would still be necessary to prove that there were no other exchanges. Secondly, if silence had to be proved to the satisfaction of the court, then the record of whole interviews (admissible and inadmissible material alike) might have to go to the magistrates and the jury. In the Crown Court it might be made a matter for the judge to decide whether the accused had failed to mention his defence earlier, but we are looking for ways of shortening not prolonging trials, and this would not solve the problem for the magistrates.

4.53. We recognise the strength of feeling behind the call for a modification to the right of silence during investigation. And some of us are sympathetic towards the position taken by the Criminal Law Revision Committee. Nonetheless in the light of the preceding arguments the majority of us has concluded that the present law on the right of silence in the face of police questioning after cautioning should not be altered.

The caution

4.54. The caution at present required by Rule II of the Judges' Rules[2] tells a suspect that he has a right not to speak and explains what may happen if he chooses not to exercise it. If such a right exists, then, in our view, it is only proper that the suspect should be made aware of it. Our research indicates that this caution is freely administered but that, by and large, suspects do not exercise their right to remain silent.[3] We believe nevertheless that the procedure for cautioning could be improved in certain respects.

[1]See for example the discussion by Lord Devlin in *The Judge*, OUP 1979, chapter 3.
[2]See para 4.49.
[3]See para 4.43, and also Softley, *op. cit.*, chapter 4.

4.55. The respects in which the present Rule II caution is unsatisfactory seem to us to be as follows. The evidence to us and the research suggests that the timing of that caution and the clarity and logic of its wording merit attention. Further, we consider that it should be made clear to the suspect that anything he has said to the police officer before he was cautioned may be reported to the court; the present caution does not refer to this at all.

4.56. It seems to us to be essential in the interest of fairness that the suspect should be made aware at the earliest practicable opportunity of the position that he is in. The present legal position appears to be that the caution need not be given until the police have sufficient admissible evidence for reasonable suspicion (that is a rather greater measure of suspicion than that required to found an arrest). But the police in practice caution when they have suspicion sufficient to justify arrest. We do not think it natural, necessary or desirable for the police to caution people to whom they want to speak and of whom they have as yet no reasonable suspicion. Once the person becomes the subject of suspicion sufficient to justify arrest then he should be formally cautioned. From that point the prohibition on drawing inferences from his silence should apply (and it should apply whether or not he is in fact cautioned).

4.57. The caution should tell the suspect in simple language that he is going to be questioned; that he has no need to reply; and that if he is prosecuted anything said either by the police or himself can be reported to the court. It should be made clear to him that anything he said to the police before he was cautioned may be similarly reported. The Rule II caution should also make clear (as it does not do now) that the gist of what is said will be written down. The minority of us who take the view that the caution in that form is a barrier to investigation would remove from it the advice that the suspect has no need to reply and would explain to him instead that he must decide whether or not he will answer the questions or say nothing. The effect of this would be that any silence or evasion of questions could be used as part of the prosecution's case against the suspect. That, as we have already indicated, is unacceptable to the majority of us. Outside the police station the caution will generally have to be given orally. Inside we suggest that it should be included in a written notice of rights which we propose that the suspect should be given on his arrival at the station.

The right of silence after charge and before trial

4.58. It has been suggested that there would be less objection to modifying the suspect's right of silence if there were some form of procedure for questioning in front of a magistrate immediately after charge and with legal advice available to the accused person.

4.59. We accept that the arguments against drawing an inference adverse to the accused from a defence that is mentioned at trial but not to the police are less strong if the suspect has had the opportunity of legal advice, knows the elements of and the strength of the case against him and has the protection of a court; indeed a minority of us thinks that in those circumstances it is right for a suspect to be at risk for failing to answer reasonable questions. The majority of us takes the view that the arguments in relation to the similar

proposals for structuring investigation before and at charge in a quasi-judicial form are equally conclusive at this point. To require a suspect to speak, even in these circumstances, is inconsistent with the very nature of the accusatorial system; the burden of proof should not and cannot be altered in this way without turning pre-trial and trial procedures into inquisitorial procedures. There are further objections of principle which arise from the potential confusion between the investigative and judicial functions, if magistrates were to be involved in the investigation stage. The magistracy should be seen to be independent of the police, and anything that tended to associate them with the questioning process (even if only in a supervisory capacity) could jeopardise that independence.

4.60. There are additionally practical problems about this scheme, and also any scheme to use magistrates to validate the product of police questioning. To be effective the hearing before the magistrate would have to be as close as possible to the interview and charge. In 1978 486,000 people were proceeded against in England and Wales for indictable offences.[1] (We shall confine the discussion to indictable offences because this illustrates the problem well enough.) 67,600 of those people (14 per cent) were kept in custody up to the first court appearance, which presumably would have been within one or two days of charge (and of their interview). The remaining 418,400 were either charged and bailed to appear at court or summoned. For the latter their first court appearance might have been anything up to three to four months after their encounter with the police; for the former, although some might have appeared on the following day, for the majority their first court appearance is unlikely to have been on average much less than a fortnight to three weeks after it.[2] If a procedure for interrogation or the validation of statements before magistrates were to be confined to those who were kept in custody, only the minority of suspects would have the advantage of these procedures. What is to happen to the majority? For them to wait until their first court appearance would vitiate the purpose of the procedures. There would, therefore, have to be a special hearing for them.

4.61. The resource implications are difficult to assess. This is partly because procedures having different purposes would have different implications: a procedure used only where the police wanted to use statements in evidence would require fewer resources than a procedure in which all statements had to be validated. If there had to be a special hearing, it would take time to transport each person to the court and for him to be questioned before the court. The time involved would certainly not be negligible for the magistrates (and for the supporting court staff); the procedures would tie up police resources, in transporting suspects to or arranging for them to appear before the magistrates, supervising them at court and questioning them before the court.

4.62. In addition to fundamental objections of principle, therefore, there are, it seems to us, great practical difficulties in any scheme which uses magistrates in some way in the investigative process. And the resource

[1]These figures are taken from Table 8.1, *Criminal Statistics for England and Wales 1978*, *op. cit.*
[2]See for example Gemmill and Morgan-Giles, *op. cit.*, Table 3:11, p 24.

implications for the magistracy, the courts service and the police cannot be ignored. We do not consider that this approach should be further pursued.

The right of silence at trial

4.63. We think it appropriate to mention here the question of whether the present rule of evidence should be retained that the accused need not give evidence in his own defence at trial. It fits into the general discussion of the right of silence (the Criminal Law Revision Committee also recommended that judge and prosecution should be entitled to comment adversely on the accused's failure to give evidence at trial)[1] and it has some implications for the way the defence and prosecution prepare for trial.

4.64. The issues which arise in relation to silence at the court stage are seen by nearly all our witnesses to be different from those in connection with silence in the face of police questioning. The accused person is by then aware of the case against him; the prosecution will have had to make out a *prima facie* case against the accused; he will have had an opportunity to consider his defence and usually to consult a lawyer; there are procedural safeguards on how he may be questioned; the proceedings are open to public scrutiny and it is unlikely that anyone can take advantage of an accused who is unaware of his rights. As might be expected, those who argue for permitting the drawing of inferences of guilt from silence during investigation also do so in relation to silence during the court stage. But many who oppose any provision for drawing such inference from silence at the earlier time do not feel strongly about a similar proposal regarding silence in court. Since the magistrates and jury in any event may well draw adverse inferences from silence, this, it is said, leads defence lawyers almost invariably to put their clients in the witness box. A number of those who have made submissions to us do, however, oppose the drawing of inferences from silence at the court stage. Their submissions derive from their interpretation of the burden of proof borne by the prosecution, upon which we have already commented.

4.65. The CLRC based its case for change upon the observation that it is not altogether clear how far the law allows the judge to go in commenting upon the accused's failure to go into the witness box (he can draw attention to the decision but not suggest that it is enough to lead to an inference of guilt), and they expressed the opinion that the present law and practice are much too favourable to the defence. They stated it as a matter of principle that when a *prima facie* case has been made against the accused, it should be regarded as incumbent on him to give evidence in all ordinary cases.

4.66. All but one of us incline to the view that any modification to the present law of evidence which aimed at requiring the accused to answer a *prima facie* case established by the prosecution would be likely to weaken the initial burden of proof that the accusatorial system of trial places upon the prosecution. The accused should not be obliged, indeed, in the ultimate event he cannot be obliged, either to enter the witness box or to mount any defence. Comment on the lines at present allowed should be enough to enable the jury to form a sensible judgment on the significance of that failure, such as it is. As

[1] *Eleventh Report, op. cit.*, paras 102 ff.

the CLRC themselves said, "Failure to give evidence may be of little or no significance if there is no case against him or only a weak one. But the stronger the case is the more significant will be his failure to give evidence."[1] The stronger the case is the more certain will be the accused's chance of conviction if he does not rebut it.

The unsworn statement

4.67. As a related feature of criminal procedure, we consider it right to comment upon one other matter of trial procedure. The Criminal Evidence Act 1898, which enabled the accused for the first time to give evidence on oath in all cases, also expressly retained the right of the accused to make an unsworn statement. This derived from the time when the accused had not been able to give evidence and seems to have been developed by the judges as a means of permitting the accused at least to say something in his defence. The CLRC recommended its abolition as a useless anachronism,[2] and that position gains almost unanimous support in the evidence to us. All but one of us think it should go. Although it is of relatively long standing, its purpose has long since gone. And there are some positive objections to it. It provides an opportunity for the accused to engage in attacks on the prosecution or upon his coaccused, which cannot be tested in cross-examination. Its status is unclear and may be confusing to a jury and magistrates; since it is not on oath and cannot be tested by cross-examination, it is not formal evidence. But the jury can scarcely ignore it, and have to be instructed merely to make of it what they wish. In our view, this is extremely unsatisfactory. It is anomalous that this part of the defence case should not be subject to the law of perjury, and we are aware of a number of cases in which the freedom has been abused. Although the prosecution is permitted to comment on the accused's decision to put his case in this way, the more it does so, the more notice the jury may be expected to take of the statement. Abolition of the right will not mean that the accused will be unable to tell his story in his own words, only that this will have to be on oath and subject to cross-examination. Some accused, however, decide to make an unsworn statement because they fear cross-examination on their criminal record, if they mount an attack on the prosecution witnesses, for example, in attempting to show that a confession has been improperly obtained. If the unsworn statement were to be abolished, we consider that this point would need review. It would also be necessary to make provision for the unrepresented accused to address the court on any matter on which his counsel or solicitor could have done if he were legally represented. We endorse the recommendation to this effect made by the Criminal Law Revision Committee.[3]

The Judges' Rules

The notion of voluntariness

4.68. The Judges' Rules are intended to give a framework for police conduct during interrogation.[4] The presumption behind the Judges' Rules is that the circumstances of police questioning are of their very nature coercive, that this

[1] *Op. cit.*, para 110.
[2] *Op. cit.*, para 104.
[3] *Op. cit.*, para 105.
[4] See the *Law and Procedure Volume*, paras 68–94.

can affect the freedom of choice and judgment of the suspect (and his ability to exercise his right of silence), and that in consequence the reliability (the truth) of statements made in custody has to be most rigorously tested. This presumption finds its expression in the "voluntariness" rule which is stated in paragraph (e) of the preamble to the Judges' Rules:

> "It is a fundamental condition of the admissibility in evidence against any person, equally of any oral answer given by that person to a question put by a police officer and of any statement made by that person, that it shall have been voluntary, in the sense that it has not been obtained from him by fear of prejudice or hope of advantage, exercised or held out by a person in authority, or by oppression."

4.69. That paragraph deals both with the conduct of the interviewing officer and of others that is to be prohibited (threats, inducements, oppression) and with the means of enforcing that prohibition (exclusion of confessions obtained in contravention of it). It is somewhat difficult to discuss the one without the other, but we shall leave to the final section full discussion of the exclusion of evidence as it applies in general to all features of the rules of police conduct proposed, and shall mention it now only to the extent necessary to make our position on police questioning clear.

4.70. Both the notion of voluntariness and the application of the rule seem to us to cause much difficulty to the police and to the courts. Features of the voluntariness rule have produced some case law which is hard to grasp. It was apparently unobjectionable for a mother to say to her small son and his youthful companion "You had better, as good boys, tell the truth"[1] and for a man to be encouraged by a chaplain to repent his sins and to be told that, before God, it would be better for him to confess his sins;[2] but it was objectionable for a father to say to his son in the presence of a police officer "Put your cards on the table. Tell them the lot. If you did not hit him they cannot hang you",[3] or for a social worker to say to a juvenile being interviewed by the police "Do not admit something you have not done. But it is always the best policy to be honest. If you were at the house, tell the officers about it."[4] Although the judgment of the House of Lords in *DPP v Ping Lin*[5] may bring some clarification to the judge who has to consider the matter after the event, it can scarcely be said to give firm guidelines to the interviewing officer. In that case it was held that the question of admissibility turns not on whether the officer did something improper but whether his words or conduct actually caused the suspect to confess out of hope of advantage or fear of prejudice.

4.71. A more serious difficulty with the rule as a guide to police officers on how to conduct an interview is the imprecision of the concept of "oppression" as the judges see it. This is illustrated by the judgment of the Court of Appeal in *R v Prager.*[6]

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[1] *R v Reeve and Hancock* (1872) LR 1 CCR 362.
[2] *R v Gilham* (1828) 1 Mood 186; 168 ER 1235.
[3] *R v Cleary* (1964) 48 Cr App R 116.
[4] *R v Thompson* The Times 18 January 1978.
[5] [1975] 3 All ER 175.
[6] (1971) 56 Cr App R 151, 161.

"The only reported judicial consideration of 'oppression' in the Judges' Rules of which we are aware is that of Sachs J. in *Priestley* where he said:

> 'to my mind, this word in the context of the principles under consideration imports something which tends to sap, and has sapped, that free will which must exist before a confession is voluntary ... Whether or not there is oppression in an individual case depends upon many elements. I am not going into all of them. They include such things as the length of time of any individual period of questioning, the length of time intervening between periods of questioning, whether the accused person had been given proper refreshment or not, and the characteristics of the person who makes the statement. What may be oppressive as regards a child, an invalid or an old man or somebody inexperienced in the ways of this world may turn out not to be oppressive when one finds that the accused person is of a tough character and an experienced man of the world.'

In an address to the Bentham Club in 1968, Lord MacDermott described 'oppressive questioning' as—

> 'questioning which by its nature, duration or other attendant circumstances (including the fact of custody) excites hopes (such as the hope of release) or fears, or so affects the mind of the suspect that his will crumbles and he speaks when otherwise he would have stayed silent.'

We adopt these definitions or descriptions and apply them to the present case."

4.72. What this amounts to is that a police officer is required under the confusion and pressures of an investigation to make some assessment of the character, susceptibilities and mental state of the suspect whom he is interviewing and then to try to adapt his questioning of him to that assessment. He may then find that the judge, having heard witnesses often months after the event and in the entirely different environment of a court, makes his own assessment of the character, susceptibilities and mental state of the suspect at the time of the interrogation and of the conditions of that interrogation, and decides, that, he, the police officer, behaved "oppressively", that is that he broke the rule. This cannot be satisfactory. As Irving puts it "If any person is subject to a rule he should know when he is breaking it. This cannot be said of the rules governing the conduct of interviews with respect to voluntariness or oppression."[1]

4.73. Another serious doubt about the validity of the rule seems to us to have emerged from our research. The criteria of "fear of prejudice and hope of advantage" are of long standing in the judges' approach to determining the "voluntariness" of a confession and, hence, its reliability. The link between involuntariness on these criteria and unreliability is in legal terms exact; in psychological terms it is uncertain, to say the least. The addition of oppression in the 1960s may bring the legal notion of involuntariness rather closer to the psychological interpretation of that term, but as we have pointed out the

[1] *Op. cit.*, p 152.

imprecision of that word makes it difficult to use as a guide for regulating the conduct of interrogations. What our research suggests is that in psychological terms custody in itself and questioning in custody develop forces upon many suspects which, in Lord MacDermott's words, so affect their minds that their wills crumble and they speak when otherwise they would have stayed silent.[1] Those forces do not fall within the legal definition of factors that would render a confession involuntary and therefore unreliable. In other words, legal and psychological "voluntariness" do not match. This taken together with the ineffectiveness of principle (e) of the Judges' Rules as a rule of conduct for the police in our view puts in doubt the value of retaining the voluntariness rule.

4.74. But the way the police treat the suspect during his time in custody must be regulated and the police must have some guidance upon how interviews should be conducted. The conditions of custody and questioning must be such as to give as much confidence as possible that confessions obtained by questioning in custody are reliable. But there can never be certainty. And that places an enormous responsibility upon the police to check upon the details of confessions. We understand that this is good police practice now. We recommend that it should become general practice. Because of their familiarity with the conditions of custody the police may underestimate and, indeed, may not even fully understand the effect that custody has upon suspects. However we do not accept the suggestion that a person should never be convicted upon his confession alone uncorroborated by any other evidence. To do so would, unless the criteria for prosecution were changed, mean that those who were willing to confess and to plead guilty could not even be charged unless or until other evidence of their guilt had been secured. That has such considerable implications for the resource and organisational aspects of pre-trial procedure and for the right of the accused to a speedy disposal as to be altogether too drastic a way of removing the risk of false confessions. People do confess to offences and are convicted, sometimes on a plea of guilty, where there is no other material evidence. We do not consider that it would be in the interests of justice to introduce rules of evidence which would have the effect of precluding this. But when the evidence against the accused is his own confession, all concerned with a prosecution, the police, the prosecuting agency and the court, should, as a matter of practice, seek every means of checking the validity of that confession.[2]

4.75. In order to secure that the maximum possible reliance for evidential purposes can be placed upon suspects' statements in all cases where they are made, what is required are workable and enforceable guidelines for the police, criteria that the courts can apply without a feat of imagination that sometimes defies belief, and a clear and enforceable statement of the rights and safeguards for the suspect in custody. In addition police training on interviewing should be developed in ways which will not only improve their interview techniques but also bring home to them the powerful psychological forces that are at play upon the suspect and the dangers that are attendant upon these. If these requirements can be met (we shall be developing our proposals in the rest of

[1]Irving, *op. cit.*, chapters 7 and 8.
[2]For the present practice of the Director of Public Prosecutions see the *Law and Procedure Volume*, Appendix 25.

this section), we recommend that it should be left to the jury and magistrates to assess the reliability of confession evidence upon the facts presented to them.

The polygraph

4.76. A possible way of minimising the risk of false confessions being used in evidence is to employ technological aids. The most obvious of these is the polygraph or lie detector. We gave some consideration to this on the basis of a study of it by Irving and Hilgendorf published in the first volume of our research series, where an account of its use in the USA will be found,[1] and during our visit to police departments in the USA. We have concluded, however, that, although it may be useful as an aid to investigation, its lack of certainty from an evidential point of view tells against its introduction in this country for the purpose of court proceedings.

Safeguarding the rights of the suspect: the Commission's proposals

4.77. Our own proposals involve a reaffirmation and, on some matters, a development of the arrangements at present provided for in the Administrative Directions to the Judges' Rules. Our concern for the moment is with the content of what should be provided and not with the form in which it is presented nor with the way in which it is enforced. We see these provisions as minimising the effects of arrest and custody upon the suspect (such effects cannot altogether be removed). The provisions are part of a whole. This includes a presumption of release after arrest unless certain conditions apply of which the suspect should be made aware, and requirements for cautioning, but it also recognises the duty of the police to question suspects in custody and the requirement of investigation in special circumstances for prolonged but closely supervised detention. The elements that we shall now discuss may be put in terms of certain rights that should in all circumstances, or all but the most exceptional circumstances, be accorded to the suspect in custody and of which he should be informed in writing and orally when he arrives at the police station: the right not to be held incommunicado, the right to legal advice, the right of particularly vulnerable people to special protection, the right to be fairly interviewed and to be properly cared for.

The right not to be held incommunicado

4.78. Administrative Direction 7(a) provides that

> "A person in custody should be supplied on request with writing materials. Provided that no hindrance is reasonably likely to be caused to the processes of investigation or the administration of justice:
>
> (i) he should be allowed to speak on the telephone to his solicitor or to his friends;
>
> (ii) his letters should be sent by post or otherwise with the least possible delay;
>
> (iii) telegrams should be sent at once at his own expense."

And section 62 of the Criminal Law Act 1977 provides:

[1]Barrie Irving and Linden Hilgendorf: *Police Interrogation: The Psychological Approach* (Royal Commission on Criminal Procedure Research Study No 1, London HMSO 1980), pp 59 ff.

> "Where any person has been arrested and is being held in custody in a police station or other premises, he shall be entitled to have intimation of his arrest and of the place where he is being held sent to one person reasonably named by him without delay or, where some delay is necessary in the interest of the investigation or prevention of crime or the apprehension of offenders, with no more delay than is so necessary."

Further, in the case of juveniles there is provision under the Children and Young Persons legislation requiring anyone who arrests a juvenile to take such steps as may be practicable to inform at least one of his parents or guardians; and there are arrangements for notifying high commissions and embassies when citizens of another country are taken into custody.[1]

4.79. The statutory provision under s. 62 of the 1977 Act extends and endorses the requirement of the Administrative Direction. Most, if not all police forces, have a space upon the detention or charge sheet which they use (it is variously named) where they record the notification of this right, the suspect's response to it and the action taken to give effect to that response. We have no information on a national basis on the extent to which suspects are formally and orally notified of this right or of the extent to which it is exercised. The operation of the provisions of the 1977 Act has been monitored only to check upon the degreee to which the discretion to refuse intimation of a third party is exercised for beyond four hours (a comparatively rare event, considering the number of arrests). However Softley found that a substantial proportion of suspects did not exercise the right,[2] a finding confirmed by examination on our behalf of station records in a large number of police forces. Compliance by the police also seems to be high, and the exercise of the discretion to refuse intimation to be rare.

4.80. We recommend reaffirmation of the right contained in s. 62 of the 1977 Act and in the Children and Young Persons legislation, together with the obligation that it places upon the police. The additional facilities set out in Administrative Direction 7, including that of making a telephone call, and those in respect of citizens of another country should also be retained. However we consider it necessary to maintain the proviso which allows the police discretion to refuse to pass on intimation in those infrequent cases where it is not in the interests of the investigation or the prevention of crime or of the arrest of other offenders. This is in order to cope with the situation where news of a suspect's arrest will alert his associates, allowing them the opportunity to escape, destroy evidence or hide the proceeds of crime or threaten or harm witnesses. It is unrealistic to suppose that this does not happen. The police have a duty to see that it does not. But that duty should be exercised reasonably and in a way that is accountable. We recommend, therefore, that notification of the right should always be given, that the police should be able to refuse notification in all cases (although one of us would confine this solely to grave offences) but only on specific grounds, and that if it is refused, the specific reason in that case should be recorded in writing and made known to the suspect. The discretion to refuse should not lie with the investigating

[1] See the *Law and Procedure Volume*, paras 88 and 89 and Appendix 14.
[2] *Op cit.*, Table 3:1, p 66.

officer; the responsibility should be that of the officer in charge of the station. We consider that it would be desirable for the terms of the proviso to be more precisely spelt out. As this is a problem which is mentioned more often in connection with access to legal advice, we shall discuss it fully there.[1]

The right to legal advice

4.81. In the evidence put to us the case for the suspect in custody to have access to legal advice has usually been bound up with arguments for and against a lawyer being present during questioning. And those arguments bring in consideration of the use of a lawyer independently to validate the product of questioning and to provide protection and support to the suspect during interview. Although the provision of legal advice to the suspect and the use of a solicitor to validate questioning raise rather different issues, we shall discuss both matters here. They are to some extent linked by the three main issues which the evidence to us has exposed: whether suspects want to be involved with solicitors at this point: how, if they do, solicitors are to be provided and at what cost; and whether in the interests of the investigation, prevention and prosecution of crime the police should in certain cases be able to exclude the suspect from access to a solicitor.

The existing provisions and the main issues

4.82. The right of access to legal advice is affirmed by the Judges' Rules. "Every person at any stage of an investigation should be able to communicate and to consult privately with a solicitor. This is so even if he is in custody provided that in such a case no unreasonable delay or hindrance is caused to the processes of investigation or the administration of justice." Administrative Direction 7, which we have already mentioned, also refers to the suspect's being allowed to speak to his solicitor on the telephone. These provisions are criticised in the evidence submitted to us as giving the police an unfettered discretion to preclude solicitors from having access to suspects at the police station, with the consequence, it is said, that few suspects in police custody use or get advice from a solicitor. The police and others argue, on the other hand, that unless they have some discretion there will be cases in which, for example, evidence may be lost and associates may escape apprehension.

The relevant factual material

4.83. Such research as has been done indicates that relatively few suspects actually ask to consult with a solicitor while they are in police custody. Softley found that about one in ten did so; a third of these requests were refused by the police.[2] Research based on interviews with defendants tried on indictment indicates a rather higher rate of requests, but even so these occur in only a minority of cases. Baldwin and McConville report that only a third of a sample of defendants who pleaded not guilty in Birmingham Crown Court stated that they had asked to see a solicitor.[3] The majority of these defendants (more than three-quarters of them) reported that their requests were turned down by the police. A study by Zander of convicted prisoners found that rather less than

[1] See paras 4.89–91.
[2] *Op. cit.*, p 68.
[3] "Police Interrogation and the Right to See a Solicitor", *Crim L R*, 1979. 145–152.

half said that they had asked to see a solicitor and three-quarters of these that they had not been allowed to do so.[1] Findings from defendant based samples have to be treated with a degree of caution but, taken together, these studies indicate that the infrequency with which solicitors attend the police station is to be attributed as much to the fact that suspects do not ask to see them as to the refusal of the police to allow access, but it is not known why so few suspects make a request to see a solicitor.

4.84. It might be concluded from these findings that requests might well be increased if more and better information were supplied to suspects about their right to consult a solicitor while they are at the police station. At present, few forces take adequate steps to ensure that suspects are, as a matter of course, made fully aware of this right. Most rely upon displaying a notice of rights in the charge office and cell block and drawing the suspect's attention to it. In forces where the suspects are actually given a notice or it is read over to him the take up rate may be higher than in those where this is not done; in one of the forces studied by Softley one in five asked for a solicitor compared with one in fifteen elsewhere. The number is, however, still low.[2]

4.85. American experience confirms that the provision of information alone does not ensure that the right to have a lawyer is exercised. Several studies following the decision of the Supreme Court in *Miranda v Arizona* indicate that, as in England and Wales, the right is exercised by only a minority of suspects.[3] One study, in which volunteer attorneys were on call around the clock to advise arrested persons, found that an "astonishingly small" number of defendants requested counsel, 7 per cent of 15,000 persons arrested for felonies and serious misdemeanours during the year over which the project ran.[4] Unfortunately these figures cannot be taken at their face value since there is uncertainty whether the appropriate warnings were always given to suspects. But while other studies suggest this as one possible reason for low take-up, they stress as more important the difficulties in ensuring that suspects fully grasp the significance of warnings and are in a position to assess the consequences of waiving their rights.

The Commission's proposals

4.86. In order to ensure that the right of access to legal advice is made completely effective a number of witnesses to us have pressed either for a solicitor to be present at all interviews (statements obtained without the presence of a solicitor being automatically inadmissible) or for a solicitor to be present except if the suspect waives his right, such waiver being obtained by the solicitor himself and not by the police. Both of these schemes would involve

[1] "Access to a Solicitor in the Police Station", *Crim L R*, 1972, 342–350.
[2] Softley, *op. cit.*, p 68.
[3] The American provisions on legal advice for suspects are different in several respects from those in this country. The *Miranda* ruling ensures that no statement made during police questioning and no evidence discovered as a result of that statement can be admitted in evidence at trial unless the suspect is first warned of, among other things, his right to consult with and to have counsel present during questioning. If he is unable to afford a lawyer himself, one will be provided at public expense. Any waiver of this right has to be made explicitly, and by the suspect himself.
[4] R J Medalie, L Zeitz and P Alexander: "Custodial Interrogation in our Nation's Capital; the Attempt to Implement Miranda" *Michigan Law Review*, 66,1346.

the presence of a solicitor at the police station whenever a suspect was to be interviewed (as would schemes which require the presence of a solicitor to supervise police interviews or to validate the product of questioning). They have considerable resource and organisational consequences, including the availability and willingness of solicitors to cope with an increased demand for their services. We discuss these aspects at paragraphs 4.97 and 4.98, but first consider the issues of principle that a requirement for all suspects to have legal advice raises.

4.87. What means can be devised for making effective as one of the principles for the conduct of pre-trial investigation the right to legal advice which is set out in the Judges' Rules? Let us be clear what this is. It is the right to consult a lawyer privately, before or, if requested by the suspect, during a police interview. It should not be dependent upon the suspect's happening to be aware that he has the right or upon his having his own solicitor or upon the convenience of the police. But it does not, should not and cannot mean that the suspect should be compelled to consult a lawyer or, having consulted one, to take the advice that is tendered. The suspect should be formally notified of his right and that should be a matter of record on the custody sheet. If he waives it that should likewise be recorded and he should be invited to sign the record. For the resource reasons which we develop later[1] we consider it would be impracticable to require the waiver to be made in the presence of a solicitor. If he wishes to exercise it and has no solicitor, some new arrangements will be necessary to make one available.[2] Unless there are pressing reasons to the contrary[3] he should not be interviewed until he has consulted the solicitor of his choice. We would also add that although the right exists at all times that a suspect is being interviewed by the police, we do not think it would be practical to require the formal arrangements that we propose to be applied other than to persons in custody.

4.88. The right to legal advice as we have described it does not bring with it a right vested in the solicitor to be present during an interview. The right is that of the suspect. He may ask for and be afforded the facility to receive legal advice. He can take it or not as he pleases. He may decide that he wants a solicitor to be present during interview and that he will not answer police questions without one. But that should be a matter for the suspect to decide. The police will, no doubt, take it into account in deciding how to proceed. There may also be circumstances where they may wish a solicitor to be present, for example in the investigation of a highly complex fraud. We would suggest that the practice of having a solicitor present should be encouraged. If a solicitor is present at an interview, he should have no wider formal function than to offer the suspect advice if it is requested.

4.89. There is a strong body of opinion in the evidence to us that the right should be absolute; the police should not have discretion to withhold it. It is based on the following considerations. Many people are inarticulate or illiterate and there are particular problems for the ethnic minorities. Furthermore, a

[1]See para 4.94.
[2]See para 4.97.
[3]See para 4.91.

person being questioned by the police is in a position of disadvantage. He is unlikely to be properly aware of the legal intricacies of the situation, to understand, for example, the legal concept of intent or the application of the laws of evidence in his case, or the full implications or the desirability of exercising his right to silence, or to know what the penalty is likely to be for the offence of which he is suspected. Only an experienced lawyer can give him this kind of information and advise him how best to proceed. In the interests of justice he should always have that advice, unless he chooses to forgo it. But there are also arguments for allowing the police discretion to withhold the right where exercise of it would cause unreasonable delay or hindrance to the processes of investigation or the administration of justice. Examples are where there is a threat to a kidnapped child, and finding the child could be delayed by waiting for a solicitor's arrival, or where a solicitor could, whether inadvertently or not, alert associates of an arrested suspect in a major armed bank robbery and thus allow them to escape, destroy evidence or interfere with witnesses.

4.90. The balance between the interests of the community and those of the suspect is particularly delicate here. There are certain limited and exceptional circumstances when the interests of the suspect in this respect have to be subordinated to those of other individuals who may be at risk and, where particularly serious offences are involved, to those of the wider interests of the community. However conferring the discretion to withhold access must not bring with it the risk that it will be used improperly. In particular, we do not consider it sufficient justification for withholding access that a solicitor may advise his client not to speak: that is the suspect's right. Nor should the police refuse access where secrecy is desirable but not imperative. The police could allow access but make the solicitor aware of their position and record that they have done so. If the solicitor behaved improperly, he could and should then be made subject to the disciplinary procedures of his profession. If there are, as the police assert, solicitors who are in collusion with criminals, they should be brought out into the open and removed from the profession.

4.91. Accordingly our general view is that the power to refuse access should be exercised only in exceptional cases. In the first place it should be limited to cases where the person in custody is suspected of a grave offence.[1] Further, even in the case of such offences, the right should be withheld only where there are reasonable grounds to believe that the time taken to arrange for legal advice to be available will involve a risk of harm to persons or serious damage to property; or that giving access to a legal adviser may lead to one or more of the following:

(a) evidence of the offence or offences under investigation will be interfered with;

(b) witnesses to those offences will be harmed or threatened;

(c) other persons suspected of committing those offences will be alerted; or

(d) the recovery of the proceeds of those offences will be impeded.

[1] See para 3.7.

Where the power to refuse access is exercised, it should be done only on the authority of a sub-divisional commander or above, and the grounds should be recorded on the custody sheet. These can be the subject of later review, for example by the inspectorate of constabulary and the practice in the force could be brought to the attention of the police authority.

4.92. We considered whether lack of access to a solicitor should render inadmissible statements made by a suspect in those circumstances. One of us considers that no statement made to the police should be admissible unless the suspect has first had the benefit of legal advice, and that the procedure for summarising interviews which we have proposed[1] should be used only if a solicitor is present. The rest of us do not consider that this is a satisfactory approach. There are resource considerations to which we shall refer.[2] But quite apart from these, the rest of us take the view that lack of legal advice does not of itself result in statements which are unreliable and should not automatically lead to their exclusion as evidence. The right of access will be contained in the rules for the treatment of suspects in custody which we shall be proposing.[3] This will contain provisions for supervision, recording, justification and review of withholding the right of access, which, taken together with disciplinary procedures and an appropriate civil remedy, are likely to be more effective than automatic exclusion of evidence in guaranteeing the right.

4.93. To sum up, all suspects other than those suspected of grave offences will have an unrestricted right to consult and communicate privately with a solicitor at any stage of an investigation, and even for the restricted group the circumstances in which the right may be withheld will be limited and the subject of record and review. Uncharged suspects held who cannot be brought before a court within 24 hours will also be seen by a solicitor.[4] We turn now to consideration of the resource and organisational implications of these proposals since a right without the resources and organisation to give it effect is worthless.

The resource implications

4.94. We take as our starting point for assessing the likely resource implications of our proposals the estimated cost if all those suspected of indictable offences were to take up their right and wanted a solicitor to be present for the duration of their interviews. At current (August 1980) rates of legal aid remuneration, the cost might be of the order of £30 million a year (excluding VAT).[5] It is difficult to assess to what extent present patterns of take-up of legal advice will be affected by the changes which we propose. But if take-up rates increased only to the level of those in stations where suspects

[1]See para 4.13.
[2]See para 4.94.
[3]See paras 4.109 and 4.110.
[4]See para 3.107.
[5]This estimate uses the number of suspects interviewed at a police station in connection with an offence triable on indictment in 1978 (720,000) and, on the basis of the Cranfield research on the tape recording of interviews, assumes an average time spent interviewing and taking a statement from a suspect of about three-quarters of an hour, together with a quarter of an hour consultation time. It is further assumed that average travelling time to and from the police station would be an hour and that work undertaken outside office hours would be charged at a rate 50 per cent higher than the usual rate.

are at present fully informed of their rights to have legal advice (that is a rate of 20 per cent), the cost on these assumptions would be of the order of £6 million a year. If this were to be paid entirely out of public funds it would constitute a substantial increase in criminal legal aid (in 1980–81 the provision of criminal legal aid in magistrates' courts is estimated to be £37.7 million). It is impossible to estimate the extent of possible off-setting savings on legal aid in the courts which might result from earlier advice being available to defendants.

4.95. We attach great importance to securing that the right to legal advice is effective and consider that it warrants making the appropriate financial provision a high priority. However, should there be pressure on resources, we have reviewed whether any fair method could be found of limiting the demand for legal advice at the police station. Criteria that rely on the characteristics of the offender or the nature of the offence seem to us to be unsatisfactory because they do not necessarily reflect a need for legal advice. And if it were found necessary to restrict legal advice at public expense to a particular group we consider that the most equitable criterion for selecting those to whom it is to be made available would be the length of time that suspects spend at the police station.

4.96. The application of any particular time limit to the choice of suspect who is to benefit must, to some extent, be arbitrary. The suggestion that we would make has regard to other aspects of our proposals for the treatment of suspects in custody. Our research shows that about 25 per cent of suspects are still detained uncharged after six hours.[1] This is the cut off point we have chosen for the second review of detention and could also constitute the time when legal advice should become available at public expense. The availability of this right at this point could then be combined with a review of detention. On the assumption of a 20 per cent take up rate, the provision of legal advice at public expense to this group of suspects could cost of the order of £1.5 million a year.

The provision and remuneration of solicitors

4.97. Cost is one factor in the equation. Another is how the provision of solicitors would be facilitated. Our research indicates that a requirement to have a duty solicitor based at a police station 24 hours a day would waste a lot of his time. Even at a busy station, he would be unoccupied for most of the day. Despite this, there would be occasions where one solicitor alone would not be able to cope with the workload, because several suspects may be brought in together and because interviews may overlap.[2] Accordingly the objective should be for solicitors to be available to attend if requested rather than to be present at the police station around the clock. We note the recommendation of the Royal Commission on Legal Services for the setting up of properly organised duty solicitor schemes.[3] If that recommendation is accepted, we imagine that giving full coverage of the country on a 24 hour basis to provide advice in

[1] See para 3.96.
[2] Barnes and Webster, *op. cit.*, Table A:9, pp 60–61.
[3] The Royal Commission on Legal Services, *Final Report*, London HMSO 1979 Cmnd 7648, para 9.9, p 94.

police stations will be some time in coming. At present there are just over a hundred schemes in England and Wales. They are court based and seek to provide advice and representation for unrepresented defendants on their first appearance in court. Very few provide a 24 hour service. A survey in 1976 of 50 schemes found that six did. Law Centres might be able to provide some assistance in the few areas they cover. For the time being any arrangements for providing legal advice to suspects at the police station on a country wide basis, in our view, will have to depend on private practitioners who do criminal legal aid work and are prepared to be available round the clock. The Legal Aid Solicitors List, which covers the whole country and is updated annually, lists those firms in each town who undertake criminal legal aid work; about one-third of them have an out-of-hours telephone number and this proportion is, we are informed, increasing each year. This list should be made available in all police stations, and if a suspect requested a solicitor and did not have one of his own he would be referred to it, as is the practice in many police stations at present. But if the right of access to a solicitor is to be effective it is essential for solicitors to be available when requested. Furthermore it will be essential for solicitors to be available to meet the requirement we propose for an uncharged suspect to be seen by a solicitor after 24 hours in custody if he cannot be brought before a court. Accordingly we consider that schemes for the provision of solicitors for these purposes cannot be left to grow sporadically and piecemeal across the country and that central and systematic action to develop schemes which guarantee availability of solicitors round the clock will be necessary.

4.98. Existing systems of remuneration make it difficult for solicitors to recover the costs associated with attending police stations from the legal aid fund. Although it was decided in 1976 that a legal aid order could be backdated to cover services, such as attendance at a police station, given before the order was granted, this decision was not followed in a later case.[1] In any event, since a legal aid order can be granted only by a court, it cannot cover cases where there is no prosecution. In these circumstances, the solicitor has to be paid under the Green Form scheme, which allows him to give free legal advice and assistance up to a value of £40. The scheme is means-tested and the financial eligibility limits are such as to exclude most people from qualifying for assistance. Even if they do, they may have to pay a contribution. Recovering the contribution can give rise to problems and, unlike unpaid contributions under a legal aid order, the loss falls on the solicitor. Clearly a solution to these difficulties has to be found if attendance by solicitors at police stations is to be properly remunerated, and arrangements for adequate remuneration will have to be one of the features of the schemes discussed in the preceding paragraph.

The solicitor as an independent monitor of the interview

4.99. We would on resource grounds alone reject the possibility of using solicitors as an independent monitor of police conduct of interviews and to authenticate the accuracy of the record of questioning. As we have indicated the cost could be as much as £30 million a year. There are other objections to

[1] *R v Tullet* (1976) 1 WLR 241 and *R v Rogers* (1979) 129 NLJ 170.

solicitors performing these functions. Some of those who gave evidence to us pointed to the conflict between the roles which the solicitor would be required to play. He would be there to look after the interests of his client, the suspect; at the same time he would have to act as an independent monitor and recorder of all that went on. These proposals work well enough if it is assumed that the only thing that might be challenged is the conduct of the police officer. That will not always be so; the suspect's behaviour or allegations may occasionally be open to challenge. In those cases the "independence" of the suspect's solicitor is of doubtful standing. This objection seems to us to carry some force, whether it applies to the solicitor as a monitor of police conduct of the interview or as authenticator of the accuracy of the record.

The presence of an independent third party

4.100. We have already discussed and rejected for various reasons the possibility of using a magistrate or a solicitor to provide an independent monitor of the police conduct of interviews. We need briefly to consider the possibility of using some other class of person for the purpose of providing an independent account at trial if there is a dispute about what went on during an interview. There seem to us to be telling objections to the idea. Some sort of special paid service would have to be created if enough people were going to be available at all hours of the day and night. Who would they be? They would have to be people of some degree of competence and responsibility, if they were to be required to give independent evidence later at court. With trial delays at the Crown Court of a year or more, they would need to take and retain accurate records. How would that be organised? Who would take on what would be, in the main, a tedious job, to be done in very uncongenial surroundings? How long the public's impression of their independence would last is another doubt. This does not seem an option that merits further exploration.

The use of closed circuit television

4.101. Nor do we consider that the use of closed circuit television to provide some measure of third party inspection of the conduct of interrogations would justify the very considerable expenditure that would be involved in its installation, operation and maintenance. We have examined its application in certain police stations in Northern Ireland, following the recommendation of the Bennett Committee on *Police Interrogation Procedures in Northern Ireland*.[1] We have concluded that its use there is warranted only by the special problems presented in dealing routinely with persons suspected of terrorist offences.

The special position of juveniles

4.102. Juveniles, that is children of 16 and under, make up a sizeable proportion of those who are proceeded against for criminal offences, 36 per cent of those found guilty or cautioned for indictable offences in 1978.[2] The Administrative Directions provide that juveniles should so far as practicable be

[1] London HMSO 1979, Cmnd 7497.
[2] See para 3.72.

interviewed only in the presence of an adult who should be one of their parents if possible. Our evidence and research suggested that juveniles are sometimes interviewed without an adult present but that generally an adult will be found. The provision can delay juveniles being dealt with, particularly if parents are not readily available or refuse to attend, as some do. Softley found a third of parents of 50 juveniles unavailable or refusing to attend, and delays of over three hours in about one in five cases.[1] That study and Irving's confirmed what experience also indicates, that parents, although they can be supportive of their children, are not always so.[2] We understand that there is occasionally a difficulty, if a parent is not available, in finding another adult of the same sex, but this is not an absolute requirement since the Direction says that the conditions for interviewing juveniles are to be complied with "as far as practicable". The fact that 16 year olds may be married or have left home to work can produce some incongruous situations and this has led some people to suggest either that a waiver of the requirement might be allowed or that the upper age limit for a juvenile for this purpose be lowered from 17 to 16.

4.103. In our view the provisions should contain recognition of two factors. First the possible lack of comprehension of a juvenile may render any statement or admission he may make unreliable. Secondly a parent has a right to know where his child is and to be with his child during an interview. Accordingly we consider the existing provision in the Administrative Direction is broadly right and we recommend only two changes to it. We think that the requirement for the adult to be of the same sex as the juvenile is unnecessary; it is far more important that the adult should be known to the juvenile. It is, in our view, essential that a juvenile should have an adult present other than the police when he is interviewed and it is highly desirable that the adult should be someone in whom the juvenile has confidence, his parent or guardian, or someone else he knows, a social worker or school teacher. Juveniles may not as readily understand the significance of questions or of what they themselves say and are likely to be more suggestible than adults. They may need the support of an adult presence; of someone to befriend, advise and assist them to make their decisions. We recognise that parents may not always act in a supportive way and that their presence may not necessarily solve the problem of the juvenile's suggestibility. Nonetheless it is proper that parents should have the opportunity to be present when their child is in trouble. Particularly for the latter reason the juvenile should not be able to waive the right. This presence is, however, no substitute for having access to legal advice and the right to that applies equally to a juvenile. Inevitably any age limit is arbitrary, but, so long as 17 is the age at which for the purpose of criminal procedure generally juveniles are treated as adults, it should remain so for this aspect of the pre-trial arrangements also.

4.104. The other change that we recommend is to make clearer the circumstances in which the existing proviso " as far as practicable" can be applied. There may be circumstances (we expect them to be exceptional) where delay in interviewing a juvenile while his parents or other adult are awaited could have very serious consequences. Juveniles, unfortunately, can be involved

[1] *Op. cit.*, pp 66 and 67.
[2] *Op. cit.*, respectively at p 67 and p 127.

in serious offences, either with other juveniles or with adults, and we think it would be contrary to the public interest to prevent the police questioning a juvenile, where, for example, a life is at risk. We would therefore recommend that an exception to the general rule that a juvenile should be interviewed only in the presence of an adult should be possible only if there are reasonable grounds to believe that waiting for the arrival of an adult will involve a risk of harm to persons or serious damage to property. The decision to proceed should be taken, where practicable, by the sub-divisional commander and. in any case, an officer not responsible for the enquiry. It should be a matter of record. We shall discuss later[1] the treatment of any evidence obtained where a juvenile is questioned (justifiably or unjustifiably) without an adult present.

Other special provisions

4.105. The Administrative Directions make special provisions for another adult to be present at interviews of suspects who are mentally handicapped or deaf or for taking statements in a language other than English.[2] These are additional to the other rights that the suspect has, including the right to legal advice. We have not been made aware of any great problems over interviewing the deaf or those whose first language is not English. But we think it would be desirable to add to the provision for the taking of statements in languages other than English a requirement that where the person being interviewed does not have English as his first language and where the police officer, if he himself does not speak that language, considers that the suspect has difficulty in speaking and understanding English, such a person should be interviewed and a statement taken from him only in the presence of an adult capable of acting as interpreter.

4.106. The mentally handicapped present a problem to which we see no ready solution. Administrative Direction 4A places upon the officer who is to conduct the interview responsibility for deciding whether the person to be interviewed is mentally handicapped. This can put officers into a position of great difficulty. Mental handicap may be a condition that is easy to diagnose for an expert in a consulting room, although even then there may be areas for dispute. The pressures of custody make the task far more difficult for the police officer, who, usually, has only his common sense and experience to go on.

4.107. The demands of the situation mean that the discretion will have to continue to rest with the interviewing officer, although, we understand, it is the practice for the station officer to be on the look out for the mentally handicapped, as for those who are under the influence of drink or drugs. Some expert witnesses to us have suggested that broad guidelines could be developed to help identification of the mentally handicapped. We have not pursued this specialist matter in any great detail but we recommend that action should be taken to follow up this idea, with a view to improving training and possibly introducing guidelines in this respect, so that officers are more readily able to detect the condition and then to call in expert guidance where it is required. We also note that problems can occur over those suffering from mental illness.

[1]See para 4.134.
[2]See the *Law and Procedure Volume*, paras 93 and 94.

That is not a matter for the lay person to try to diagnose and, if police officers have the slightest suspicion that a suspect is suffering from a mental illness a doctor should be called in immediately. As with the provision for interviewing juveniles, the requirement for a mentally handicapped person to be interviewed in the presence of an adult is limited by the words "as far as practicable". Again, we consider that guidance should be more precise and that interviewing in the absence of an adult should take place only where it is essential because of the urgency of the situation. The proviso should therefore be in the same terms as that for juveniles.[1] Similar provisions for the taking and recording of the decision should be prescribed.

The role of the social worker

4.108. Interviews may be attended by social workers of various kinds (local authority social workers, probation officers, or those with special responsibility for the mentally handicapped). The nature of their role, responsibilities and duties should be clear, especially if they are attending an interview of a juvenile. In that case, whether or not the juvenile is in care and whether or not the social worker is standing technically *in loco parentis*, the social worker should have the same function as the juvenile's parent, of providing support and advice, and he should have an opportunity to speak with the juvenile in private. Generally the social worker should be present to ensure that the person being interviewed, whether a juvenile or a mentally handicapped person, understands the questions that are being put to him. He should not attempt to act as his legal adviser. We suggest that consideration should be given to placing some obligation on local authorities to make provision for social workers to be always available out of ordinary working hours.

The regulation of interviews

4.109. At present the police have little guidance upon how to conduct interviews. There are the provisions of principle (e) to the Judges' Rules on voluntariness and the interpretation of "oppression" in *Prager*,[2] and Administrative Direction 3 deals with the comfort and refreshment of persons being interviewed and the provision of seating for them. We have proposed the abandonment of the voluntariness rule because of its imprecision and the uncertainty of its effect in practice as a means of regulating questioning of suspects. In the preceding sections of this chapter we have developed a framework for ensuring that a suspect is aware of his rights while he is in custody and of the decisions that are being made about him and that the decisions are responsibly and accountably taken. And in our discussion of detention upon arrest[3] we made proposals for improving the supervision of the treatment of detained suspects. For the actual conduct of questioning we need to replace the vagueness of the Judges' Rules with a set of instructions, which provide strengthened safeguards to the suspect and clear and workable guidelines for the police.

4.110. We call this a code of practice for the regulation of interviews and recommend that it should be contained in subordinate legislation subject to

[1]See para 4.104.
[2]See para 4.71.
[3]At paras 3.94 ff.

affirmative resolution of Parliament and made by the Home Secretary after consultation with the police, the judiciary and persons with the relevant expert medical and psychological experience. The code of practice will be part of the general provisions governing the treatment of persons in custody that we have been developing in this chapter and in the final sections of the preceding chapter, and it should be aimed at producing conditions of interview that minimise the risk of unreliable statements. Its provisions will also amount to a statement of what is viewed as acceptable practice when the police have to interview those who are reasonably suspected in connection with an offence. So, as well as the sanctions attached to its breach (which we shall discuss in the next section) it will carry an element of social and moral imperative. We do not propose spelling out in detail what its provisions should be, but we recommend that it should deal with the following matters: the right of access to legal advice, special treatment of juveniles and others, the modes of note taking, the taking of statements, and the use of tape recorders, and the giving of the cautions, all of which we have already discussed; the existing provision of the Administrative Directions on the comfort and refreshment of persons being interviewed; and the length, timing and circumstances of questioning, which would be its main innovative feature.

4.111. The sort of provisions we have in mind should take realistic account of the pressures upon the police and upon suspects and should, therefore, have some degree of flexibility built into them, but exercise of that flexibility should be only upon reasonable grounds and should be accountable. We would suggest for consideration provisions that required an interview to be broken for brief refreshment and for meals after specified times; that precluded interviewing at night if the suspect had been interviewed for any substantial period in the day or immediately after a suspect had been woken up (it would be unrealistic to prohibit all interviews at night since if that were so a person arrested late in the evening might have to be held overnight); that prohibited questioning after a suspect had been held incommunicado beyond a specified period; that prevented interviewing persons substantially under the influence of drugs or alcohol; that precluded more than a specified number of officers being present at any one time; that set conditions of lighting, ventilation and seating for the interview room. As we say, these provisions will have to be worked out in detail by those with expert knowledge. What we have suggested is meant only to provide broad guidance as to the sorts of factors to be covered.

4.112. We have also considered whether the code of practice should attempt to regulate the content of questioning, that is to indicate what are permissible and impermissible tactics that the police may use in questioning. We take it for granted that there should be an explicit condemnation and prohibition of the use of violence or threats of violence or other harmful action, either to the suspect, his family or any other person with whom he has a connection. Further in recognition of the United Kingdom's international treaty obligations we think it would be proper for the code of practice also to contain a specific prohibition of torture or inhuman or degrading treatment (the words of Article 3 of the European Convention for the Protection of Human Rights and

Fundamental Freedoms).[1] Society should publicly express its total rejection of such behaviour by a police officer.

4.113. Apart from this, we have concluded that regulation of the nature of questioning is not, for a variety of reasons, practicable or desirable. The main problem lies with tactics aimed at producing confessions. First it is difficult to define the tactics in such a way as to make it precisely clear what is prohibited and what is not. For example if the use of bluff is considered undesirable, is that to be taken to cover only outright lies about the evidence that the police already have, or intentional failure to give the suspect full information about the position, or inadvertently doing so? This problem of definition is one of the defects of the existing criteria for determining voluntariness and one of the reasons we are suggesting it should be abandoned. Secondly there is no point attempting to ban the explicit use of a particular tactic when its effect is implicit in the situation in which the suspect finds himself; for example prohibiting the explicit offering of bail as an inducement to confess when people in custody often perceive, without being told, that if they do confess they are more likely to be released. We prefer, then, rules whose breach can be clearly demonstrated both at the time and *ex post facto*. We also emphasise again the importance of training for the police not merely in the skills of interviewing, which we believe ought to be taught on a more systematic basis, but in the psychology of interviewing so that officers can be made more fully aware of its potential to produce false confessions as well as true ones.

4.114. Finally the code should repeat the existing provision in the Judges' Rules which place a limit on questioning about a particular offence. At present questioning, other than in exceptional circumstances, is not permitted after the suspect has been charged with that offence and a person must be charged when the police have sufficient evidence to do so. Witnesses to us have suggested that these provisions are unsatisfactory for two reasons. They can be circumvented and questioning can be prolonged by the police either making a holding charge on another offence or using the subjective element in judging the sufficiency of the evidence in order to delay charging. However we can see no fair or workable alternative. There must be some terminal point on questioning and the point of charge provides an event that is clearcut. The decision on whether there is sufficient evidence to charge cannot be made other than by the investigating officer on the basis of the evidence available to him. We consider that our proposals for accountable review of detention upon arrival at the police station, after six hours, and after 24 hours will offer an adequate and independent safeguard against delayed charging and against the use of a holding charge to prolong questioning in custody.[2]

The enforcement of the rules on the treatment of suspects

4.115. The present rules governing the matters we have been discussing in this Part of our report, the use of coercive powers[3] and questioning, are to be

[1] There are similar provisions in Article 5 of the United Nation's Universal Declaration of Human Rights and Article 7 of the International Covenant on Civil and Political Rights.
[2] The Commission's proposals on charging and the criteria for prosecution are at paras 8.4 and 8.9.
[3] Much of the discussio. of the enforcement of rules in the following paragraphs is also relevant to the enforcement of the rules on coercive powers described in chapter 3.

found in (or extracted with difficulty from) a mixture of statute law, common law, evidential law, and guidance to the police from the judges and the Home Office. Our witnesses have advanced arguments of practice and principle for collecting into one place and reformulating in modern terms these jigsaw pieces of two centuries of police and legal history. They argue that without clarity and precision the rules cannot be capable of enforcement. Society should be prepared to give clear and open expression to the rights to be enjoyed by suspects, to the safeguards provided for them, to the rules to be observed by the police and to the exceptions to the generality of those rules where necessary to enable the police to perform their duty of enforcing the law and protecting the public. We consider the case incontrovertible. Those who object to it seem to us to do so mainly because they are opposed to the proposal which is frequently made that the enforcement of statutory rules should depend entirely on the automatic exclusion of evidence obtained in contravention of them. We do not regard this as the only appropriate form of enforcement.

The form of the rules

4.116. We have already recommended that the rules that affect the liberty of the citizen or the invasion of his privacy, that is those on arrest and detention, search and surveillance, should be incorporated in primary legislation. So far as the rules governing the treatment of suspects in custody are concerned, we consider that all aspects of them should be made statutory. It will be necessary to use primary legislation for certain purposes, for example to alter the laws on evidence to effect the change we propose in respect of the voluntariness rule and some of the proposals that we shall be developing later in this section on how evidence obtained in breach of the rules is to be treated. The rules which will regulate the facilities to be provided for and the treatment to be accorded to suspects in custody and the code of practice which will govern the conduct and recording of interviews should be contained in subordinate legislation. This should be made by the Home Secretary, with consultation as appropriate, and subject to the approval of Parliament by affirmative resolution, which will give flexibility to amend aspects of detail if experience or changing circumstances require it.

Methods of enforcing the rules

4.117. The rules seek to secure that suspects in police custody are treated in a humane and civilised manner, that their rights are made available to them to exercise if they wish, and that the product of police questioning is as reliable and accurate as possible. There are two, not mutually exclusive, ways of achieving these aims. It may be done by contemporaneous controls and supervision, or by review after the event.

Police supervision and discipline

4.118. The rules that we have proposed are designed to give the police, both at operational and at supervisory levels, a clearer framework and more precise guidelines within which to work. It is our belief that they will be more effectively enforced (and therefore generally more likely to achieve their objectives) by contemporaneous controls and good supervision than by review

often long after the event. Apart from the role that solicitors and the courts will play in supervising extended periods of custody, we have ruled out, for various reasons, the possibility of using persons independent of the police routinely to monitor police activity in this field. The duty to see that these rules are obeyed should rest in the first instance where it does now, with the police service itself. We stress the importance of a division of responsibility between those who are investigating an offence and the uniformed officer who has to look after the welfare of the suspect in custody. There should be an explicit duty upon arresting officers as soon as practicable to take a suspect to a station which has the necessary facilities of accommodation and of staff to provide adequate supervision and thus to comply with the rules which we have proposed. Breach of the rules should be regarded as being a breach of the police disciplinary code. The standard of compliance with the rules should be made a matter of annual inspection by HM Inspectors of Constabulary.

4.119. An important component in securing public confidence in a system of control that depends upon police supervision and discipline is effective arrangements for the investigation of complaints against the police. We are aware that there have been criticisms of the present arrangements for investigation using the Police Complaints Board set up under the Police Act 1976. Some of these criticisms were made in the evidence submitted to us and the Board has had access to the relevant submissions. We are aware that the Government is currently studying the Board's assessment of the position published in its Triennial Review Report in 1980. We ourselves attach great importance to the complaints system having credibility with the public and we therefore welcome the Government's response to the proposal made in Chapter V of their report for the most serious complaints involving unexplained injuries to be investigated by a specialist body of investigating officers seconded from all police forces and under the direction of someone having judicial experience. We also consider that our own proposals for a more open system of recording police decisions during the investigative process should facilitate subsequent scrutiny by supervising officers and by the Board of the way the police have conducted themselves.

Review by the courts

4.120. Controls after the event all involve review by the courts, usually but not always in the context of and incidental to the trial of another issue. They attain their effect by the application of some sort of sanction on the officer concerned or by giving the suspect some form of remedy for the action that he has suffered. The three sanctions or remedies that are applied are the criminal law, the civil remedy of monetary compensation, or, in cases proceeded with and contested, the use of a power to exclude the evidence obtained through the breach of the rule concerned (either necessarily or at the judge's discretion).

The application of the criminal law

4.121. It has been suggested to us that breaches of the rules might be made a criminal offence. We reject this as a general proposition. The rules we are suggesting should include the prohibition of torture or inhuman or degrading treatment, in addition to the use of violence or threats of violence. The use of

the latter constitutes a criminal offence. At the moment the only offence which might cover the other prohibited treatment is assault but it is not clear whether that offence would cover all eventualities. In view of society's rejection of such behaviour, if it is not already prohibited by the criminal law, consideration should be given to creating the necessary offence, although we recognise that there may be difficulties of definition. For all other breaches of the rules the police disciplinary code provides adequate and more appropriate sanctions.

Civil actions

4.122. Some of the witnesses to us have been critical of civil action as a remedy. They point to the difficulty of proving breaches of the rules and to the cost of such actions, and some doubt whether they have any impact on the individual police officer, since any award of costs is borne by police funds. Nonetheless they provide a means by which those who suffer substantial inconvenience, distress or other disadvantage as a result of unjustified police activity may gain some form of redress. It is the only means of redress for those who are not prosecuted and consequently have no opportunity to raise the matter during a trial. As we have already noted, we see this applying particularly in the case of unlawful arrest or unjustifiably prolonged detention. The arrangements we propose for recording decisions during the course of custody may assist in proving cases of unlawful action in these and other respects, for example in relation to improper refusal of access to legal advice, and the civil courts may therefore prove to have a useful role to play in the application of the statutory rules.

The exclusion of evidence

4.123. Those who consider that the existing rules are inadequately enforced most commonly advocate as a solution the automatic exclusion of evidence from being used as part of the prosecution's case at the trial which was obtained in breach of the rules. Under the present law automatic exclusion applies only to statement evidence which the judge finds to be "involuntary". All other evidence (leaving aside the special field of the breathalyser law) obtained by irregular or unfair means is admissible, subject to the judge's discretion; and the judge's discretion since the decision in *R v Sang* is limited to admissions, confessions and generally to evidence obtained from the accused after the commission of the offence.[1] The rationale behind the present law is that evidence of certain kinds is or may be so unreliable as to preclude its being heard by the jury; this is the so called "reliability principle" for exclusion. Those who urge the introduction of automatic exclusion for breach of the rules do so with a view to compelling the police to comply. This is the so called "disciplinary principle"; the police lose their particular case through their wrongful behaviour and will be deterred by that from acting in the same way in the future.

4.124. But English judges have not seen themselves as having that function of controlling improper police behaviour; their main concern has always been with the reliability of the evidence. This position was reaffirmed by Lord Diplock in his judgment in *Sang*:

[1] [1979] 2 All ER 1222.

> "It is no part of a judge's function to exercise disciplinary powers over the police or prosecution as respects the way in which evidence to be used at the trial is obtained by them. If it was obtained illegally there will be a remedy in civil law; if it was obtained legally but in breach of the rules of conduct for the police, this is a matter for the appropriate disciplinary authority to deal with."[1]

4.125. One obvious defect of using an automatic exclusionary rule of evidence to enforce compliance with the provisions governing the exercise of police investigative powers is that it can apply only to a small proportion of cases. Only a minority of those who are, for example, stopped and searched by the police are arrested,[2] and a sizeable minority of those whose property is searched are not charged.[3] Of persons arrested a significant proportion is not subsequently prosecuted.[4] The overwhelming majority of those prosecuted plead guilty.[5] And only a proportion of those who contest their cases challenge the legality of the police exercise of their powers.[6] Further, the point at which any such challenge occurs will be remote in time and effect from the incident giving rise to it. Accordingly an automatic exclusionary rule can operate to secure the rights only of a very small minority of those against whom a particular power has been exercised and this must cause doubt about its effectiveness as a deterrent of police misconduct. As one American commentator has put it: "There is no reason to expect the rule to have any direct effect on the overwhelming majority of police conduct that is not meant to result in prosecution and there is hardly any evidence that the rule exerts any deterrent effect on the small fraction of law enforcement activity that is aimed at prosecution. What is known about the deterrent effect of sanctions suggests that the exclusionary rule operates under conditions that are extremely unfavourable for deterring the police. The harshest criticism of the rule is that it is ineffective."[7]

4.126. The United States of America provides some evidence on these matters but because that jurisdiction is in so many respects different from our own the lessons that can be drawn need to be treated with care. There an automatic exclusionary rule has been used for more than half a century. Its use appears to be justified as a deterrent to unlawful conduct by the police, to prevent prejudice at trial by eliminating certain kinds of evidence and to preserve the integrity of the court by preventing its involvement in illegal activity. Much research has been done on its ability to achieve the first of these objectives and much jurisprudential learning has been generated upon all of them. We venture into so complex and controversial a field with some hesitation, but three salient points for the purpose of this discussion seem to us to emerge. First one of the reasons why the United States Supreme Court has felt constrained to develop the rule is to protect the citizen's constitutional

[1]At p 1230.
[2]See the *Law and Procedure Volume*, Appendices 2 and 3.
[3]*Ibid.*, Appendix 7.
[4]Para 4.43.
[5]See, for example, *Criminal Statistics England and Wales 1977*, London HMSO 1978 Cmnd 7289, Table 4:1, p 58.
[6]See, for example, Vennard, *op. cit.*, chapter 4 on disputes over statement evidence.
[7]Dallin H Oaks: "Studying the Exclusionary Rule in Search and Seizure", *University of Chicago Law Review*, 39,665, p 755.

rights in the face of what has been called "a vast abnegation of responsibility" in the law enforcement agencies to discipline themselves. The English observer has to remember that in the USA there are a bewildering complexity and amount of law enforcement agencies, ranging from the federal agencies, like the FBI, through the great city police departments, to tiny community forces of one or two men. Few are subject to any federal government supervision or control. Secondly the Supreme Court's assumption of this role gains its moral and political force from its responsibility to protect and interpret the rights of the citizens of the United States that are enshrined in the Bill of Rights. Thirdly, the research does not show unequivocally that the exclusionary rule serves directly to deter the police from unconstitutional conduct.[1] Chief Justice Burger underlines these points:

> "Some of the most recent cases in the Supreme Court reveal, almost plaintively, an unspoken hope that if judges say often and firmly that deterrence is the purpose, police will finally notice and be deterred. I suggest that the notion was never more than wishful thinking on the part of the courts ... We can well ponder whether any community is entitled to call itself an 'organised society' if it can find no way to solve the problem except by suppression of truth in search of truth."[2]

4.127. Our conclusion is that the United States experience does not offer an encouraging prospect of an automatic exclusionary rule achieving the objectives its proponents set for it here. Indeed in some respects it tells against them and supports the position taken by the English judiciary and the one which the majority of the Commission favours. The solution, so far as the disciplinary principle is concerned, is to be found in police supervisory and disciplinary procedures. Here the police service is less fragmented than in the USA. There is a common discipline code for all forces. There are national representative bodies and a single Minister with responsibilities for the police service at national level; and there is a central inspectorate. All of this offers the prospect of achieving the same objectives that an automatic exclusionary rule is supposed to achieve without the possible side effects.

4.128. For these reasons all but one of us oppose the general introduction of an automatic exclusionary rule as a means of enforcing the statutory rules governing the treatment of persons in custody or of the generality of the other provisions that we are proposing for regulating investigatory powers. There are other considerations which we mention because from them derives another proposal that needs discussion. On the basis of American experience and also on that of the breathalyser law, we believe that an automatic exclusionary rule would give rise to an increase in disputes about the admissibility of evidence (with adverse consequences for trial delays). There would thus be an increase in court time spent on matters which are not concerned with the innocence or guilt of the accused; which would risk a diminution of public respect for the institutions of criminal justice. One of the objections to the application of the exclusionary rule in the United States is that it can and does lead to the patently guilty going free because of some minor procedural technicality; "the

[1] See, for example, Oaks, *op. cit.*
[2] Warren Burger: "Who Will Watch the Watchmen?" *American University Law Review*, 14, 1, pp 11-12 and 23.

criminal is to go free because the constable has blundered."[1] In its model code of pre-arraignment procedure the American Law Institute proposed introducing a proviso to the automatic exclusionary rule which would bring it into force without discretion only if the violation was "gross, wilful and prejudicial" to the accused.[2] The Australian Law Reform Commission in its report in 1975 on criminal investigation used a similar approach to tackle the problem.[3] It proposed the introduction of what has been called "a reverse onus exclusionary rule." There should be automatic exclusion of any illegally obtained evidence unless the prosecution can satisfy the court that it should be admitted in the public interest, on the grounds of, for example, the triviality of the breach, the demands of the circumstances of the investigation, or the seriousness of the offence being tried.

4.129. Several of those who submitted written evidence to us commended the Australian Law Reform Commission's proposal for a reverse onus exclusionary rule and we discussed it specifically with our oral witnesses. It gained only limited support. The problems of interpreting it consistently were alluded to, and it would not certainly serve to reduce trials within trials. Those who rely on the disciplinary principle argued that to vest any discretion in the judge was contrary to the principle and would diminish its deterrent effect. Those who work upon the reliability principle rejected its basic premise, that breaches of the rules merit exclusion regardless of their effect on reliability.

4.130. The reverse onus exclusionary rule is consistent with neither of the two principles that we have been discussing so far but with a third principle: what has been called the protective principle.[4] This has the following rationale. Where certain standards are set for the conduct of criminal investigations, citizens can expect, indeed they have a right, to be treated in accordance with those standards. If they are not so treated, then they should not be put at risk nor should the investigator gain an advantage. The courts have the responsibility for protecting the citizen's rights. The most appropriate way to do so in these circumstances is to remove from the investigator his source of advantage and from the accused the cause of his risk, that is to exclude the evidence. If this principle is applied, exclusion of good evidence irregularly obtained is the price to be paid for securing confidence in the rules of criminal procedure and ensuring that the public sees the system as fair. In contrast to the disciplinary principle this approach can leave it to the court to exercise a discretion not to exclude evidence when the breach of the rules is trivial and does not infringe the suspect's rights or where though serious it can be justified by appeal to some other value, for example to preserve another person's life. It would be in this context also that a reverse onus exclusionary rule could come into play. The protective principle can also be used in a way that distinguishes between rights that involve fundamental civil liberties (the right not to be subjected to violence, or not to be compelled to incriminate oneself), and rights created in

[1]Chief Justice Cardozo of the New York Court of Appeals in *People v Defore* (1926).
[2]*A Model Code of Pre-Arraignment Procedure*, 1975 The American Law Institute, Section 160.7 (2)(a).
[3]*Criminal Investigation: Report No 2 An Interim Report*, Australian Government Publishing Service, Canberra 1975, para 298.
[4]See A J Ashworth: "Excluding Evidence as Protecting Rights", *Crim L R*, 1977, p 723.

order to produce reliable evidence (the right not to be subjected to prolonged questioning or to questioning after a long period held incommunicado).

Exclusion of evidence: the Commission's proposals

4.131. We formulate our own proposals with due recognition of the importance, complexity and intractability of the problem that we are seeking to resolve. We have rejected the use of an automatic exclusionary rule as a general means of securing compliance with the statutory rules we propose. The approach which the majority of us favours contains elements of both the reliability and the protective principles. But it applies them to the rules that we propose should be made by Parliament to control police conduct rather than to the court's exercise of a discretion to admit evidence or not. One member of the Commission who does not adopt this approach would wish to maintain the existing law on the automatic exclusion of involuntary statements and to see the courts exercise a wider discretion to exclude evidence obtained in breach of other aspects of the rules than they do at present and than the judgment in *Sang* envisages. Another favours an even wider application of automatic exclusion, so that any evidence obtained in breach of the rules would be inadmissible. The rest of the Commission considers that it is not satisfactory to leave the content and enforcement of these rules to the courts for the reasons developed in the preceding paragraphs. Parliament should take the responsibility for deciding what the rules should be. The case for this has already been argued in our proposal that the present voluntariness rule should be replaced. The police need a greater measure of certainty than the existing rules and the manner used to enforce them provide. They should know that if they comply with the rules their evidence will be admitted, to be weighed by the court for what it is worth. The exceptions written into the rules to give flexibility to meet the emergency situation or to deal with grave crimes are intended to provide more certain guidance to the police than the subsequent exercise of judicial discretion, whether based upon a reverse onus exclusionary rule or not. If the police do not comply with the rules or if they use the exceptions unreasonably, the consequences should be known to them for certain. There can of course be no absolute certainty since the police may be satisfied that they have complied with the rules but be faced with allegations of malpractice when the matter comes to court. That is in the nature of the system. But they should know that if there was non-compliance, certain consequences will flow. Those consequences should depend on the purpose of the rule that has been breached.

4.132. We would distinguish between the provisions for the treatment of suspects in custody and for interviewing which deal with the prohibition on violence, threats of violence, torture or inhuman or degrading treatment, and those provisions which are designed to provide an environment for interviewing which conduces, to the extent possible in custody, to the suspect's answers to question being reliable (that is those designed to replace the voluntariness rule). In general, as we have said, we consider that the exclusion of evidence is not a satisfactory way of enforcing compliance with rules. However in order to mark the seriousness of any breach of the rule prohibiting violence, threats of violence, torture or inhuman or degrading treatment and society's abhorrence

of such conduct, non-compliance with this prohibition should lead to the automatic exclusion of evidence so obtained. Proof of non-compliance would be a matter for the judge or magistrates to decide on the facts.

4.133. But what should be the consequences of other breaches of the rules in relation to evidence subsequently obtained? For the reasons set out above a breach of the rules by the police should not, in the view of all but one of us, lead to total immunity for the suspect from prosecution and conviction or to the automatic exclusion of evidence. But since reliability is the primary purpose of the code of practice for interviewing suspects, the reliability of confessions obtained in its breach must be open to question; and it would not therefore be right for statement evidence obtained in breach of the code to be accepted uncritically and without comment by the criminal courts. The advocate for any accused who contests the truth of a confession alleged to have been made by him will have considerable scope for discrediting the evidence of that confession if it has been obtained when the provisions of the code have not been observed. But it should not fall simply to the defence to point out the unreliability. The judge should point out to the jury or the magistrates be advised of the dangers involved in acting upon a statement whose reliability can be affected by breach of the code. They should be informed that under pressure a person may make an incriminating statement that is not true, that the code has been introduced to control police behaviour and minimise the risk of an untrue statement being made and that if they are satisfied that a breach of the code has occurred it can be dangerous to act upon any statement made; accordingly, they should look for independent support for it, before relying upon it. The effect of that warning would be that where a breach of the code has occurred, senior officers, and those responsible for advising on the prosecution, will need to consider the availability of other evidence before deciding whether it is proper to permit the prosecution to proceed. We think this will encourage what is already universally regarded as good police practice: namely that so far as is possible evidence from questioning should be checked and independent confirmation of its reliability should be sought.

4.134. The rules for the additional protection of juveniles and the mentally handicapped together with those for the general conduct of interviews are aimed both at protecting these groups and securing the reliability of statements obtained. We recognise that there are particular problems in achieving the latter objective in respect of these groups and we recommend that as a matter of practice the police give especial attention to testing the reliability of such statements. If the rules for the special protection of juveniles and the mentally handicapped are breached, a minority of us considers that the vulnerability of these groups warrants applying the protective principle and recommends that proof of such breach should lead to automatic exclusion of the statement evidence so obtained. Where because of the urgency of the matter a juvenile or a mentally handicapped person has to be interviewed in the absence of a third party and relevant statement evidence is obtained, the jury or the magistrates should be advised that such evidence may be unreliable and that unless there is substantial other evidence pointing to the accused's guilt it would be unsafe to convict. The majority of us, while recognising the special vulnerability of these groups, considers that the primary reason for giving them protection is

because of their suggestibility and the consequent risk that anything they say may be unreliable. They think that the proper way to ensure that protection is given is by on the spot supervision and by the use of the police disciplinary code. It is, in their view, inconsistent with the Commission's general position on the use of an automatic exclusionary rule to try to apply it in this context. They therefore recommend that the general approach for breaches of the rules which are concerned with reliability should be applied to breaches of the rules in respect of juveniles and mentally handicapped persons. But they would agree with their colleagues that the jury or the magistrates should have their attention drawn to the possible unreliability of evidence obtained from a juvenile or mentally handicapped person in the absence (justified or not) of an adult.

The position of other investigative and law enforcement agencies

4.135. Our discussion in this and the preceding chapter has focused, as our terms of reference require us to do, upon the investigative activities of the police. We have already mentioned that our approach to rationalising the coercive powers of the police should, in principle, be applied to the investigative activities of other law enforcement agencies.[1] We consider that our proposals on questioning should apply equally to the questioning of suspects by persons other than police officers who have the duty of investigating offences or charging offenders, for example the officers of HM Customs and Excise. This is the existing position in relation to the Judges' Rule, since Rule VI requires such persons to comply with the Rules, so far as may be practicable. We appreciate that there may be practical difficulties for agencies who do not operate in the same way or in similar conditions to the police, but we do not think that circumstantial considerations should be allowed to outweigh the argument of principle that persons suspected of criminal offences, whatever those offences are, should be treated alike by those who have authority to conduct criminal investigations.

[1] See para 3.52.

CHAPTER 5

Summary and conclusions of Part I: the investigation of offences

5.1. In this Part of our report we have considered what powers should be available to the police for the investigation of offences and the controls and safeguards to which their exercise should be subjected. On the basis of a brief historical analysis of existing statutory provisions and procedures we established that there is a case for them to be reformulated and restated in modern terms (2.2–8).[1] Our review would be conducted on the assumption that the police are to retain the primary responsibility for the investigation of offences (2.9–17). For this purpose they require certain investigative powers. Their exercise of those powers and the controls upon them must command public confidence. To this end we set out the standards of fairness, openness and workability as a means of evaluating existing procedures and proposals for change (2.18–24).

5.2. In chapter 3 we considered powers which involve an intrusion upon someone's person or property or a deprivation of his liberty. These are powers to stop and search a person or a vehicle, to search premises (including surreptitious surveillance), to arrest and detain a person in custody, to search a person or his premises on arrest, and other procedures during custody. We established certain principles which should govern the availability and exercise of such powers (3.1–10). They should be available only where there is suspicion on reasonable grounds that an offence has been committed. In general they should be exercisable against a person only if there is suspicion on reasonable grounds that he has committed an offence. In exceptional circumstances where a grave offence is involved the latter principle need not necessarily apply. In addition there are certain powers which should be available only in respect of grave offences. Coercive powers should be exercised only when this can be justified in the circumstances of the particular case. Their exercise must be subjected to improved safeguards. Their exercise in a particular instance must, where practicable, be explicitly justified at the time, so that the person against whom the power is exercised is aware of the reasons for it and the validity of its exercise can subsequently be reviewed and, where appropriate, remedy for misuse of the power readily obtained. To achieve this the decision to exercise the power and the reasons for it must be recorded.

5.3. This provides the framework for rationalising, clarifying and simplifying the existing provisions which the evidence to us and our own assessment show

[1]References in this chapter are to the relevant paragraph numbers.

to be necessary. We recognise one major difficulty. An attempt to rationalise powers may lead to their being more widely available and consequently risks an increase in their oppressive use. To prevent that, the principles we have established for their availability and the safeguards to be placed upon their exercise must be rigorously applied. In the case of certain powers a small minority of us considers that the risk arising from the method of rationalisation proposed is appreciable and they are opposed to it. The majority of us considers that, although such risk exists, taken overall the proper balance between powers and safeguards has been struck.

5.4. Coercive powers should be placed upon a *single statutory footing* (3.10). This should enshrine the general principles for their availability and exercise and spell out the following safeguards for the application of each power. In addition to the application of the criterion of suspicion on reasonable grounds, the decision to use any particular power and the reasons for that decision must, where practicable, be recorded at the time so that its exercise can be reviewed after the event. The person concerned should at all stages be made aware of his rights, of the circumstances in which he may be compelled to do anything and of the reasons for the decisions that are being made. Where consent is given it should be free and genuine and recorded in writing.

5.5. Within this framework we recommend a rationalisation of *powers to stop and search*. The power to stop and search persons on reasonable suspicion of being in possession of stolen goods should be available throughout England and Wales. The miscellany of other existing powers should be replaced by a single provision allowing stop and search for stolen goods or any item the possession of which is prohibited in a public place; three of us oppose the application of this power to searches for offensive weapons (3.20–21). Search of vehicles should be permitted on the same footing (3.29). All but two of us consider that there should be a specific power to stop people and vehicles in the vicinity of a grave incident where this might lead to the prevention or termination of a grave offence, the recovery of valuable property or the apprehension of the suspected offender or of someone who has escaped from lawful custody whose continued liberty is a threat to persons or property (3.92–93). Other than this stopping vehicles at a road check should be authorised only when a person suspected of a grave offence is moving in a particular area or when such offences may be committed in the area over a defined period (3.31–33). The power to stop vehicles under the road traffic legislation should not be used to circumvent the general requirement for reasonable suspicion before stopping vehicles (3.30).

5.6. In accordance with the principles we have adopted *warrants to enter and search premises* should not give rise to general searches. We recommend that warrants should be specific both in relation to the object of the search and the premises to be searched and searches should be lawful only if carried out in accordance with the terms of the warrant (3.47). The police should be entitled to seize items which are the subject of a warrant found in the course of a lawful search and items found incidentally during the search which could themselves have been the subject of a warrant (3.48–9). Warrants should be obtainable in respect of prohibited goods (that is, stolen property and articles

whose possession is an offence) (3.39). We recommend a new procedure to obtain before charge evidence of grave offences, either by order for production, subject to appeal, or on warrant. Where an order for production has been disobeyed or there is need for haste or secrecy a warrant to search should be obtainable (3.42–43). Apart from this new procedure, which should be the responsibility of a circuit judge, warrants should continue to be issued by a magistrate (or, in the view of all but one of us, in urgent circumstances by a police superintendent) (3.45). We recommend a new scheme to provide more effective monitoring of their use (3.46). There should also be a statutory scheme for the regulation by judicial authority of surreptitious surveillance using technical devices but to be available only for the investigation of grave offences (3.57–59).

5.7. The *use of arrest* should be restricted to cases where it is necessary to achieve one of the following purposes (the necessity principle): to ascertain the identity of the suspect, to prevent the continuation or repetition of the offence, to protect the suspect or other persons or property, to secure or preserve evidence of the offence, to obtain such evidence from the suspect himself, or to secure the suspect's attendance at court (3.76). These restrictions should be statutorily applied when an arrested suspect arrives at the police station, but, wherever possible, they should be applied by the arresting officer (3.77).

5.8. The present *powers of arrest without warrant* should be placed upon a consistent footing. This should be done by replacing the present definition of an arrestable offence and the miscellaneous statutory powers by a single power of arrest for all imprisonable offences. Three of us take the view that this will not of itself provide a more rational basis than exists at present and that it will lead to an increase in the use of arrest; they think that arrest should in general be available, as now, only for offences carrying a maximum penalty of at least five years imprisonment (3.82). The majority considers that the wider availability of the power of arrest is unlikely to lead to an increase in the use of arrest; rather the restrictions to be placed upon it will have the overriding effect. Further they believe that there is good reason for bringing the power of arrest without warrant broadly into line with that on warrant (3.83). They also recommend that, if someone who is seen by a constable actually committing an offence for which a power of arrest without warrant is not available positively refuses to give his name and address, the constable should have a power to arrest him for that offence (3.86). Two of us are opposed to the extension of the power of arrest, even in these restricted circumstances, to offences which cannot carry a prison sentence (3.86).

5.9. *Detention following arrest* should be restricted in accordance with the necessity principle. There should be safeguards on detention to achieve this and to ensure the care of the detained suspect and protection of his rights. We recommend that an officer should be designated as having responsibility for all aspects of the suspect's treatment while in custody (3.112). The suspect should be informed orally and in writing of his rights on arrival at the police station (4.77). All events relating to his detention should be recorded on a custody sheet, which should be uniform throughout the country (3.113). The criteria for detention should be reviewed and recorded on the suspect's arrival at the

station. After six hours an officer of inspector rank or above should satisfy himself whether the criteria are still met. If he considers there are grounds for continued detention these must be recorded. With one exception suspects must be released (whether on bail or not) or charged within 24 hours and brought before a court either that or the next day (3.104). The exception is where a person suspected of a grave offence has not been charged within 24 hours. We recommend a new scheme to provide an external check upon cases of such prolonged detention. Within 24 hours such a suspect should be brought before a magistrates' court sitting in private which should have discretion to authorise a further limited period in custody or order release (with or without bail). When a magistrates' court is unavailable within the 24 hour period, there should be a mandatory visit by an independent person (we propose that this should be a solicitor) but the suspect should still be brought before the next available court (3.106–107).

5.10. We recommend that the common law *power to search a person on arrest* should be placed on a statutory footing (3.115). Anything other than a superficial search of the person should await arrival at the police station. The current practice of searching a person at the police station and of taking and recording his property should be given a statutory basis. This should not be carried out routinely in respect of every suspect (3.116–117). The criterion for *search of premises* should be suspicion on reasonable grounds that on the premises occupied by the arrested person or under his control there are articles material to the offence for which the person has been arrested or to a similar offence. Such search should not, in the view of all but one of us, require a magistrate's warrant, but should require written and reasoned authorisation of a senior police officer before it is carried out, even where the arrested person has consented to the search (3.121).

5.11. *Taking of fingerprints* should not be a matter of routine, and where taken with the suspect's consent, this should be in writing. Compulsory fingerprinting, which should be possible before charge for investigative purposes, should be permitted, but only subject to the following safeguards. The compulsory taking of fingerprints should be specifically justified. Fingerprints, whether taken compulsorily or by consent, should be destroyed if there are no proceedings or if the accused is acquitted, and there should be a right to witness destruction (3.129–131). The same procedures should apply for juveniles as for adults, with the additional requirement of the consent of the parent or guardian for voluntary fingerprinting. A majority of us considers that the power to take fingerprints under order should be extended to the 10–13 age group (3.132). The taking of intimate *body samples* should be possible only with the consent of the person concerned; relatively more superficial intrusions on the person should be permitted without the suspect's consent, but only on specific written and reasoned authority, which, as with fingerprinting, should (in the view of all but one of us) be given by a senior police officer. Such samples should, where appropriate, be taken by a medical practitioner (3.137).

5.12. In chapter 4 we considered the means of regulating the questioning of suspects, of protecting their rights and of ensuring that the court receives as

accurate a record of any interview as is possible. These matters are currently governed by the Judges' Rules and Administrative Directions to the Police. We recommend that all aspects of the treatment of a suspect in custody, including the conduct of interviews, should be regulated by statute, which should bring up to date and extend the scope of the current provisions (4.115).

5.13. There should be no duty on a suspect to answer questions. The majority of us thinks that there should be no modification to the *right of silence* (4.53). The suspect should be informed accordingly, as soon as there are reasonable grounds for suspecting him of an offence. In practice this will be the point of arrest. The present caution in the Judges' Rules should be simplified and clarified to this effect (4.56–57). A minority of us takes the view that it is proper for a suspect to be expected to respond to reasonable police questions and that accordingly the caution should not be so worded as to deter him from answering or to preclude the use of his failure to answer as part of the case against him (4.51 and 4.57). The majority of us considers that such a provision would be contrary to the very nature of the accusatorial system of criminal procedure and would put the innocent suspect at greater risk of inadvertently incriminating himself (4.52). We with one exception recommend no modification of the present law about an accused person's not giving evidence at trial (4.66), and all but one of us favour the abolition of his right to make an unsworn statement (4.67).

5.14. Practice in *recording the product of police questioning* varies and could be improved. Steps should be taken to identify best practice and ensure its adoption in all forces and to improve the note taking skills of officers (4.15). We recommend a new procedure, where a written statement is not made at the conclusion of a police interview; the interviewing officer should in the presence of the suspect make a note of the main relevant points, read them over to him and invite him to comment if he wishes (4.13). Although our research as well as foreign experience shows that *tape recording* cannot be used to monitor all exchanges between the police and suspects, we are convinced of its value and practicability. We recommend its gradual introduction, to be used in indictable cases for the making and reading back of the summary of interview or of a written statement (4.25–30).

5.15. We rule out proposals for *an independent third party* (whether a magistrate, solicitor or other person) to be present to monitor the conduct of interviews and approve the record of the product of questioning (4.62, 4.99–100). We wish, however, to make *the right of access to legal advice*, stated as a principle in the present Judges' Rules, an effective right (4.87). It should be made effective by the development of duty solicitor schemes and the provision of adequate remuneration to solicitors (4.97–98). It should be unrestricted for all suspects with one very limited exception. Where a person is suspected of a grave offence and there is reason to believe that access to a solicitor may cause delay resulting in risk to life or property, or give rise to interference with evidence or witnesses, the disposal of the proceeds of crime or the escape of accomplices, the police may withhold access. This should require the authority of a sub-divisional commander, and specific grounds for withholding access should be recorded (4.90–91). Even in these cases the

suspect must be brought before a court or have a mandatory visit from a solicitor within 24 hours (3.107).

5.16. Additionally all suspects should continue to have the right to have someone *notified of their arrest.* They should be informed of that right on their arrival at the police station. Notification would be capable of being refused in all cases (or, in the view of one of us, those involving grave offences), but only on the same grounds as for the withholding of access to legal advice. The grounds for refusal, which should be on the authority of the station officer, should be recorded (4.80).

5.17. The provisions for allowing access to legal advice and for the notification of a person's arrest should apply equally to *juveniles and to other special groups* (such as the mentally handicapped). Additionally juveniles and the mentally handicapped should be interviewed only in the presence of another adult, who should be a parent, guardian or somebody else known to them if possible. That right should not be capable of being waived or withheld, except where waiting for the arrival of the adult would be likely to risk damage to property or harm to persons. A decision to proceed with an interview in these circumstances should be taken only by a sub-divisional commander (4.102–107).

5.18. All the foregoing provisions should be included in the statute regulating the treatment of suspects in custody (4.115). This should additionally incorporate *a code of practice for the regulation of interviews,* designed to protect the suspect from oppressive questioning and to ensure, to the extent possible, the reliability of any statements made (4.109–114). All but one of us recommend that in general breaches of the code should not render any subsequent statement inadmissible as evidence, but should be relevant to the assessment by the court of its reliability (4.131). To mark the seriousness of breaches of the rules prohibiting violence, threats of violence, torture or inhuman or degrading treatment, these should result in automatic exclusion of subsequent statements (4.132). One of us takes the view that there should also be automatic exclusion of involuntary statements and that any other breach of the rules in the code should afford grounds for consideration of the exercise of judicial discretion to exclude evidence so obtained (4.131). A minority of us considers that breaches of the code in respect of the treatment of juveniles and other special groups should attract automatic exclusion and one of us would extend this to other breaches (4.134). We consider that the present uncertainty of status and effect of the rules on the treatment of suspects in custody should be removed. The remedies for the breach of these rules and of the provisions relating to the exercise of all the investigative powers of the police should be made more effective. To this end police supervisory arrangements should be improved. The placing of the rules in statutory form will bring their enforcement within the ambit of the police disciplinary code. The fuller record keeping that we recommend should facilitate subsequent review and remedy, for the purposes of disciplinary action, the complaints procedure and civil actions (4.118–122).

PART II

The Prosecution of Offenders

CHAPTER 6

The present arrangements

Their main characteristics

6.1. The present arrangements for the prosecution of criminal offences in England and Wales defy simple and unqualified description. But to enable the reader to understand the discussion that follows we begin this chapter with a brief account of the main characteristics of those arrangements, as they have emerged from the evidence to us, from our visits in this country and from the research we have commissioned.[1]

6.2. First is the right to begin criminal proceedings that belongs to everyone, whether as an individual or acting in groups, and whether in a private or public capacity. Of course there are some limitations on this right but in principle it is available to all. As a consequence there is not, as in most other countries, one or a very limited number of prosecutors acting in the public interest, but a great variety of them. Even the private citizen can prosecute in the public interest.

6.3. Second is the fact that the police bring the great majority of prosecutions and do so on the same basis as anyone else. Although there is a variety of checks upon them, their centrality in the process has, for over a hundred years, been integral to it. It is a position which they see as of great importance in their duties as a whole, but it is one that, exactly in this form, is peculiar to England and Wales.

6.4. Thirdly the system of police prosecutions is essentially local. Apart from the role of the Director of Public Prosecutions (which is comparatively limited in the number of cases that come his way though they are usually significant in substance), arrangements for police prosecutions are, by and large, at the discretion of and under the control of the local chief constable and the police authority for each of the 43 separate police force areas.

6.5. Fourth is the lack of pattern in the system. It is not a system in the sense of being uniformly organised and administered in each of these areas and it does not rest on a single legislative foundation. The majority of forces have prosecuting solicitors' departments, that is solicitors in the local authority service who act on behalf of the police in advising on prosecution decisions and

[1] A full description of the present arrangements is to be found at chapter 5 of the *Law and Procedure Volume* and of various particular aspects of them in the Royal Commission's Research Studies 10, 11 and 12.

presenting cases in court on which the police have decided to proceed. But a significant minority do not, and instead use local firms of private solicitors to advise and act for them. Even among the majority there is little pattern in the structure, administration and function of the prosecuting solicitors' departments. Only one feature is common. The relationship between the chief constable and his prosecuting solicitor is one of client and solicitor. The solicitor acts upon the instructions of the police; the solicitor may advise, but the chief constable is not bound by that advice.

6.6. So, the arrangements are characterised by their variety, their haphazardness, their local nature and, at least so far as the police are concerned, by the unitary nature of the investigative and prosecutorial functions, with primacy of responsibility for the decisions on prosecution being vested in the police and not in the legal profession. The present arrangements have grown gradually and piecemeal, adapting themselves to changing conditions, over the 150 years since an organised modern police service was first created. Since the late 1870s there has been no major legislative attempt to alter them and until recently little manifestation of public concern about them. It might be concluded, therefore, that by and large the arrangements work and have worked satisfactorily; the functions they are supposed to fulfil are fulfilled, as nearly as is possible with any man-made and administered procedures.

The basis for analysing the present arrangements

6.7. But the last paragraph begs a central question. How is the satisfactory working of a prosecution system to be judged? Very few of our witnesses have offered any explicitly formulated answers to this question. In most submissions the answers had to be inferred from the comments on the existing arrangements and the proposals made. But we think it desirable and necessary to make explicit from the beginning of the discussion our position on what the standards for judging the adequacy of a prosecution system should be.

6.8. We shall weigh the present arrangements,[1] the proposals put to us for change and our own recommended system on the broad standards of fairness, openness and accountability, and efficiency (that is we shall be using a similar descriptive and evaluative framework to that which we employed in considering procedures for the investigation of offences but using the standard of efficiency rather than of workability, since it is more appropriate to evaluating the operation of a system). We shall be discussing these terms fully later in this chapter. For the present a brief and less than precise elaboration is sufficient to indicate what we have in mind. Is the system fair; first in the sense that it brings to trial only those against whom there is an adequate and properly prepared case and who it is in the public interest should be prosecuted (that is, tried by a court) rather than dealt with in another way (by cautioning, for example), and secondly in that it does not display arbitrary and inexplicable differences in the way that individual cases or classes of case are treated locally or nationally? Is it open and accountable in the sense that those who make the decisions to prosecute or not can be called publicly to explain and justify their

[1]Our discussion will for the moment focus upon the prosecution activity of the civil police, that is the police forces maintained by local authorities and grant aided by the Home Office under the Police Act 1964.

policies and actions as far as that is consistent with protecting the interests of suspects and accused? Is it efficient in the sense that it achieves the objectives that are set for it with the minimum use of resources and the minimum delay? Each of these standards makes its own contribution to what we see as being the single overriding test of a successful system. Is it of a kind to have and does it in fact have the confidence of the public it serves?

Fairness: the theoretical considerations

6.9. No one has suggested to us that any prosecution system can entirely avoid the prosecution of people who have not in fact committed the offence charged. The investigator and prosecutor can be misled by witnesses or even the accused person himself. Nor, for the reasons that are discussed in the following paragraphs, can a prosecution system bring all those who are in fact guilty before the courts. The proper objective of a fair prosecution system is not therefore simply to prosecute the guilty and avoid prosecuting the innocent. It is rather to ensure that prosecutions are initiated only in those cases in which there is adequate evidence and where prosecution is justified in the public interest. This requires a high standard of competence, impartiality and integrity in those who operate the system. The guilty should not escape prosecution nor the innocent be prosecuted because those who make the decisions or collect the necessary evidence upon which the decisions can be made are inefficient or are motivated by sectional political, social or economic interests, or are corrupt. That is essential to public confidence in the system.

6.10. Our witnesses have not offered us an altogether clear cut view on the standards to judge whether prosecutions are based on adequate evidence. There is general agreement that there should at the least be a *prima facie* case, that is, as we understand the term, enough admissible evidence to prove all the necessary elements of the offence and evidence that does not appear to be so manifestly unreliable that no reasonable tribunal could safely convict upon it. One view is that if there is a *prima facie* case in this sense, then the matter should go to the courts to decide, because this is the court's function, to be exercised publicly, and not that of an official, to be exercised in the privacy of his office. But a number of our witnesses who have active experience in making prosecution decisions have pointed to the serious effects it would have upon the courts in trying cases which did not have a higher prospect of success than the *prima facie* test provides. Additionally, it may be seen as unfair to an accused against whom there is a *prima facie* case to prosecute him when there is no reasonable prospect of his conviction. The prosecutor must, on this view, consider the cogency of the evidence that he has to present in terms of whether a court is likely to believe it and, in turn, to convict the accused upon it. And he ought, if he can, to make some assessment of the likely strength of the defence case.

6.11. As to the element of public interest, our witnesses are in broad agreement that it is not necessary or desirable for all offences to be prosecuted. But, not surprisingly, there are differing opinions on when not to prosecute. The issues are far from clear cut in relation to individual cases, to classes of case and to the considerations that ought properly to be placed in the balance. What relative weight, for example, should be placed upon vindicating the law

in the eyes of the victim of an offence and upon taking account of compassionate reasons for not prosecuting the offender? If it is right that shoplifters of a certain type should not be prosecuted for a first offence, should it be considerations of age or sex or physical and mental condition that apply? And exactly what should they be? In addition to the considerations that relate to the individual case or class of case, should the burden of business upon the courts and the potential cost of a protracted case be a policy ground for not proceeding with a trivial breach of the law? No firm answers to these questions come from our witnesses. But certainly the ability of any prosecution system to take account of these considerations of humanity and of other elements of public interest is a hallmark of its fairness, provided that such criteria are applied consistently.

6.12. One important element in public confidence in the fairness of prosecution arrangements is the consistency with which criteria for prosecutions are applied throughout the country. A few of our witnesses have been prepared to argue as a point of principle that there should be absolute national policies allowing of no variation to take account of local circumstances. Against this it has been strongly put to us, particularly by the police, that this is not a realistic view. The criminal law does not operate in a social vacuum. Law enforcement has to react to the constraints and pressures of the environment in which it is applied. There must be some measure of flexibility allowed in the application of any national guidelines on prosecution policy. What the system needs to provide are safeguards against the response to local circumstances being arbitrary and without justification and explanation. This raises the question of accountability to which we shall be turning later. For the moment we observe that the need for and desirability of having flexibility in the system are not inconsistent with the possibility of being able to lay down some general policy guidelines or with being able to detect arbitrary application of them.

6.13. The system must also minimise arbitrary differences between decisions locally, that is inconsistency in decision making. Clearly complete consistency is unattainable. But there are ways, including good staff selection and training and supervision, of reducing differences of this kind, and we shall touch upon this in the context of the discussion of efficiency in the present arrangements.

Fairness in the present arrangements

6.14. To what extent do present arrangements meet the standards of fairness that we have set in the preceding paragraphs? There are a number of difficulties in making this assessment. First, decisions not to prosecute are probably as numerous as decisions to prosecute. But they are decisions to take no action, and are, therefore, of their very nature less likely to attract criticism if they are wrong than decisions to take action. The latter will in due course involve a variety of people with widely different interests who are the more likely to be vocal in their criticism of a wrong decision. Either as a consequence of this or because decisions are on the whole right, we have found no general criticism of the present arrangements on the ground that people are not prosecuted who ought to be. Secondly the decision to prosecute is not only often nicely balanced but also it is taken before trial and upon the basis of the prosecutor's experience and judgment. Circumstances can change after the

initial decision has been taken. Witnesses fail for a variety of reasons to appear at trial, do not "come up to proof" or make a poor showing under cross-examination. These are factors the prosecutor cannot necessarily anticipate and he is, in any event, trying to put himself into the place of the court which will be hearing both sides of the case. Accordingly the standard of the extent to which the system avoids prosecuting on unsatisfactory or inadequate evidence has to be used with some circumspection. Not all acquittals either by the magistrates or jury, or by order or direction of the judge, necessarily represent "bad" initial decisions to prosecute.

6.15. Keeping in mind the provisos mentioned in the previous paragraph, we turn to an assessment of the present arrangements on the standard of fairness. We take this under two heads: whether the "right" people are brought to trial and whether there are arbitrary variations of prosecution policy and practice up and down the country.

6.16. Because of the standard and burden of proof in a criminal trial the fact that a prosecution does not result in conviction does not necessarily imply that it should not have been brought. It follows that an examination of acquittal statistics is not a sure guide to determining how well cases are being selected for trial. In any case a significant acquittal rate is not necessarily a sign of an unhealthy system. There would be a question mark over a system in which everyone who was placed on trial was convicted. Nonetheless a study of acquittal rates does give some assistance in this, even though the detailed figures that we have relate to Crown Court trials (only a minority of all criminal trials) and to samples that may not be representative of the country as a whole. Taken in conjunction with other evidence and argument on these matters, however, we believe that a fair measure of confidence may be placed upon the conclusions that we draw.

The evidence of the acquittal statistics

6.17. Acquittal statistics have to be interpreted with caution, because of the different definitions of "acquittal" that are used and bases on which calculations are made. However, figures for 1978 indicate that 47 per cent of defendants pleading not guilty in the Crown Court and 50 per cent in the magistrates' courts were acquitted.[1]

6.18. Many people indicted before the Crown Court may be acquitted without having their cases reach the jury. The prosecution may offer no evidence and the trial judge may then order an acquittal, or the judge, having heard the prosecution case and considering that there is insufficient evidence to leave the case to the jury, may direct the jury to acquit. In 1978, 19 per cent of all acquittals in the Crown Court were ordered by the judge and in a further 24 per cent the judge directed the jury to acquit.[2] Thus a relatively high proportion of cases resulting in acquittal heard in the Crown Court (43 per cent) fail because the prosecution is unable to adduce sufficient evidence even to make a *prima facie* case. How and why does this happen?

[1] *Criminal Statistics England and Wales 1978, op. cit.*, Table 4.9 on p 87 and *Judicial Statistics England and Wales 1978*, London HMSO Cmnd 7627, Table B.7(b) at p 31.
[2] *Judicial Statistics 1978, op. cit.*, Table B.7 (d) at p 32.

6.19. Three recent enquiries shed some light on these questions. As part of a wider study of cases acquitted in the Crown Court, Baldwin and McConville have examined 88 cases involving 116 defendants tried at the Birmingham Crown Court during 1975 and 1976 in which the accused was acquitted by order or direction of the judge.[1] A smaller scale study, conducted by the Prosecuting Solicitor's Department of Greater Manchester studied 40 cases committed for trial at the Crown Court over a three month period in 1978 where no evidence was offered by the prosecution, where the judge ordered an acquittal or where the case was left to lie on file. The third study, undertaken by the Association of Chief Police Officers and published in Part III of its evidence to us, surveys acquittals in the Crown Court during 1977, including the reasons behind directed acquittals.

6.20. The study by Baldwin and McConville found, as did the ACPO survey, that the commonest factor for ordered and directed acquittals was the failure of the prosecution to offer sufficient evidence. They attribute this (in about a third of the cases in their sample) to the absence of key prosecution witnesses or their failure to give evidence in a satisfactory manner. It is clear that in many such cases the failure of the case in court is not within the prosecution's control. However they conclude that there was a residue of cases (about a fifth) where an acquittal ought to have been predicted in advance of trial.

6.21. This picture is repeated in the Manchester survey. In a little over half of the cases the withdrawal or collapse of the prosecution's case could not have been foreseen when the case was committed for trial. But there were, in addition, 14 cases (out of the 40) where the survey raised doubts about the strength of the evidence and, on occasions, the desirability of instituting proceedings; in eight of these the prosecuting solicitor responsible for the survey had felt that proceedings should not have been instituted.

6.22. These figures suggest that there is a proportion (on the basis of the Birmingham and Manchester samples, about one fifth) of ordered and directed acquittals where there is doubt whether the evidence was sufficient to justify the decision to prosecute at the time when that decision was made. But these figures need to be put in context. Ordered and directed acquittals occur in about 7 per cent of all cases (including guilty pleas) heard in the Crown Court. As a proportion of all court hearings for indictable offences they are even lower. In 1978, out of a total of about 470,000 defendants proceeded against, about 70,000 (approximately 15 per cent) had their cases heard at the Crown Court.[2]

Separation of the investigator's and the lawyer's roles

6.23. The analysis of the acquittal statistics in the preceding paragraphs provides one base for looking critically at the current arrangements for police prosecutions. The empirical evidence that the acquittal statistics provide gains support from some people with wide experience of prosecution work who have

[1]We are grateful to Drs Baldwin and McConville for agreeing to allow us to refer to their findings, which are as yet unpublished.
[2]*Criminal Statistics 1978, op. cit.*, Tables 4.1 and 4.5 at pp 75 and 80.

cited to us instances where evidentially weak cases have been continued by the officer in charge of the case despite and sometimes in the face of contrary advice from the lawyer who has conduct of the prosecution. It has also been put to us that indictments are sometimes overloaded, that is that more charges than necessary are included on the indictment, thus creating extra work for the court without affecting the sentence. The implication is that the investigator's and the lawyer's functions in the prosecution process should be made separate and distinct.

6.24. This approach is also supported by another line of reasoning. Although there is no evidence that the police act other than impartially it is said to be unsatisfactory that the person responsible for the decision to prosecute should be the person who has carried out or been concerned in the investigation. A police officer who carries out an investigation, inevitably and properly, forms a view as to the guilt of the suspect. Having done so, without any kind of improper motive, he may be inclined to shut his mind to other evidence telling against the guilt of the suspect or to overestimate the strength of the evidence he has assembled. The police are not required to seek legal advice or, if they are given it, to accept it before deciding to prosecute, except in those limited number of cases which are the province of the Director of Public Prosecutions. There is a close supervision over police decisions to prosecute but these are within the organisation and by no means all forces have prosecuting solicitors' departments, or if they have them, consult them on prosecution decisions.[1]

The effect of the availability of legal advice

6.25. However the availability (or indeed the provision) of legal advice does not necessarily mean that evidentially "poor" cases will not be prosecuted. The acquittal statistics we have discussed relate entirely to the Crown Court where a lawyer must conduct the prosecution. As we have already illustrated cases can collapse at trial for reasons which could not possibly have been foreseen or forestalled by the provision of earlier legal advice. The survey of acquittals at the Crown Court in 1977 of cases prosecuted by provincial police forces, which was undertaken on behalf of the Association of Chief Police Officers and submitted in Part III of their evidence, suggests that in the great majority of cases (about three quarters) the police had sought legal advice either on the number and level of counts or on the sufficiency of evidence. Where the acquittals were on the direction of the judge either because no or insufficient evidence was offered, legal advice had been sought in over 80 per cent of cases. The Association's survey does not indicate at what point in the proceedings advice had been sought but it does say that advice was not acted upon in only a third of one per cent of cases.

6.26 There is no comparable statistical information about the Metropolitan Police. But the Commissioner's stated policy was made clear both in his written and oral evidence to us. The assistance of the Metropolitan Police Solicitor is to be sought for the prosecution of all serious and evidentially complex cases. All police witnesses to us were unanimous in claiming that only

[1]See Mollie Weatheritt: *The Prosecution System: Survey of Prosecuting Solicitors' Departments* (Royal Commission on Criminal Procedure Research Study No 11, London HMSO 1980).

in exceptional circumstances would they not accept legal advice if it were given.

6.27. To some extent the evidence from police sources on this point is at odds with evidence we received from other sources, notably that of the Prosecuting Solicitors' Society, and with the analysis of the acquittal statistics in paragraphs 6.17.–6.22. It may be that the timing of the advice (often when proceedings are well advanced) and the status of the adviser (the client/solicitor relationship) are such as to minimise its effect in preventing evidentially weak cases coming before the courts. But even that diagnosis needs to be treated with some caution. Cases that have been handled from an early point by the Director of Public Prosecutions are among those which some have criticised as displaying bad judgment in the decision to prosecute.

The theoretical case for separation: the example of other jurisdictions

6.28. Accordingly experience in this country does not show for certain that the application of a legal mind necessarily improves the fairness of decisions to prosecute. However the case for separation is also argued on the ground that the investigator, by virtue of his function, is incapable of making a dispassionate decision on prosecution. The different prosecution arrangements in other common law jurisdictions have been cited to us in support of this proposition.

6.29. It may perhaps be true that the investigator is psychologically committed to a belief in the guilt of the suspect and is therefore incapable of making a dispassionate decision on whether or not to prosecute. His decision to proceed may be influenced by factors which can never be put in evidence (perhaps information from an informer). But we have not been made aware of any systematic empirical evidence that supports it in relation to investigators as a group. It may be equally true that lawyers who spend their professional lives working in a prosecution agency become just as committed to securing convictions as police officers are said to do. Indeed in our visits to other jurisdictions we have observed and been told of instances where this may have been so.

The practicability of separation: experience in other countries

6.30. We have examined a number of other common law jurisdictions having prosecution arrangements in which the prosecutor and the investigator are separate officials. Our conclusion is that, as a matter of practice, it is difficult to achieve a total separation. The two roles overlap and intertwine. This is partly because the decision to prosecute is not a single intellectual act of a single person at an identifiable moment in the pre-trial process but it is made up of a series of decisions of a widely different kind made by many people and at various stages in the process.

6.31. We know of no common law jurisdiction in which the first decision maker, the officer on the street, has his discretion to start the process of prosecution circumscribed other than by his training and the constraints of the law. It would be impossible and, indeed, in our view, undesirable for this discretion to be further limited. Thus the pure theory of separation could not work in practice.

6.32. In the United States of America and in Scotland the prosecution systems are such that the police do not bring offenders before the courts in the first instance. It is for an independent legal official, the District or Prosecuting Attorney in the United States and the Procurator Fiscal in Scotland, to decide whether or not to prosecute, having regard to all the circumstances of the case both evidentiary and in relation to the public interest. It is he who first approaches the court. The independence of the lawyer from the police is clearly marked. The investigative functions of the police and the prosecutorial functions of the lawyer appear to have been separated. But what the effect of this is on the quality of prosecution decisions we could not discern. Comparisons are impossible because of the differences between systems both in practice and in statistical material kept and available. A closer examination suggested to us, however, that in practice the complete separation of functions cannot be readily or completely achieved.

The United States District Attorney

6.33. The District Attorney of the County of San Diego in California, an office which we were able to study in some detail, has a large investigative staff under his direct control which he uses to investigate certain sorts of crime. This is not untypical. The District Attorney's Office had, in 1979, a staff of about 130 attorneys and 60 investigators. These are sworn peace officers, with powers similar to those of the civil police. They investigate cases under the direction of the District Attorney in two ways. First they are used as back-up investigators to improve the quality of a case which has been presented to him by the police and which he wishes to prosecute. Their second major function is as initiatory investigators. The District Attorney has established specialist squads on his own staff, which investigate major white collar crime, organised crime, corruption by public officials, including the police, and major fraud. The District Attorney saw the police as being responsible for the maintenance of law and order on the streets and for dealing with street crime; whereas his own involvement in the investigative field is with the more specialised sorts of crime and those which are more difficult to investigate and solve. He plays therefore a key role in the investigation of crime and the enforcement of the law in his jurisdiction. And yet he saw investigation and prosecution as distinct and different functions and did not consider that his responsibilities for active investigation interfered with the proper discharge of his duty to prosecute fairly and dispassionately.

6.34. We do not wish to draw too firm conclusions from a jurisdiction that is in so many other respects very different from that in England and Wales. (Our understanding is, however, that it is not markedly different from many others in the USA.) But we think it suggests two possible, though not inevitable, consequences of attempting to split the prosecutorial and investigative functions. The first is that police skills in assembling evidence, particularly in complicated cases, may thereby be adversely affected; secondly, and perhaps partly as a consequence of that, the prosecutor may be compelled to take on some part of the investigative function. Certainly the United States experience, as we observed it, indicates that the threads of investigation and prosecution are often difficult to disentangle.

The Scottish Procurator Fiscal

6.35. Paradoxically the arrangements for prosecution in Scotland underline this point. We say paradoxically because it is the model of the procurator fiscal that has been most often urged upon us as that of the ideal independent public prosecutor, who stands remote from the distracting pressures that involvement in the investigative process entails. And yet the fiscal has responsibility under the common law for the investigation of crime and may under the statute law instruct the chief constable to investigate offences. The police report murders to the fiscal and the duty fiscal attends the scene; it is recommended practice for the fiscal to be present at the post mortem. At the scene of the crime the fiscal may give instructions about the collection of evidence. It is, however, only in cases of violent death that the fiscal becomes involved in the primary investigation. In other serious or complicated crime he will be brought in prior to charge only at the discretion of the police. After charge and the referral of the case to him, he may ask the police to make further enquiries. There is also some element of investigation in the enquiries which the fiscal himself undertakes in the most serious cases (generally, those to be tried by a jury, which constitute only a small proportion of cases). He sees and takes statements from all the witnesses whom the police have seen, including from the police themselves but not from the accused, and from any others who his investigation suggests should be seen. It is on this "precognition" of witnesses that the Crown's decision to prosecute in the most serious cases is based. In these cases there is some measure of duplication of investigative activity between the police and the fiscal. This is justified on the grounds that the fiscal must satisfy himself that there is a case for prosecution by seeing the witnesses and making his own judgment on their credibility and reliability.

6.36. In the large majority of minor and indeed quite serious cases, however, the fiscal plays no part at all in the investigation. He merely approves the case for proceeding on the basis of the paper evidence that the police put to him. Our impression from our visit to a number of fiscals' offices in Scotland was that this is a formal and routine task of endorsing a police decision to proceed, an impression which is, we understand, confirmed by research recently done by the Scottish Home and Health Department. This applies particularly in the offices with a very heavy work load. The fiscal is therefore in the generality of cases remote from the physical activity of investigation and dependent entirely upon the investigative skills of the police (although he may be consulted).

6.37. In effect in the Scottish system the police decision to report to the fiscal is the critical one in the bringing of proceedings in the majority of cases. His is an extra door that has to be passed through in getting to the court and in general it is readily opened. Saying that is not to detract in any way from the importance of the fiscal's function or to distort his relationship with the police. The fiscal is responsible for seeing that the "right" cases are prosecuted and that they are in the right shape for prosecution; he cannot be instructed to proceed by the police. But the line between investigator and prosecutor is not quite as sharp as some of those who gave evidence to us suggested.

Chapter 6

The Canadian Crown Counsel

6.38. In Canada we saw the arrangements for the prosecution of offences detected by the police in the provinces of British Columbia and Ontario. In the former it was introduced in this form only five or so years ago. In the latter it has been in existence for over 100 years. In both the police have full responsibility for the investigation of crime and for the initial decision to bring a person to court for trial. They it is who lay the charge in the first instance. They may have consulted Crown Counsel or the Crown Attorney (as the independent prosecutor is called respectively in British Columbia and Ontario) on legal matters before doing this but they are not required to. Once the case is in the court system, the conduct of the prosecution is vested entirely in the Crown Counsel or Attorney. He may amend, extend or drop the charges at any stage and cannot be required to proceed by the police. These arrangements seem to us in many ways best to reflect the reality of the situation: that it is difficult to dissociate the conduct of the investigation from the decision to prosecute; that the majority of decisions to prosecute do not present problems of great legal complexity; that, whatever the arrangements, the critical decisions which bring the potential accused into the system are and have to be police decisions; but that a genuinely independent and legally qualified person is required to conduct the prosecution (that is to deal with the case with full authority once the initial decision to proceed has been taken).

6.39. The prosecution systems that we have been discussing differ from the arrangements in this country in giving greater prominence to the lawyer's role in the series of decisions that are taken in the process of prosecution and in giving to the lawyer the right to stop proceedings at an earlier stage than would be possible here. Whether such systems bring more of the "right" people to trial, the first head under which we have been discussing fairness, is impossible to say. But if they do it is not because they have entirely separated the functions of the investigator and the prosecutor.

Consistency in policy and practice as an element of fairness

6.40. The second main head under which we shall examine fairness in the present arrangements is the extent to which they avoid arbitrary variations of prosecution policy and practice. The clearest indication that there are variations between different police force areas in relation to one aspect of prosecution policy comes from the statistics of persons cautioned by the police for indictable offences.[1] In 1978 the Cheshire, Cleveland, Durham, Greater Manchester, Hertfordshire, City of London and Merseyside forces and the Metropolitan Police cautioned 2 per cent or fewer of adults for indictable offences while Wiltshire cautioned 14 per cent, Devon and Cornwall 15 per cent and Suffolk 22 per cent. The Leicestershire and South Wales forces cautioned 33 per cent and 34 per cent respectively of juveniles for indictable offences in that year, while Dorset and Devon and Cornwall cautioned 67 per cent and 69 per cent respectively.[2] Clearly there are different force policies in this matter. However we have been made aware of no great public concern at

[1] See the *Law and Procedure Volume*, paras 150–154 for a description of the various types of cautioning.
[2] *Ibid.*, Appendix 23, Table 23.4.

present about the variations that these figures reveal. The evidence put to us, in so far as it considers these matters, has focused as much upon variations in law enforcement and investigative policies adopted in different parts of the country and against certain groups in the community. In this context variations in practice have been instanced to us over dealing with pornographic material, with certain kinds of offences committed by homosexuals, and with pickpockets and other types of street offences.

6.41. Undoubtedly some of the variations, particularly in cautioning policy, may to some extent be explicable in terms of the area which the forces are required to police. The large, anonymous metropolitan area with its high floating population and its regular daily courts is a very different environment from the rural shires. Furthermore an outbreak of a particular offence which is normally cautionable in a particular area may well warrant a sterner policy of prosecution for a period. However, whether such wide disparities of general policy are justifiable or not, it is clear that such machinery that exists for diminishing them is of limited scope and effectiveness.

Coordinating machinery

6.42. The very independence of the chief constable militates against conformity. Apart from those prosecutions (a relatively tiny number) which by statute require the consent of the Attorney General or the Director of Public Prosecutions, and apart from those cases that are required to be referred to the Director under the Prosecution of Offences Regulations 1979, to which he brings some measure of uniformity of prosecution practice, the direct impact of central or national bodies upon chief constables' prosecution policies is very limited.

6.43. The Director has told us that it has not been the practice of his Department to offer unsolicited advice on matters of general prosecuting policy.[1] Indeed he does not regard himself as empowered to do so. He and the senior members of his staff do, however, attend from time to time regional conferences of the Association of Chief Police Officers and other conferences of senior officers and discuss general prosecuting policy, and they give lectures to detectives of all ranks up to superintendent at which their policies are explained and advice is given on a variety of matters. All of this, however, is unsystematic and its impact uncertain.

6.44. The role of the Home Office is even more peripheral. The Home Secretary has no authority to direct a chief constable to a particular course of action, and chief constables are under no obligation to justify their decision to him. In the light of this constitutional relationship it is not surprising that the Home Office has issued only a limited amount of advice[2] which touches upon the exercise of the discretion to prosecute and that this advice has largely been confined to procedural matters. The statutory responsibilities of Her Majesty's Inspectors of Constabulary do not extend to offering advice to a chief constable to change his prosecution policy, although an inspector could draw striking variations within his region to the attention of the chief constables in it.

[1]See the *Law and Procedure Volume*, Appendix 26.
[2]Two circulars are cited over the last twenty years.

6.45. The national and regional[1] committees and conferences of the Association of Chief Police Officers provided one other means of fostering uniformity of prosecution policies. But we understand that at national level it is rare for matters of this kind to be discussed, except in the field of traffic offences. At regional level chief constables have reached agreement about when to prosecute for speeding offences and on cautioning for certain other traffic offences. The training conferences that are organised by the Prosecuting Solicitors' Society provide a potential forum for matters relating to general prosecution policy to be aired. But because of the relationship of the prosecuting solicitor to the chief constable and the fact that a number of forces do not have prosecuting solicitors this could scarcely be a telling force for uniformity.

6.46. It is clear that effective machinery for achieving conformity in prosecution policies is lacking. And there are greater variations in policy in certain respects than we believe to be desirable. On this aspect of the standard of fairness the present arrangements could be improved. The experience of other jurisdictions is more difficult to use in this context because they differ from this country in organisation, in size, in relationship with the police and other agencies and in the amount of criminal cases to be dealt with. Nonetheless we noted that in British Columbia the Ministry of the Attorney General and in California the California District Attorney's Association have produced manuals for the use of prosecutors which give both general and specific guidance upon prosecution policy and are intended to produce conformity of practice.

6.47. However conformity of practice is not the main focus of public concern nor are the potential remedies for the lack of it to be justified solely or indeed primarily upon the ground that they would improve such conformity and thereby enhance the fairness of the system. The potential remedies would be either to strengthen one or more of the instruments of central Government control discussed in the preceding paragraphs or to create a national prosecution service. We shall be discussing these possibilities in the next chapter, but their justification, so their advocates claim, is to be found in improved openness and accountability and in greater efficiency as much as in their ability to enhance the fairness of the system.

Openness and accountability: the theoretical considerations

6.48. Openness is the second standard we have set for evaluating a prosecution system. We have defined that term, briefly, as the extent to which the system makes it possible for those who take prosecution decisions to be called publicly to explain and justify their policies and actions. This is often called "accountability".

6.49. The accountability of the police has recently again become a matter of live controversy. But that is in the wider context of all the operational activities of the police in the maintenance of law and order. The exercise of the discretion to prosecute is a limited, though important, part of general police activity. We recognise that in discussing accountability in this limited area and, as we shall be doing, in making recommendations for altering present

[1]For the purposes of certain police matters England and Wales is divided into eight regions.

arrangements in order to enhance the openness of the system we shall be venturing into the wider field. That is inevitable. But it is not a reason for avoiding these issues.

6.50. We find it helpful to contrast two different styles of accountability, using terms suggested by Marshall in his essay *Police Accountability Revisited* in *Policy and Politics*.[1] The familiar type of ministerial and political responsibility he calls the "subordinate and obedient" mode. In this "the supervisor's responsibility is typically accompanied by administrative control and the ability to direct and veto". In contrast, there is a style of accountability which he calls the "explanatory and cooperative" mode. The characteristics of this are that it gives no power to bind or reverse executive decisions but provides "an avenue for challenge, for the requiring of reasoned explanation and for advice and recommendation". In the discussion that follows the person who is held accountable is referred to, where necessary, as the prosecutor; that is the person who is the chief officer or head of the agency which conducts prosecutions and in which decisions to prosecute are taken.

For what should the prosecutor be accountable?

6.51. The prosecutor should, we suggest, be accountable for the efficient operation of his agency and for his effectiveness as a prosecutor. We shall be discussing efficiency as a standard in detail later. In terms of effectiveness, the prosecutor might be held to be accountable for the general policies towards prosecution upon which he works and for the exercise of his discretion within the framework of those policies in individual cases. We discussed accountability with those who gave oral evidence to us. We found them to be unanimous that the prosecutor should, in principle, be held accountable to some body or other for his general policies, but cautious about the implications of making prosecution policies publicly known, because this would appear to be undermining the authority of Parliament and encouraging the breaking of the law. Accountability for individual decisions is a different matter. There must be accountability within the agency itself, if the head of it is in any way to be responsible for its effectiveness. But accountability outside, as a number of those who gave evidence to us have pointed out, presents serious problems whether or not it occurs after the decision has had its effect. The decision to prosecute or not, of its very nature, can involve the interests and reputations of witnesses, of the victim and of the accused or suspect. Publicly calling into question a decision not to prosecute could amount to a trial of the suspect without the safeguards which criminal proceedings are designed to provide. Similarly, questioning the original decision to prosecute when a person has been acquitted could amount to a retrial.

To whom should the prosecutor be accountable?

6.52. The person or body to whom the prosecutor should be accountable depends upon the subject of accountability and the nature of the prosecution service that is established. For the efficiency of his organisation the prosecutor should be accountable (in the "subordinate and obedient" mode) to the body

[1]Geoffrey Marshall: *Police Accountability Revisited*, in *Policy and Politics*, ed. D Butler and A H Halsey, London, MacMillan Press Ltd, 1978.

that provides him with his resources. For his policies in general and their application in individual cases the position is more complex.

Accountability to the courts

6.53. The result of the prosecutor's decision to proceed in individual cases comes before the courts. In this sense the prosecutor's discretion is subject to the scrutiny of the courts and to that extent has a degree of accountability to them. A bad individual decision can be called in question, although the court is not always able or willing to assess the propriety of the original decision to bring the case, but general policies to prosecute are less readily reviewable. If the courts have consistently by open criticism or by the level of the penalties awarded on conviction indicated their disapproval of prosecuting certain types of offence or offenders in certain circumstances, the prosecutor may become aware of this. However in view of the number and variety of courts the effect on policies in general cannot be other than arbitrary. But even this measure of accountability does not apply to the decision not to prosecute. In the nature of things it cannot do so in an individual case. And only if the prosecutor adopts a general policy of not prosecuting certain classes of case may the possibility of a court's intervention arise. Even then the policy has to be brought to the court's attention. The discretion not to prosecute, according to Lord Denning in the *Blackburn* case, is reviewable if exercised too generally. He remarked:

> "He [the chief constable] can also make policy decisions and give effect to them, as for instance was often done when prosecutions were not brought for attempted suicide. But there are some policy decisions with which, I think, the courts in a case can, if necessary, interfere."[1]

Lord Denning cited a hypothetical decision not to prosecute for thefts of goods under the value of £100. In such a case the chief constable "would", he said, "be failing in his duty to enforce the law" and could be compelled by the courts to enforce it. The intervention of the court in this way is very rare.

6.54. There is a further measure of accountability to the courts in the present arrangements for funding prosecutions. These rely largely on orders for costs made by the courts either out of central funds (in indictable cases) or against defendants (in summary cases). Although court officers assess the amounts to be paid in each case to the prosecuting lawyers, the supervision afforded by these arrangements is generally more apparent than real, and in any event the courts are not in any position to supervise prosecution departments or to assess their efficiency. The arrangements therefore do not promote accountability for the use of public funds.

Accountability to Parliament and the local community

6.55. We believe there is a strong case in an elective system of democracy, where Parliament is the source of the law which the prosecution system has a part in enforcing, for there to be some channel of explanatory accountability to Parliament for prosecution policies in general. For the reasons that we gave in paragraph 6.51, we do not think decisions in individual cases should be the subject of Parliamentary enquiry, except in the most general terms, indicating

[1] *R v Metropolitan Police Commissioner ex parte Blackburn (No 1)* [1968] 2QB 118.

the Minister's satisfaction or otherwise with the way that discretion has been exercised within the policy guidelines of which Parliament is aware. (This is the Attorney General's current practice.) We also consider that accountability to some authority that is comprised of the representatives of the local community is required. If the prosecutor is to exercise his discretion to prosecute within national policy guidelines in a way that takes account of local conditions (and we believe that he should do), there should continue to be some formal channel of explanatory accountability to a local body to ensure that his discretion is not arbitrarily exercised.

Openness and accountability in the present arrangements

6.56. Our review of the present arrangements for prosecution accountability suggests that in a number of respects they are unsatisfactory. We stress that in saying this we are not passing judgment on whether the system is efficiently run, whether general prosecution policies are sound or whether individual decisions are generally good. We are merely remarking that the means of checking whether this is so could be improved.

6.57. We see the possibility of improvement in two particular areas. First in "obedient" accountability for efficiency, and secondly in "explanatory" accountability for general policies. In respect of efficiency we consider that the present lack of systematic arrangements for the funding and supervision of prosecuting solicitors' departments does not and cannot produce a properly accountable system. New arrangements need to be devised to remedy this.

6.58. Some machinery for explanatory accountability on general policies exists, but it requires to be strengthened and adapted to become more effective. At a national level the lack of power in the Director of Public Prosecutions to issue general advice on prosecution policy limits his role in securing consistency of practice to those cases for which he is responsible. This means that Parliament is able by questioning the Attorney General to explore the Director's and the Attorney's policies only in respect of a very limited number and range of cases. We note that the Lord Advocate's responsibility for the procurator fiscal service in Scotland gives the possibility for Parliament to enquire both into general policies and particular decisions. However such enquiries in public do not seem to be regular or frequent and replies on specific cases are normally couched in general terms.

6.59. At the local level few police authorities established under the Police Act 1964, so far as we are aware, interest themselves in the chief constable's exercise of his prosecutorial discretion. This is, perhaps, partly to be explained by the doubts that exist, and over which there is currently much debate, about the extent of the accountability of the chief constable to the police authority for the general policing of the force area. Nonetheless the machinery is there. We take the view that it can be used and that it should be made patently clear that the prosecutor is accountable in the "explanatory and cooperative" mode to his local supervisory authority for the way in which he is exercising his discretion to prosecute in general and in a particular case, on the same lines as the Attorney General now is to Parliament.

6.60. One final point needs to be made on accountability. We have already remarked in our discussion of the discretion to prosecute upon the importance

of the initial decision that is taken by the police officer on the street or by the officer who first receives a report of a supposed offence from a member of the public. That officer's discretion, although it is not entirely unfettered, controls the input to the prosecution system. Accordingly the chief constable's policies on the disposition of his officers in an area and the priorities of their investigative activity can critically affect what offences are or are not prosecuted in that area. Any machinery of accountability at national and more particularly at local level has to recognise this interdependence of the investigator and the prosecutor, and, at the same time, take account of the implications of any requirement for the application of an independent legal mind to the conduct of the prosecution.

Efficiency: the theoretical considerations

6.61. The third standard for assessing a prosecution system is how efficiently it works. Our terms of reference require us to have regard to the efficient and economic use of resources. But it is not that alone that makes us stress the importance of this standard for generating public confidence in the arrangements for prosecuting criminal offences. Delays in preparing cases for trial with consequent court adjournments, inadequately prepared cases leading to their early collapse, and the employment of professionals upon tasks for which they are not trained are just a few examples of how resources can be and, as we know from our evidence, are wasted in the prosecution system. And this inefficient use of resources can also produce equally undesirable consequences: injustice to the accused, inconvenience to witnesses and frustration to those employed in the system.

6.62. Efficiency then is essential. But the concept is notoriously difficult to use in relation to the criminal justice system. This is because objectives are hard to define in precise terms and for this reason it is difficult to measure whether they have been achieved. These difficulties are compounded by lack of information on the amount of resources being devoted to the prosecution system; this is partly, but not entirely, to be explained by the problem of distinguishing between and separately costing various uses of police time. Finally, how can the relative value for money of bringing people to trial and convicting them for various sorts of offence be assessed? How is a long (and expensive) contested trial that leads to the conviction for manslaughter of a man who has killed a friend under extreme provocation and is then sentenced very lightly to be compared with a short uncontested trial (and therefore relatively inexpensive) at which an habitual burglar is sent to prison for a substantial period, during which he will not be preying on the community? We recognise these theoretical difficulties but do not think they should be exaggerated. The waste of resources and the undesirable consequences of them to which we referred in the previous paragraph are readily perceived. Any authority or person who has responsibility for supervising a prosecution agency should be able to detect them in his own operations, should want to know what is causing them, and if they are remediable should take steps to correct them. But to be able to detect them a standard of comparison is required. The lack of that is the problem with the present arrangements and one of the factors which must inevitably detract from their efficiency.

Efficiency in the present arrangements

6.63. The absence of pattern in the present arrangements is well documented in the evidence to us and in our research.[1] Not all forces have prosecuting solicitors' departments. In those that do, the status, size and function of the departments differ widely. Some report to the county council, some to the police authority; some control their budgets and staffing, others do not; funding arrangements differ; some prosecute all cases in magistrates' courts, others only a proportion; a few advise the police on the prosecution decision in all cases, others do so rarely. As the Prosecuting Solicitors' Society puts it in Part II of their evidence:

> "There are no national organisational arrangements and in the sense in which the word is generally understood, there is no system. The dissimilarity in arrangements from area to area does not in general result from different needs or conditions but from the different approaches of County Councils and their Chief Executives and from the different personalities of Chief Constables and County Prosecuting Solicitors."

6.64. The Prosecuting Solicitors' Society argues further that: "The present hotch-potch of different arrangements and non-arrangements is harmful to the prosecution process in this country and must detract from the regard in which it is held." In fact the lack of uniformity of arrangements has not of itself attracted criticism from others of our witnesses. Indeed some have commended it as being the most economical way to meet the different circumstances of different areas, for example in relation to the venue and timing of court sittings. But on that point, the research done for us on the organisational implications of changing the prosecution system suggests that there do not appear to be any forces where the establishment of prosecuting solicitors' departments would be impracticable or uneconomic.[2] We see no merit in uniformity just for the sake of neatness. But uniformity of arrangements would make possible the detection of inefficiencies in the system. It would assist in achieving nationally such consistency in the application of general prosecution policies as is thought desirable. It would help to create a career service, even though that may not be a national service, with the potential for attracting and keeping good recruits and thus for enhancing the quality of decision making and prosecution advocacy. Thus uniformity of prosecution arrangements is desirable because, in our view, it would assist the system to measure up to the standards that we have been discussing throughout this chapter and by doing that enhance the public confidence in the system.

6.65. As will be clear from the foregoing analysis of the present arrangements in the light of our evidence and research there is a case for some change. Indeed not a single witness who has addressed this part of our terms of reference in detail has argued that there should be absolutely no change made. The areas of debate are on the direction and extent of change. We turn now to our own proposals.

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[1]Weatheritt, *op. cit.*

[2]David R Kaye: *The Prosecution System: Organisational Implications of Change* (Royal Commission on Criminal Procedure Research Study No 12, London HMSO 1980), chapter 2.

CHAPTER 7

The Commission's proposed prosecution system

The Commission's approach to change

7.1. The analysis in the preceding chapter of the present prosecution arrangements indicates, in our view, that there are certain defects in those arrangements which require attention. However, in seeking to remedy those defects and in so doing to meet the standards for a prosecution system that we have established in our analysis, we must not and cannot ignore the strength, resilience and complexity of the existing arrangements and institutions, which have been for so long developing and adapting to meet the ever increasing and changing demands placed upon them. We have to start from and build on these. Too many people and institutions—the courts, the legal profession, the police and other prosecution agencies—are involved for change to be effected otherwise. Furthermore it is unrealistic to expect that there will not be an increase in public expenditure if change is made. The greater the organisational consequences of change, the greater will be the cost. The likely availability of resources is one of the factors that we have had to take into account.

7.2. In developing our approach we have recognised the changes that have been and still are occurring in the prosecution system since the *Report of the Royal Commission on the Police in 1962*.[1] Following their recommendations, police advocacy in the magistrates' court has declined and prosecuting solicitors' departments have been established in most police forces. These trends are seen by the police and the overwhelming majority of our witnesses as desirable and they form the basis for our own proposals.

Statutory establishment of a prosecution service

7.3. We consider that there should be no further delay in establishing a prosecuting solicitor service to cover every police force.[2] This should, in our view, be structured in such a way as both to recognise the importance of independent legal expertise in the decision to prosecute and to make the conduct of prosecution the responsibility of someone who is both legally qualified and is not identified with the investigative process (we are here concerned with fairness); to rationalise the present variety of organisational and administrative arrangements (in order to improve efficiency); to achieve better accountability locally for the prosecution service while making it subject to certain national controls (fairness and openness are both involved here); and

[1] *Op. cit.*, paras 380–381.
[2] For this part of the discussion this should continue to be taken as a reference to the civil police.

to secure change with the minimum of upheaval and at the lowest cost possible. This is the sense of almost all of the evidence to us on this point. A very few witnesses defend the use of private solicitors as prosecutors for the police, on the grounds that their experience of defence and prosecution work makes them more effective prosecutors and gives them enhanced impartiality and that using them offers greater flexibility of prosecution arrangements particularly in country areas. We have some doubts about the validity of these arguments but our main reason for recommending the phasing out of the private solicitor in favour of an organised service is that the use of the former makes it virtually impossible to achieve some of the important objectives which we believe are desirable; in particular greater conformity of general prosecution policies, enhanced efficiency, and accountability for the efficient use of resources and for the execution of general prosecution policies.

7.4. As we have noted, the Royal Commission on the Police in 1962 made a similar recommendation for the establishment in all forces of prosecuting solicitors' departments to be available to prosecute for the police and to provide legal advice. Implementation of that recommendation has been continual but slow and inconsistent in its results. We believe there were two main reasons for this. First no guidance was given to those who were to implement the recommendation as to the organisation and administration required, and this left the problem of resources as a constant, but not necessarily unreasonable, excuse for inertia. Secondly in the subsequent legislation no power was given to require the responsible authority to establish prosecuting solicitors' departments. As a first step, therefore, we recommend that a statutorily based prosecution service should be set up to cover all police force areas in England and Wales. If the service is to be put upon a statutory footing, it will be necessary to define precisely what the functions of the prosecutor are to be.

The main features of the Commission's proposals

7.5. Before proceeding to consider in detail our main proposals for change and improvement in the arrangements for prosecution we think it will be helpful to summarise their essential features. As will become clear, we are proposing that the arrangements for prosecution should continue to be locally based. The legislation, which we believe will be essential, should set out the functions of the prosecution agency in general terms. These would be:

(a) the conduct of all criminal cases once the initial decision to proceed has been taken by the police;

(b) the provision of legal advice to the police, as and when requested, on matters relating to the prosecution of offences; and

(c) the provision of advocates in the magistrates' courts in all cases where proceedings are commenced by the police (apart from guilty pleas by letter under s. 1 of the Magistrates' Courts Act 1957, which only require someone to read out the statement of facts) and the briefing of counsel in all cases tried on indictment which are not the province of the Director of Public Prosecutions.

7.6. It is a central feature of our proposals that there should be a division of functions between the police and prosecutor as indicated by the first function

mentioned in the preceding paragraph. What do we mean by "responsibility for the conduct of a case"? First let us make it plain what we wish to be achieved. We want to secure that after a clearly defined point during the preparation of a case for trial and during its presentation at trial someone with legal qualifications makes the variety of decisions necessary to ensure that only properly selected, prepared and presented cases come before the court for disposal; and to do that without diminishing the quality of police investigation and preliminary case preparation and without increasing delays.

The relationship between the prosecutor and the police

7.7. In order best to attain this we would leave with the police complete responsibility for investigating offences and for making the initial decision whether to bring the matter before a court (that is, under present procedures, whether to charge or to apply to the court for issue of a summons or warrant of arrest), [1] or to take no proceedings. It also includes the decision whether to caution as an alternative to prosecution, which in our view should continue to be the responsibility of the police. (We discuss the practice of cautioning further in paragraph 7.59.) Once that initial decision has been taken the case is within the jurisdiction of the court. This seems to us to be the clearest point, which, for the purpose of legislation, can be used to mark the division in responsibilities of the police and the prosecutor. After that point the case should become the responsibility of the latter (we discuss further at paragraph 7.17 the extent of that responsibility); he may then on the information before him decide to proceed as charged, or to modify or withdraw the charges.[2] In practice there is, of course, a variety of decisions taken as a case is being prepared for trial and is being tried. Those decisions will be for the prosecutor; and it is in that sense that he will have responsibility for the conduct of the case once the initial decision to proceed has been taken.

7.8. The clear demarcation of responsibility which we propose will make general the existing practice in cases that are handled by the Director of Public Prosecutions and in a number of force areas with well-established prosecuting solicitors' departments. In essence what we are proposing is a system in which the local prosecutor will have similar responsibilities locally to those which the Director of Public Prosecutions now has nationally. The police will retain unimpaired their law enforcement role and the primary responsibility for bringing detected offenders before the courts. Because of this the police will have to develop their cases as well as they can (as they do with Director's cases now), and where they have any doubt or need guidance on points of law or evidence will consult the local prosecutor before they initiate proceedings, as they do the Director. Thus the police will be required to sustain their standards of training and performance in all aspects of their investigative work, including case preparation. The prosecutor will have an independent role in the later stages of the process and an enhanced status because of that. His experience of the courts' view of cases that are improperly brought in terms of the public interest will enable him to act as an additional filter on proceeding with such cases and his role and status in the system will add weight to his advice to the

[1] For the Commission's proposals on these matters see chapter 8.
[2] This is elaborated at para 7.68.

police on these types of case before the initial decision to proceed is taken. The system is, therefore, one which depends upon cooperation, with checks and balances operating within a framework in which all are seeking the same objectives. This unity of purpose but independence of responsibility could be symbolised by providing that all cases (not merely those on indictment) initiated by the police are brought in the name of the Crown and by designating the local prosecutor as "the Crown prosecutor".

7.9. These are the main features of the locally based system. It will additionally have national elements to be provided by the Director of Public Prosecutions and the Minister responsible for the service. Other checks and balances will be provided by the arrangements for local and national accountability and supervision. We deal with these later in the chapter, but we think it necessary to discuss here two other ways of arranging the responsibilities of the chief constable and of the Crown prosecutor to which we have given consideration and explain why, on balance, we have rejected them.

7.10. Many witnesses to us have argued that the decision to prosecute should be removed entirely from the police and placed with the independent legally qualified prosecutor. We have discussed some of the implications of this proposal in the preceding chapter. And we have drawn attention to the fact that the decision to prosecute is in fact not one but a long series of decisions which more often than not begin with a decision by a member of the public to report an incident to the police. To bring the independent legal prosecutor into the process before inquiries have been made to determine whether the reported incident is a criminal offence and whether there is sufficient evidence to constitute a *prima facie* case would simply be to create a different kind of police investigator. We consider it impractical and we know of no prosecution system elsewhere which attempts to do so in the generality of cases.

7.11. Alternatively there is the arrangement in which the lawyer must be involved as soon as the preliminary investigation is complete and before the initial approach is made to the court, as with the Procurator Fiscal in Scotland and the District or Prosecuting Attorney in the United States of America. The impression we have gained, however, from our visits to and study of jurisdictions which employ this system is that in practice the police retain a very large measure of control over the decision to prosecute and, especially where the volume of cases puts pressure on the system (as would be the case in much of this country), the lawyer's decision tends to be little more than an endorsement of that of the police. In the generality of cases, therefore, there seems little to be gained from this arrangement, provided the police maintain their present level of performance. The Crown prosecutor, on our proposal, will be involved early in the preparation of complex or otherwise difficult cases and for the rest he will act as a long stop. There might also be some adverse consequences in shifting responsibility so far. Although it is already the practice in some well-established prosecuting solicitors' departments for the application for summons in most cases to be approved by the prosecuting solicitor (and we would not wish that arrangement to be changed), making it required practice for all cases, including those proceeded with by way of arrest and charge might cause delay and would be likely to require some increase in

resources beyond those required for the change we propose. There is also the consideration of its possible impact upon the effectiveness of the police.

7.12. It has been put to us that the discretion to prosecute is an integral part of law enforcement. To remove it from the police, that is to deprive them of the final say in whether a particular offender is brought before the courts, would be seriously to hamper them in their primary function of maintaining law and order, because it would be likely to diminish the constable's authority. A less strong variant of that argument is that although the change may not have this direct effect it will have it indirectly. There is, it is argued, no strong evidence that the police have fulfilled their functions as prosecutors less than adequately. Removing the decision from them would, therefore, be an arbitrary and doctrinaire expression of the public's lack of confidence in their competence and integrity and would be likely to be damaging to morale and hence to effectiveness in law enforcement. A minority of us feels that there is much force in these arguments, as, in their view, the police are in an appropriate position to take account of wider public attitudes and of public order considerations, and the chief constable, as a matter of principle, should have the right of access to the courts in respect of any case where the evidence clearly demonstrates the commission of an offence. It could, in their view, lead to uncertainty and possible waste of police time if the ultimate enforcement of the law by prosecution were in other than police hands. But the majority considers that what is being proposed is nothing radically different from the present procedure for a large proportion of the more serious cases, in which the Director of Public Prosecutions in effect has the function envisaged for the Crown prosecutor. To remove responsibility for the conduct of the case from the police after the point of charge would, in their view, help to free the police to get on with the tasks of preventing, detecting and investigating crime and would in no way diminish their effectiveness in enforcing the law.

7.13. We do not think an appeal to experience in those jurisdictions where the police do not have and never have had the discretion to prosecute is helpful. It is certainly true that the police in such jurisdictions with whom we have discussed this, in Scotland, California and Ontario, have all said that the prosecution arrangements do not affect their ability to play their law enforcement role. Indeed they have been surprised to be asked the question about it. The Scottish police consider that the independence of the fiscal is one of the strengths of their system. But they have known no other.

7.14. There are, however, two places in which there has in recent years been a change in arrangements of the sort that is envisaged here, in Northern Ireland and in British Columbia. Our discussions with the police in Northern Ireland and with the Director of Public Prosecutions there, who since 1972 has had responsibility for prosecution in all indictable and serious summary offences, suggest that the system is working well and to the satisfaction of the police as well as of other parties. However the special circumstances of Northern Ireland, we consider, make it difficult for us to draw sure conclusions from this experience as to the likely effect of a similar change in England and Wales.

7.15. The other example of recent change that we found, in British Columbia, also points in the same direction and is particularly helpful because the change there was of the kind that we are proposing. As we said earlier,[1] since 1974 Crown Counsel have had complete control over the conduct of prosecutions and have taken over what was a large measure of police responsibility in this field. We discussed the question with the City of Vancouver Police Department. They were concerned with some of the consequences of the change, for example poor notification of police witnesses, unnecessary calling of police witnesses and inadequate feedback to the police about the outcome of their cases. But they did not feel that their law enforcement function was in any way diminished. They concluded their presentation to us by saying:

> "It would be fair to say that overall the Vancouver Police Department is satisfied with the prosecutorial system with which it operates. The Department is working cooperatively with Senior Crown Counsel to improve those areas that still give cause for mutual concern. The very structure of the Justice System used today gives clearly defined areas of responsibility. This has helped to remove the suspicion from the public mind that the system is weighted heavily in favour of the police."

7.16. That view is, to some extent, confirmed by the existing relationship between the Director of Public Prosecutions and the police. This is not thought to hamper the latter's law enforcement role in respect of his cases, although we have no precise knowledge of the extent to which the Director terminates on policy grounds proceedings already initiated. On balance the majority of us believes that police attitudes will be determined by how well any modified system works in practice. Nonetheless, it would be unrealistic not to expect some difficulties in any transitional period.

7.17. In recognition of the concern expressed to us over this matter we considered the possibility of giving the Crown prosecutor the final word in respect of what might be called the legal elements of the decision to prosecute, especially the evidentiary issues, and leaving with the police the decision on social and policy grounds. Three of us share that concern and favour this approach, which they see as practicable and giving due weight to the responsibilities of the chief constable for law enforcement. The majority, however, does not consider that it would in practice always be possible to make the distinction. Discussions with our witnesses suggest that the line between law and policy is not necessarily sharply drawn (and we know of no other jurisdiction where prosecution responsibilities are divided in this way). Drawing the line at the point of charge both recognises the need for the police to continue to have discretion over the initiation of proceedings as an essential element of their law enforcement role and has the merit of being clear cut. We do not imagine it will eliminate all disputes since whenever issues are delicately balanced one must expect debate and possible disagreement. But we expect there to be consultation, as there is now. The police and the prosecutor will be aware of the other's interests and responsibilities. As we have observed earlier their roles are interdependent. They must inevitably work in partnership. This

[1]See para 6.38.

should keep unresolvable disputes to a minimum. If they occur, the arrangements we propose for local and national accountability and supervision and for the Director of Public Prosecutions to act as final arbiter should provide the remedy.

The abolition of police advocacy

7.18. The third of the responsibilities set out in paragraph 7.5 develops a recommendation of the Royal Commission on the Police in 1962 (to which we have already referred) to what we see as its proper conclusion: that, where possible, the prosecution case in magistrates' courts should be put by a professional advocate and not by a police officer. The duty of providing advocates is to be placed upon the Crown prosecutor; his department will require to be staffed to a level where he is able generally to fulfil this requirement from his own resources. It is likely that staffing levels will not be such as to enable abnormal peaks of demand always to be met and it is certain that in the period of transition from the present staffing levels to a fully developed system the Crown prosecutor will have to look elsewhere for advocates. For these circumstances we would recommend the use of solicitors in private practice and of the Bar. We are aware that in some force areas without prosecuting solicitors' departments there are firms of solicitors whose business is largely or exclusively police prosecution work. We are unable to assess the impact of this recommendation upon them, and we have had no substantial evidence on this point from such firms. Nonetheless the trend away from prosecution advocacy by the private practitioner has been proceeding steadily over the last decade. We do not see why this consideration should now be used to delay the transfer of responsibility which we recommend and which commands wide support from our witnesses.

Prosecutions in the Crown Court

7.19. The establishment of a unified system of Crown prosecutors, even on a local basis, raises the question whether they should have the responsibility for prosecuting all cases, on the lines of similar systems in other countries. We therefore asked those witnesses whom we invited for oral evidence whether solicitors in a prosecution service should have rights of audience in the Crown Court. Most witnesses thought that in general the structure of audience rights should remain as at present. The Prosecuting Solicitors' Society did not press for any change, save for the right to appear in the Crown Court in appeals from magistrates' courts and committals for sentence if they have already appeared, a right which defence solicitors currently enjoy. We also enquired whether it might be desirable to create a corps of barristers with exclusive rights to prosecute along the lines of the Advocates Depute in Scotland. Again most witnesses were against the proposal. It was pointed out that it is traditional for members of the Bar to accept briefs from both defence and prosecution, and that this provides a safeguard against any becoming too prosecution minded. In London at any rate the Treasury Counsel system does in fact provide a degree of continuity and an assurance of availability of experienced counsel for the Director of Public Prosecutions in serious cases. Some of us share the view taken by many of our witnesses that this matter had been effectively concluded by the recommendations of the Royal Commission

on Legal Services[1] and, in any event, consider that it is outside our terms of reference. They have concluded that there would be no support from the legal profession for changes in the traditional structure of audience rights, and that there should be no change in the present arrangements, save for the limited extension requested by the Prosecuting Solicitors' Society which those of us who feel free to express an opinion believe is reasonable. Others of us consider, however, that the present divided responsibility for the conduct of cases between the magistrates' courts and the Crown Court has undesirable consequences. Prosecuting solicitors are reluctant to take necessary decisions in cases to be tried at the Crown Court, since these will ultimately be for counsel, and this can detract from the efficiency of the process. Further, because the new and extended prosecution arrangements will produce staff (who could be barristers or solicitors) who specialise in this field there seems little weight in the argument that only the Bar, as specialist advocates, should have the exclusive right of audience in the Crown Court. Accordingly, they would recommend that prosecutors in the new service should have rights of audience in the Crown Court.

Other responsibilities of the Crown prosecutor

7.20. The Crown prosecutor will take over all the work at present done by prosecuting solicitors' departments in relation to criminal prosecutions. The police will still need legal advice on matters such as the civil law, the purchase of property, and licensing applications. Except in the Metropolitan Police, where the Solicitor's Department is used, and in a few other forces such matters tend, we believe, currently to be dealt with by private practitioners or by solicitors on the county council staff. If the Crown prosecutor were to take them on for the police it might create difficulties because he would do so on a solicitor/client basis, and, by virtue of our proposals for the Crown prosecutor's responsibilities, that relationship will not remain in its present form in respect of prosecution matters; and it could have some implications for the level of staffing of his department. But we consider that this matter can be left to be resolved as seems best for the local circumstances.

The organisation of the service

7.21. We turn now to the organisational framework for the prosecution service and the responsibility for its management. By management of the service we intend to refer to arrangements for the supervision of staffing, training and other personnel matters, funding and the provision of other resources and for the development and execution of prosecution policies. In broad terms therefore we are concerned here with arrangements for producing consistency of decision making, conformity of policy, local and national accountability, and efficiency in the use of resources. There are three approaches to the management of the service. One is to manage it on a national basis through central Government. The obvious alternative is to do so through local authorities, using the police force areas as the territorial unit for the Crown prosecutor's department. Thirdly one can, while rejecting the centralised service, still work upon a larger geographical unit than local

[1]Royal Commission on Legal Services, *op. cit.*, recommendation R 18.4, p 220.

authority areas and thus create a regionally based service. Any one of these can, of course, display features of the others.

A national system

7.22. There are strong advocates of and a number of advantages in a centrally directed national prosecution system, that is one where, under the direct control of a Minister, there is a single official who in theory is responsible for every decision to prosecute taken by the prosecution service; and one of our number would favour this. In such a service there is a direct line of management from the lowest grade of public prosecutor in whatever part of the country up to the national head of the prosecution service. The advantages of such an arrangement are to be found in its potential for achieving nationally consistent prosecution policies, for developing a national career structure with enhanced status for the service, and for producing improved norms of performance through training and staff selection on a national basis. Against this must be set the disadvantages that are likely to accrue from the bureaucratic nature of a large national organisation working in this area. In order to transmit policies from the centre into effective practice at the local level and to ensure adequate accountability to the Minister, elaborate reporting and other supervisory systems would be required; this might create pressure for management to be in the hands of professional administrators rather than of solicitors. All would be at the cost of substantial resources and, perhaps, of the morale of the solicitors who would be operating on the ground. Furthermore there would be powerful forces at work tending to promote the interests of those at the centre rather than of those on the periphery whom the organisation is, in fact, there to serve and to work with—the local police, courts and community. Nor are we persuaded that it is necessary to set up a national system in order to achieve the advantages that are claimed for one.[1]

7.23. One further point should be made. We believe it to be hazardous to argue from the experience of other jurisdictions that a national prosecution service would be workable in England and Wales. We know of no common law jurisdiction in which the equivalent of a national prosecution system of the type we are discussing either covers an area with anything approaching the population of England and Wales (although some are geographically much larger) or deals with a crime load of anything like the same order of magnitude. The nation wide prosecution agencies in the United States of America and Canada do not deal with police prosecutions. The District Attorneys, who deal with police prosecutions in the USA, in general have a countywide jurisdiction; some of these, for example, Los Angeles County, are very large but in terms of population and crime not much larger than London. And a similar observation applies in respect of the jurisdictions of the Crown Attorneys or Counsel in the Canadian Provinces and of the Crown Agent and the procurator fiscal service in Scotland.

7.24. Our conclusion is that for the reasons discussed in the two preceding paragraphs a centrally directed national prosecution system for England and Wales is neither desirable nor necessary and we do not recommend its establishment.

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[1]See Kaye, *op. cit.*, p 63.

A local service

7.25. We are proposing a locally based service with some national features. In discussing management arrangements at the local level we need first to define the kind of accountability we consider is required, and the functions we envisage for any supervisory authority. We propose that the Crown prosecutor should be accountable to the authority on the lines we have suggested in chapter 6.[1] He must be answerable for the efficient operation of his department, that is for how he uses his resources (of buildings, equipment and manpower) to achieve the objectives of his department. These we would assume to be, in general terms, the preparation of cases for trial (or other disposal) without unreasonable and inexplicable delay and the achievement of a level of convictions which does not differ greatly and inexplicably from the national norm. We do not suggest by the latter criterion that the function of the prosecutor is to gain convictions at all costs; it is his job to put the prosecution's case proficiently and dispassionately before the court. Nonetheless a significant divergence from the norm should cause the Crown prosecutor at least to consider whether his advocates are competent, whether their cases are being properly prepared, whether the decisions of the prosecutor to continue with proceedings or of the police to initiate are being carefully taken, or whether there is some other explanation.

The role of the local supervisory authority

7.26. On this footing, we would see the authority as having the responsibility for the following matters:

(a) in general terms, the provision and maintenance of an adequate and efficient Crown prosecutor's department;

(b) the appointment and dismissal of the Crown prosecutor and his deputy (there would also be central Government involvement here);

(c) the approval of the departmental budget and staffing (within nationally laid down guidelines); and

(d) a general review of departmental performance, on the basis of regular reports from the Crown prosecutor and with the assistance of some nationally prepared statistical indicators of performance.

The constitution and geographical basis of the local supervisory authority

7.27. Turning to the authority's constitution and territorial connection, we consider that the most practical solution and the one that is likely to offer the best means of achieving local accountability is to work upon the basis of existing police authority areas with a modified form of supervisory authority. We see some difficulty in simply tacking responsibility for the Crown prosecutor's department onto those of the existing police authority and to do no more than that. Such an arrangement would not indicate clearly enough that the responsibilities of the Crown prosecutor and of the chief constable are distinct.

7.28. An obvious way of signalling this distinctiveness of responsibility would be to create a new and separate prosecutions authority within the local

[1]See paras 6.57–6.59.

authority framework, although covering the same geographical area as the police authority. In order to mark its difference from the police authority it might be slightly differently constituted, still having two thirds of its membership drawn from elected councillors but having the remaining third comprised of local magistrates, solicitors in private practice who regularly do criminal defence work and others with relevant interests. The part that both of the latter groups play in the prosecution process would enable them to make an informed contribution to discussion of the operation of the Crown prosecutor's department. Two of us would favour the establishment of an independent authority. They doubt whether any other arrangement would serve to ensure the perception by the public of the independent status of the Crown prosecutor. One of them further believes that any attempt to produce a combined police and prosecutions authority will merely continue the existing police authority under another name and that a separate prosecutions authority, provided it had the duties outlined in paragraph 7.26, would not be underworked. The majority of us, however, considers that a separate prosecutions authority would, as a committee on its own, have little to do and, within the larger framework of the local authority, would be likely to have less prestige and therefore carry less weight than the other spending committees. As a result it might provide the Crown prosecutor with less support than he will require in order to play a full and independent part in the administration of justice. An ineffective authority could be as damaging to the independence of the Crown prosecutor as a stronger one which has failed adequately to recognise it. They do not favour this arrangement.

7.29. An alternative which might avoid the possible weakness of an entirely independent authority would be to develop the existing police authority in such a way as to represent the interests and supervise the activities both of the police and of the prosecution service. The chief constable and the Crown prosecutor would be of equal but independent status before the authority. To reflect the interests of those involved with the operation of the prosecution service, its constitution could be on the lines of that suggested in the preceding paragraph for the separate prosecutions authority. To mark its different function from that of the present police authority it might be called the police and prosecutions authority. The majority of us considers that having both chief officers answerable to the same authority would help to maintain the balance of interest between each, serving in the last resort to assist in the resolution of differences of view between the chief constable and the Crown prosecutor on matters which they have found it difficult to resolve. They therefore recommend the establishment of police and prosecutions authorities on the lines proposed in this paragraph.

7.30. This authority and, by definition, the Crown prosecutor working to it would operate on areas which are coterminous with existing police force areas. This would produce, for the present, 43 Crown prosecutors and areas. Although there is an argument for breaking this connection if the prosecutor's independence from the police in the conduct of prosecutions is to be made absolutely clear, the interdependence of the investigative and the prosecutorial function points to the need for a close working relationship on the ground between police officer and junior grade prosecutors. It will be a clear definition of

function and mutual respect that will ensure the independence of one from the other rather than any organisational arrangements at the top. There are, furthermore, difficulties over creating larger and differently based areas. These would have to be created either by producing completely new geographical areas or by aggregating existing police authority areas to produce a smaller number of areas (say 12 or so) for the Crown prosecutor's authority.

7.31. The first approach seems to us to be quite impractical, if the authority responsible for the Crown prosecutor is to have some local connection and supervisory responsibility on the lines we propose. Drawing new boundaries which broke the connection with the police area would also break the connection with local authority areas. If that were done, we do not see how the authority responsible for the Crown prosecutor could be constituted to represent local interests or could deal with its budgetary responsibilities. There could be no element of local financing since that derives from local authorities. (For reasons which we shall discuss later, we shall be recommending that.) Finally it would result is some police forces having their cases prosecuted by different Crown prosecutors. All of these factors could lead to confusion and inefficiency in furtherance of an end which we consider is satisfactorily achieved by the arrangements we have proposed.

7.32. The alternative, of aggregating existing police force areas, avoids most of the organisational difficulties that are associated with the approach discussed in the preceding paragraph. A number of existing police authorities are composed of more than one local authority, for example Thames Valley and North Wales, and there would seem to be no objection in principle to doing the same, but on a larger scale, for authorities to supervise the Crown prosecutor. Nonetheless there are practical objections. Spread over a number of local authorities (and to create a regional system some Crown prosecutors' authorities might have to be made up of representatives of six or more local authorities) the local representation would be very considerably diluted with consequences both for the effectiveness of the service and for its responsiveness to proper local interests. If regional authorities were to be created with broadly similar numbers of prosecutors in each (and one of us sees the local system as a first step in this direction), some of the regions would have to cover large areas and this could lead to management problems. Some regions might comprise one or at most two police authority areas, for example London, or West Midlands with Warwickshire; these would do little to distinguish the prosecutor from the police (the object of the arrangement being discussed here). Lastly for operational purposes within any region there would have to be some management hierarchy within the prosecution service which was based on the management hierarchy in the associated police force areas. The larger the regions and the more staff they contained, the more effectively they would need to be managed, and the greater the consequent possibility that management would tend to display the bureaucratic characteristics which we discussed in sketching out the objections to a national system. In short one would be creating a bureaucratic dead weight for the purpose of underlining the independent status of the prosecutor from the police. We do not consider this to be advisable or necessary and we recommend using existing police force areas as the geographical basis for Crown prosecutors' departments.

The arrangements for London

7.33. These arrangements for a local police and prosecutions authority cannot as they stand be applied to London. That is because neither of the police forces operating in the capital, the City of London and the Metropolitan police forces, is responsible to a police authority in the same form as elsewhere. Both were exempted from the part of the Police Act 1964 establishing police authorities and outlining their duties; the police authority for the Metropolitan police is the Home Secretary and the Common Council of the City of London is that for the City of London force. It is outside our terms of reference to discuss the role and constitution of the police authority as such. We have of course had to touch on it because we envisage a link between it and the arrangements for supervision of and responsibility for the prosecution service, in the creation of a joint police and prosecutions authority. Nor have we considered it our task to examine the size or area covered by the police forces themselves. What follows, therefore, should be read against a background of the existing status of the Home Secretary and the Common Council of the City of London as police authorities, and the existence of the Metropolitan and City of London police forces in their present form.

7.34. So far as the City is concerned, the police authority is locally based. There could be a police and prosecutions authority for the City consisting of or drawn from the Common Council. This would be the appropriate arrangement in line with our proposals for the rest of the country. The only doubt we have is whether a separate Crown prosecutor's department for the City would have sufficient prosecution work. However we shall be proposing that the Crown prosecutor should also take over responsibility for the conduct of all prosecutions initiated by police forces other than the civil police[1] and with this prosecution activity as well, of which there is a significant amount in the City, a separate Crown prosecutor's department might be justified. If a separate Crown prosecutor's department for the City of London is not established, we consider that a single Crown prosecutor's department should cover the City and Metropolitan forces. Operationally, this would be feasible. Although the parallel is not exact, the cooperation by the two forces in their joint fraud squad provides a precedent.

7.35. The Metropolitan Solictor's department provides a basis for a Crown prosecutor for the Metropolitan police, although it would be much larger than any other such department.[2]

7.36. The creation of a suitable authority to supervise the Crown prosecutor for the Metropolitan police district presents constitutional problems because of the unique position of the Metropolitan police and the status of the Home Secretary as police authority. To meet these special circumstances, it might be possible to set up a local prosecutions authority separate from the police authority, an option which we considered and rejected for other forces. But it is difficult to see what the local body could be or how it would be constituted. The Metropolitan police district is bigger than the area covered by the GLC and the London boroughs. It includes parts of districts in Hertfordshire, Surrey

[1]See para 7.40.
[2]See Kaye, *op. cit.*, Table D:1, p 75 and Appendix I, p 83.

and Essex. A corresponding prosecutions authority would have to take account of the interests of the boroughs and the non-London districts. It would probably be so large as to be unwieldy. That is not to say it would be impossible to constitute an authority and three of us consider it essential to create one in order to achieve a measure of local democratic accountability, but the majority doubts whether, in existing circumstances, it could reflect an identifiable local interest, or be able to reconcile conflicting interests within its area.

7.37. The alternative to a local prosecutions authority is to designate a Minister as prosecutions authority for London, by analogy with the Home Secretary as police authority. This could be either the Home Secretary or the Attorney General. The arguments for the Attorney General or the Home Secretary to be the responsible Minister for the whole prosecution service are evenly balanced.[1] The neater arrangement would appear to be for the responsible Minister also to be the prosecutions authority for the Metropolitan police district, perhaps assisted by local consultative committees. This has proved a workable arrangement in relation to the Home Secretary's responsibility both for the police service and for the Metropolitan police. But having one Minister responsible for the service and another as prosecutions authority for the Metropolitan police district is not altogether impossible. The choice of responsible Minister for the service as a whole does not necessarily determine the appropriate choice as prosecutions authority. The Home Secretary would have the advantages claimed for a joint police and prosecutions authority, regulating what in effect are two parts of a single process under independent but interlocking arrangements. On the other hand, the Attorney General's independence of the police and his present functions in the prosecutions field might be thought to fit him more appropriately to be prosecutions authority for London. We shall be discussing later in this chapter similar issues in relation to the Minister who should have responsibility for the prosecutions service as a whole and we think that the decision on the appropriate authority for London would best be taken in the light of the decision on the responsible Minister for the service nationally.

The funding arrangements

7.38. We have noted earlier the present arrangements for funding prosecuting solicitors' departments notionally out of costs orders either from central funds or from defendants.[2] This system dates from the time when most prosecuting lawyers were private practitioners who had to be paid individually for each case undertaken. The financing of large departments of salaried personnel out of individual costs orders on a case by case basis seems to us not to contribute to accountable management, and in practice to have become a fiction enabling departments to claim that they run at no cost to the local community. We recommend the abandonment of funding departments entirely in this way. We have recommended a locally based system with a measure of local accountability. For that to be effective some or all of its funding must be subject to local control. This can lead to differences of service in various parts

[1]See para 7.66.
[2]See para 6.54.

of the country or even between agencies within a local authority, but we expect the development of national standards supplemented by the machinery for inspection and advice we shall be proposing later in this chaper to reduce this difficulty. We consider therefore that a funding arrangement for the prosecution service similar to that for the police would be appropriate, that is, where there is an element of local funding but, when rate support grant and central services are taken into account, a substantial proportion comes from central funds.

Costs from central funds

7.39. Our conclusion on funding raises questions about the present rules and principles relating to costs in criminal cases. To examine these would take us beyond our terms of reference since the decision on costs is made by the court at the end of the trial. But we suggest that the establishment of a Crown prosecutor service on the lines we propose will have implications for the present arrangements for awarding costs in criminal cases and these will, as a consequence, need to be reviewed.

The Crown prosecutor and other agency prosecutions

7.40. So far we have developed proposals for the Crown prosecutor's responsibilities in respect of prosecutions conducted on behalf of the civil police, that is police forces maintained by local authorities and grant aided by the Home Office under the Police Act 1964. But there are other sorts of police forces, both statutory and private, which undertake prosecutions with or without the involvement and assistance of the civil police.[1] The largest known prosecutor among these, the British Transport Police, does not at present generally prosecute through the civil police or prosecuting solicitors but uses local private practitioners, if they do not themselves prosecute. However since a number of the other police forces already use the civil police prosecution arrangements and as the arguments of principle and practice for establishing a prosecution service for the civil police apply equally to these police forces, we recommend that the prosecutions of all of them should be the responsibility of the Crown prosecutor, on the same footing as for the prosecutions of the civil police. We have not examined the resource implications of this recommendation in detail but as the prosecution service will be staffed to cover all magistrates' courts sittings and as the additional prosecution activity is not substantial and will be spread over most of the country, we do not expect them to be significant.

7.41. Should the Crown prosecutor take on other prosecutions?[2] There are similar arguments of principle for his doing this but several constraints persuade us of its impracticability for the time being. The number of prosecutions by private individuals and non-police agencies is far higher than most of our witnesses have estimated. It may be about a quarter of all prosecutions of persons over 17 for offences other than motoring offences. Although the latter form a substantial proportion of all offences and although

[1]See K. W. Lidstone, Russell Hogg and Frank Sutcliffe: *Prosecutions by Private Individuals and Non-Police Agencies* (Royal Commission on Criminal Procedure Research Study No 10, London HMSO 1980), chapter 7.

[2]See Lidstone, Hogg and Sutcliffe, *op. cit.*, for a full description of the range of these.

many of the offences prosecuted by agencies other than the police are of a comparatively trivial and routine nature, this represents a significant burden of prosecution activity. Proposals to place their work on the Crown prosecutor would have to consider the resource consequences involved.

7.42. The second consideration is the variety of the agencies concerned. They vary from large Government departments through local authorities, minor public authorities, retail stores and voluntary societies to private individuals. They have a variety of ways of functioning. They use legal advice to a varying extent. They undertake criminal prosecutions for very different purposes, to a very different degree and in varying relationships to other enforcement measures. For some, prosecution is the weapon of final resort because they prefer to obtain their objectives by education and persuasion; the Factory Inspectorate is an example For others, such as those who are concerned in one way or another with the collection of revenue, the threat of prosecution can be used to achieve their purpose.

7.43. The very extent and nature of this variation might be thought to make the case for bringing some measure of uniformity to these arrangements for prosecuting agency offences. That is particularly so if the standards that we have used in discussing police prosecutions are applied to prosecutions by other agencies. This variation does not, however, attract much specific criticism from our witnesses. Such as there is focuses on the disparity of policy between agencies; the zeal with which social security frauds are prosecuted being contrasted with the relatively limited extent to which income tax defaulters are prosecuted. That is a good example of different agencies having different functions and objectives; and it does raise the question whether it is proper to use the criminal process to enforce revenue and regulatory laws which are the typical province of most of these non-police agencies. With the current pressure of criminal business on the courts this is surely a matter to which the Government should be giving attention, but it is outside our terms of reference. For us the practical problem is whether national conformity of prosecution policy throughout these public and non-public agencies is in fact possible. Would a Crown prosecutor be any more than a forensic arm of the agencies for whom he prosecuted? That alone might be desirable but the provision of legally qualified advocates could be and in most cases is achieved by other means.

7.44. These considerations, in our view, tell against extending the scope of the Crown prosecutor's responsibilities to include all prosecutions. However he will on our proposals be taking on prosecutions for other police forces as well as the civil police; and where a body or institution, either private or an agency of national or local government, at present uses the police to initiate or conduct its prosecutions, we envisage that it should continue to do so and that its prosecutions will therefore be conducted by the Crown prosecutor.

7.45. A final point needs to be made concerning these agency prosecutions. Agencies cooperate with the police for the purpose of investigation and prosecution in a variety of ways.[1] It seems that the police (especially in some

[1]See Lidstone, Hogg and Sutcliffe, *op. cit.*, p 184.

large urban areas) are reluctant to become involved at all in some kinds of prosecution for which they have no primary responsibility. Some agencies, for example the National Television Licence Record Office, work almost wholly without reference to the police and without wishing to involve them. Others investigate their own cases but pass them to the police for prosecution. And there are some, like the Department of Health and Social Security in its social security fraud work, which have inspectors without special powers and which work with the police to the extent that is possible. Indeed in its evidence to us the Department has expressed concern lest the level of cooperation should diminish. And that is the sense of the evidence of other non-governmental bodies, such as the Royal Society for the Protection of Birds. The introduction of the Crown prosecutor will certainly affect these relationships and that will have to be kept in mind as changes are implemented.

The private prosecutor

7.46. Apart from those retail stores that have to prosecute because of the policy of a particular police force, prosecutions by private citizens are, as a significant phenomenon, confined to prosecutions for common assault.[1] Even private prosecutions for the latter offence may well owe their relative frequency (but they form a tiny proportion of all prosecutions) to the way in which the offence is treated by the Offences against the Person Act 1861. The Act makes it an essentially private wrong; any proceedings have to be brought by or on behalf of the aggrieved person and any person who is prosecuted is thereby released from the threat of civil proceedings.[2] The Criminal Law Revision Committee has recommended the repeal of these provisions.[3] We accept the case for bringing this offence under the purview of the police and into the prosecution arrangements which we propose. As far as prosecutions by retail stores for shop-lifting are concerned, we recommend that this practice should cease and that the police should start proceedings in such cases and the Crown prosecutor should conduct the prosecutions. Police forces have not found it easy to achieve consistency in the treatment of shop-lifters, who may be elderly and with medical and personal histories justifying non-prosecution. Since a greater degree of consistency in the use of prosecution in these cases is desirable, it is, in our view, inappropriate to permit or to expect private organisations routinely to be exercising the responsibility for the decision to prosecute.

7.47. Prosecutions by private citizens other than in these cases are very rare indeed and scarcely seem a sufficient base to justify the position of the great majority of our witnesses who argue in one way or another that the private prosecution is one of the fundamental rights of the citizen in this country and that it is the ultimate safeguard for the citizen against inaction on the part of the authorities.

7.48. This right, upon which as we have noted the whole prosecution system is in theory built, is in fact subject to a number of constraints for the private

[1] See the *Law and Procedure Volume*, paras 169 ff, and Lidstone, Hogg and Sutcliffe, *op. cit.*, chapter 5.
[2] See the *Law and Procedure Volume*, paras 172 and 173.
[3] Fourteenth Report of the Criminal Law Revision Committee *Offences against the Person*, London HMSO 1980 Cmnd 7844, paras 158 to 166.

citizen. First in well over 100 Acts of Parliament the right to prosecute is subject to the consent of a Minister, usually the Attorney General, an official, the Director of Public Prosecutions, or a judge.[1] The second, more important, constraint on the private prosecutor is the cost. Legal aid is not available to begin a criminal prosecution. In indictable cases the prosecutor may at the discretion of the court be awarded his costs out of central funds at the conclusion of the case whether or not there was a conviction. In summary matters this does not apply and he can only be awarded costs to be paid by the defendant, and then only if the prosecution succeeded. If the defendant is acquitted, in all cases the court has the power to order that the defence costs shall be paid by the prosecution, and he might have to find both his own legal expenses and those of the person he has prosecuted. Certain technical considerations about the right of audience at the Crown Court also restrict the right as does the need for the prosecutor to have the necessary legal and procedural knowledge. As Lidstone and his colleagues observe,

> "These constraints combine to put formidable obstacles in the way of a private prosecutor, and they make the right of private prosecution one that is hardly exercised in practice."[2]

7.49. They do not, however, preclude a person maliciously and vexatiously applying to a magistrates' court for the issue of a summons or warrant of arrest which effectively is the start of proceedings, even though the complainant does not intend or will be unable to take the matter further than that. We have received evidence of this occurring, and, where a magistrate, perhaps properly on the evidence before him, accedes to the application, the harm caused to the person accused can be substantial.

7.50. If then the private prosecution is to be retained as an effective safeguard against improper inaction by the prosecuting authority, the financial difficulty must be removed. At the same time the risk of malicious, vexatious and utterly unreasonable prosecutions must be guarded against. Nevertheless, the application of the criminal law is of its nature only appropriate where the community's interests are at risk. Criminal sanctions are imposed for the benefit of society as a whole, on its behalf and at its expense. We do not think that private citizens should have an unlimited right of access to the criminal process to remedy wrongs for which other measures might be more appropriate. But where criminal proceedings should be taken, then they should be paid for out of public funds. We therefore recommend that if a private citizen wishes to initiate a prosecution he should apply in the first instance to the Crown prosecutor. If the latter is satisfied about the case, applying the same criteria as he would apply for any other prosecution, he should take the case on. If he is not and the private citizen, after explanation, still wishes to proceed, the latter should be able to make an application for leave to commence proceedings to a magistrates' court, that is to at least two justices, attended by a clerk.

7.51. The Crown prosecutor should attend the hearing of the application, which should be held in private, to explain why he considers the matter should not be prosecuted. We have considered whether, if leave were granted, the

[1]See the *Law and Procedure Volume*, para 159.
[2]*Op. cit.*, p 111.

Crown prosecutor should be obliged to undertake the case. But we do not consider it sensible to require a lawyer to conduct a case he has already rejected. We think it preferable to permit the private prosecutor to employ his own solicitor for the purpose and to guarantee that he will be paid. Where leave has been given, this should automatically carry with it a right for the prosecutor's reasonable costs to be paid out of central funds. This will serve to remove the financial obstacle to private prosecution, but will also remind the court that leave should be given only for prosecutions which it is proper to finance out of public funds.

The role of central Departments

7.52. We have already said that there will be a measure of national control and machinery for accountability to central Government in the locally based system which we propose. These are necessary for three purposes: first, in order to develop consistent prosecution policies and to minimise arbitrary variations in decisions between different areas; secondly, to achieve uniform and acceptable standards of efficiency and service; and thirdly, to provide a measure of accountability to Parliament in relation to general policies.

Development of consistent prosecution policies

7.53. The present position is that there is a limited degree of influence exercised by the Attorney General (and the Director of Public Prosecutions) through their responsibilities for the conduct of and provision of advice in certain prosecutions, and also by the Home Secretary through his general responsibility for the police.

The roles of the Attorney General and the Director of Public Prosecutions

7.54. The Director currently has responsibilities under the Prosecution of Offences Regulations 1979 for making the decision to prosecute in a limited range of cases and for advising the police on that decision in the cases which they refer to him and for consenting to prosecutions in a range of other cases as required by individual statutes. He may also intervene in any case to take over the prosecution. The Attorney's role both in consenting to prosecutions and in entering the plea of *nolle prosequi* to discontinue a trial on indictment is more limited. Many of these powers have a long history but the statutory consent provisions have often been arbitrarily imposed. The Director's central role derives from the nineteenth century attempt to bring some order to public prosecutions of major offences. The main general criticism of these arrangements that we have had in our evidence is the delay in handling cases by the Director's office, which is attributed to lack of resources to meet the substantial pressure of work.

7.55. We would not propose remedying this by an infusion of new resources into the Director's office. We consider that the service we propose will, in time, remove the need for the Director to be brought in by local prosecutors to decide or advise on prosecutions to anything like the extent that he is required to do now, and will thus reduce the pressure upon him and the delay in consultation. For the time being he will have a key part to play in developing the proposed new service, in conjunction, no doubt, with a reshaped and renamed Prosecuting Solicitors' Society. While new Crown prosecutors'

departments are set up and existing ones brought up to full establishment and effectiveness to take on their enhanced responsibilities, the need to refer serious or complex cases to the Director will remain and he will be closely involved in the development and promulgation of national guidelines on matters of prosecution policy and practice. Once that stage is passed, the need for the Director to be involved in local cases will be diminished. He will retain a major involvement in the maintence of national consistency of policy and practice. We would see his operational role, however, as being likely to be concentrated on dealing with all allegations of serious criminal offences committed by the police or Crown prosecutor and with other locally sensitive cases; to acting as an arbiter and final authority in the event of a chief constable's being dissatisfied with a Crown prosecutor's decision not to proceed in a particular case; to continuing to be able to take over the conduct of proceedings in any case, for example, where it became apparent that the local decision had been improperly taken; and to making the decision to prosecute and advising the Attorney General upon the exercise of his discretion in those classes of case which Parliament considers should be reserved to him.

7.56. We believe that the creation of a prosecution service on the lines proposed provides an opportunity to review the present statutory restrictions on bringing a prosecution. The rationale for imposing such restrictions was given in the Home Office Memorandum to the *Departmental Committee on section 2 of the Official Secrets Act 1911*[1] but the reasons given there do not seem to be the basis of any coherent policy and an examination of the Acts concerned suggests that some of the restrictions have been arbitrarily imposed. The Director of Public Prosecutions said in his evidence to us that the time was ripe for some rationalisation of the restrictions and that had been postponed only pending our own report. The only considerations that should apply, in our view, statutorily and absolutely to restrict prosecution relate to those very few cases where national interests may be thought to be particularly involved. These are cases where the decisions to prosecute have to take account of important considerations of a political or international character, such as offences against national security or in relation to international law or the country's international obligations. The duty for making prosecution decisions in these cases should rest with the Attorney General, or, if he considers it appropriate to delegate, with the Director of Public Prosecutions.

7.57. Rationalisation of the consent provisions need not be delayed. It will be some time, however, before the shape of the new prosecution service emerges and it is fully operational. Until then it will not be possible to decide upon the full scope of the Director's work. We can make no recommendation about this, except that the position should be reviewed by the responsible Minister and reported to Parliament five years after the commencement date for the Act establishing the new service.

The role of the Home Secretary and the Home Office

7.58. We have commented on the very limited role played by the Home Office in the development of prosecution policies.[2] Under the new system which

[1]London HMSO 1972 Cmnd 5104, pp 125–126, set out at para 159 of the *Law and Procedure Volume.*

[2]See para 6.44.

we are recommending the police, as the initiators of prosecutions, will have a vitally important part to play in the development of the system; we would regard it as essential that the Home Office and the inspectorate of constabulary should in future be more actively concerned with general questions of police practice in regard to the prosecution process.

7.59. We have already drawn attention to the scope for increasing consistency of police practice in regard to the decision to caution as an alternative to prosecution.[1] We have recommended that this decision should continue to be the responsibility of the police, although in some cases they will no doubt take legal advice, as they do now. We are here concerned with the formal police caution[2] which at present has no firm statutory basis. Not only are there variations between police forces in the use of this kind of caution, but the criteria for administering it and its effect are different in respect of adults and juveniles. We believe the time has come for the use of the formal caution to be sanctioned in legislation and put on a more consistent basis, but a detailed study of all these matters, which are interrelated, would take us beyond our terms of reference. However, establishing and promulgating the basis on which cautions should be administered will be one of the ways in which the Home Office and the inspectorate of constabulary will affect general policies on the part of the police as to prosecution. The machinery for this already exists, and we see no danger that if the Home Office adopts a more positive role on general policies this would conflict with the principle, which we would wish to maintain, that the Home Secretary should not be concerned with individual decisions to prosecute.

Standards of efficiency and service

7.60. We regard it as essential that there should be Ministerial control over the management of the new prosecution service. The Minister's function would be to set national standards for the staffing of Crown prosecutors' departments and to ensure that minimum standards of performance are being achieved. The appointment of the Crown prosecutor and his deputy by the police and prosecutions authority should be from a short list approved by the Minister; and the Minister would be involved if the Crown prosecutor or his deputy were to perform their duties so inefficiently as to warrant dismissal. He, through his department, should set general levels for establishments of staff. The department would not have a personnel function, except in relation to the senior appointments. It should fund and coordinate centrally arrangements for training members of the prosecution service. This would be a matter of great importance in an enlarged service, particularly in the transitional period. To enable the department to ensure that minimum standards of performance are being achieved across the country it will require information to assess norms of performance. Such information would also be relevant to the Minister's decisions on matters relating to funding, withholding of which, if the analogy of police funding is to be followed as we have suggested, could be used as an ultimate sanction by central Government for an inefficient local operation.

[1]See para 6.40.

[2]For a full account see the *Law and Procedure Volume* paras 150–154. In our view, the use of this expression both for this purpose and during questioning causes confusion and merits a different term being found.

7.61. The Minister should also establish a prosecutions inspectorate within his department. This would inspect and report to the Minister and to the police and prosecutions authority on the organisation and policies of, and the discharge of their functions by, individual Crown prosecutors' departments, and advise Crown prosecutors.

The appropriate Minister

7.62. Although these central Government activities would not require a large staff their nature is of importance in deciding the appropriate Minister to have responsibility for the service. The choice seems to us to lie between the Home Secretary and the Attorney General. It would not, we consider, be appropriate for it to be the Lord Chancellor, because of his position as head of the judiciary and his other responsibilities for the administration of the courts.

The Attorney General

7.63. Many of our witnesses have argued that Ministerial responsibility should rest with the Attorney General in order to mark the prosecution service's independence of the police (the Home Secretary's responsibility). The Attorney General has had and will retain some prosecutorial duties. He has always been closely associated with the Director of Public Prosecutions and has answered to Parliament on prosecution matters. On the other hand the token of independence is not the only term in the equation; clear independent status on the ground is to be the key element in the system. Furthermore the Law Officers' Department in its present form could not deal with the proposed functions of the responsible department.[1] The Attorney General's office is not that of a spending Minister. Nor is the Attorney General a member of the Cabinet, but rather he is the legal adviser to it, to the Government and, if required, to the House of Commons. Additionally he is the Crown's Attorney with, essentially, only an operational role himself as a prosecutor. He is the head of the Bar and as such is identified rather with the barristers' profession than with that of the solicitors, who will staff the new service to a great extent. Historically his interests and activity have been with the Crown Court, which deals only with a small proportion of all prosecutions.

7.64. If the Attorney General were to be given charge of this service he would have to be provided with an administrative arm. This could be done by using the Department of the Director of Public Prosecutions. The Director would, however, need additional staff to enable him to discharge such duties and it would certainly extend and alter the nature of his role. We have discussed the matter with the Director, who took the view that he could take on this additional responsibility were it to be required.

The Home Secretary

7.65. The Home Secretary's Ministerial responsibility for most other aspects of the criminal justice system qualifies him, in a number of ways, to take responsibility for this important part of the system. The Crown prosecutor will join the police in controlling the burden of business that the courts and ultimately the penal institutions are required to bear. This critically affects the

[1]See para 7.60.

resources that have to be used in the criminal justice system. The Home Secretary is answerable to Parliament for that substantial element of public expenditure. Although the Crown prosecutor will be independent of the police in the sense that he will not be subject to their instructions, there will need to be a close working relationship between the police service and the Crown prosecutors; and the police will have to develop in close consultation with the Crown prosecutor their policies in relation to the initial decision to institute proceedings, in which the Home Secretary, because of his general role in respect of the police, will have a part to play. Tensions can be relieved and disputes more readily resolved, if they occur, through a single department rather than two inspectorates reporting to separate Ministers. The Home Office could absorb most of the proposed functions quite naturally, as they are analogous to others it performs in respect of the police and probation and after-care services for example. But even if the Home Secretary were to be designated as the responsible Minister, his responsibility should be limited to the administrative aspects of the service (staffing matters, training and funding); general questions relating to prosecution policy (and in particular to the role of the DPP) would be a matter for the Attorney General.

7.66. The arguments are very evenly balanced, and we attach less importance to the choice of Minister than we do to the principle that there should be Ministerial responsibility for the matters referred to in paragraph 7.52. Some of us favour the Attorney General as a means of marking the independence of the new prosecution service, while others are more influenced by the arguments in favour of the Home Secretary. Whatever the decision may be, we are clear that there will need to be very close cooperation between the two Ministers and their departments, since both will continue to be concerned with the development of the new prosecution system.

Accountability to Parliament

7.67. The Home Secretary and the Attorney General should be accountable to Parliament for those aspects of the prosecution system for which they are to be responsible. As regards prosecution policy the Home Secretary's main concern will be with the principles on which the police should initiate prosecutions, and the consideration and development of possible alternatives to prosecution. The Attorney General will be concerned with the ethical and professional standards required of the Crown prosecutors and questions of public policy relating to the use of criminal proceedings. Whichever Minister is responsible for the management of the prosecution service will be accountable to Parliament, both through the normal financial controls, and by the provision of information, which should include the publication of the annual report of the prosecutions inspectorate. We wish to make it clear that we do not propose that either the Home Secretary or the Attorney General should have any responsibility to Parliament for the conduct of individual cases. Their powers to make enquiries about such cases should be limited to a requirement of the chief constable or the Crown prosecutor to explain the reasons for his action.

Accountability to the courts

7.68. We have noted that the prosecutor is in a sense accountable to the courts for the decision to prosecute in individual cases, in that a bad decision

is open to their scrutiny and can be called in question.[1] But in general decisions not to prosecute are not reviewable in this way. Once the initial decision to proceed has been formally given effect, by charging the suspect or issuing a summons, the case is within the jurisdiction of the court and will be the responsibility of the Crown prosecutor. A minority of us considers that the leave of the court should be required to withdrawal of proceedings by the Crown prosecutor, since that would constitute a safeguard against withdrawal for improper reasons, with the courts acting as a monitor of the Crown prosecutor's veto of police decisions to prosecute. In the opinion of the majority, however, present experience suggests that requiring the leave of the court to withdrawal has to a large extent become in practice a mere formality; this might also tend to happen under any new arrangements. To make the safeguard effective, it would be necessary to contemplate the possibility of leave being withheld—in effect, of the court forcing the prosecutor to proceed. An alternative way of securing accountability to the courts in respect of decisions to withdraw would be to require that the court be notified of withdrawals. The notification should be accompanied by reasons in writing. It would be necessary to provide for the accused to be able to ask for the case to be dismissed, so that no other proceedings on that charge could be brought, and to apply for the reimbursement of any costs he might have incurred. With these safeguards the majority of us considers that the notification procedure is all that is required, bearing in mind the other channels of accountability which will be built into the system. In addition to these the Crown prosecutor's accountability to the courts could be usefully enhanced if there were formal channels established through which the courts and the prosecutions inspectorate could regularly exchange information.

Resource implications

7.69. In formulating our proposals we have had to take account of the limitations placed upon the nature and extent of change by its likely cost. There are direct costs or savings in terms of legal and support staff, buildings and other equipment Equally there may be indirect costs or savings which are incidental upon the changes made. Better case preparation may mean that fewer cases will go to the Crown Court and then collapse, or there might be an increase in guilty pleas. Either could lead to substantial savings in the expensive resources involved at the Crown Court. A more selective prosecution policy could diminish the burden on the courts and ultimately even on the probation and prison services. Resource consequences of this kind are impossible to estimate. We can only note their potential.

Lack of information on resources: the evidence

7.70. In our original invitation to submit evidence, having in mind the specific duty placed upon us by our terms of reference, we asked witnesses to try to estimate the likely cost of any proposals for change they offered. Few could respond. This is perhaps scarcely surprising in view of the general paucity of financial information about this part of the criminal justice system. The National Council for Civil Liberties essayed an estimate of the number of

[1]See para 6.53.

staff and cost of a fully fledged national prosecution service, based upon a comparison with staff/population ratio in Scotland, and concluded that it would be of the order of £26.25 million a year for a staff of 1,750 solicitors. The Commissioner of Police of the Metropolis offered some comparative figures for the staffing of his Solicitor's Department in order to take on a public prosecutor's role, using as bases for comparison the case load of the procurator fiscal for Glasgow and Strathkelvin, the 1977 Metropolitan police case load, and the population of the Metropolitan police district. These gave between a five and ten fold possible increase in staff. The Association of Chief Police Officers in Part III of their evidence presented a comparative table of prosecution costs for England and Wales, Scotland, Northern Ireland and Denmark; this also included detection and conviction rates. ACPO concluded that the costs of prosecution are considerably lower in England and Wales than in the other countries. Unfortunately, as each of these witnesses acknowledged, their figures have to be treated with much caution. And we ourselves consider that very little can be made of comparisons with other countries, because like is not being compared with like.

7.71. Quite late in our work the Prosecuting Solicitors' Society produced an estimate of the likely increase in prosecuting solicitors and support staff that would be required for a scheme to staff up departments with full prosecutorial responsibilities in all police forces. This used the existing prosecuting solicitor/population ratio as its base and suggested a percentage increase on the 1 January 1980 staff of about 65 per cent in professional staff and 51 per cent in support staff. This was helpful; as was a report from a Home Office Working Party that examined the cost of establishing prosecuting solicitors' departments in all forces that do not have them. The latter concluded that the net annual costs of introducing prosecuting solicitors' departments on a comparable scale would be marginal. They saw no reason on financial grounds alone why the observed trend towards the establishment of prosecuting solicitors' departments should not continue unimpeded. However we had decided much earlier, when it had become clear that the first round of written evidence was going to produce very little to help us, that we would have to mount research ourselves.

The Commission's research

7.72. Our research officer conducted a study of the arrangements for prosecutions in 41 police forces, and these included the staffing, organisation and function of all existing prosecuting solicitor's departments. On the basis of this we invited Arthur Andersen and Co to undertake a project to estimate the resource and organisational implications of three possible options for change to the prosecution system: first to a system where all forces have prosecuting solicitors' departments which prosecute in all cases but where the chief constable retains the decision to prosecute, with a right of veto on legal grounds only vested in the chief prosecuting solicitor; second to a system where the chief prosecuting solicitor takes all prosecution decisions and which is organised on a regional rather than police force area basis; third to a fully fledged national system. The consultants found that, in order to estimate the resource cost of the first of these changes, they needed to assess the cost of the

change which would bring to all police forces prosecuting solicitors' departments with functions similar to those of existing departments. The costs of this change are also presented in their study. These two reports are contained in our research volume on the prosecution system.[1]

7.73. The figures that have been produced for us are much fuller than have been available previously, but even they have to be interpreted with care. First the lack of global figures for prosecution activity (including the investigative role of the police, the costs of the defence and of prosecution counsel, and the resources involved at court) makes an assessment of the relative cost of change impossible. We can only note for comparative purposes that the Supply Estimates for 1980–81 for costs in criminal proceedings were £31.7 million, for criminal legal aid £78.4 million, and for the Director of Public Prosecutions £5.8 million. Secondly it is impossible to judge the full cost of support staff, buildings and equipment that would be required. The best we can do is to assess the likely increase in support staff in prosecuting solicitors' departments if the first option for change that was put to the consultants were adopted (that is the closest to the system we are proposing). There is no way of telling the size of the staff that might be needed to run a regional or a national service. Thirdly in consequence the estimates relate mainly to the professional manpower resources required and their costs. Lastly the establishments of prosecuting solicitors' departments that were used were for March 1978, the most up to date that our research officer's survey could employ. There has been continued increase in establishment since then.

7.74. The main conclusions of the research[2] were that:

(a) in terms of solicitors required, each of the options for change that we had put to the consultants would require about the same number of solicitors; this would approximately double the number of prosecuting solicitors who were then employed in prosecuting solicitors' departments (from 535 to 1,142);

(b) the total costs associated with prosecution advocacy would be about the same as at present under any of the options or at least would not increase (in the region of £11 million a year);

(c) if police establishments are not altered to take account of police time released from advocacy duties (about 500 police officers at the time of the survey), the total annual expenditure on police plus prosecutors would be greater than at present by about £4 million a year;

(d) there would be an increase of 55 law clerks (about 18 per cent) when all police forces obtained prosecuting solicitors' departments; that would be the only increase required, since the three options do not involve increases in Crown Court work upon which law clerks are employed in existing departments;

(e) existing support staff would approximately double to cover the first option we proposed (from about 290 to 560); no estimate is possible for the other two options; and

[1]Weatheritt, *op. cit.* and Kaye, *op. cit.*
[2]Kaye, *op. cit.*

(f) so far as the implementation of change is concerned, whether a regional or national system were the ultimate objective, the introduction of a local system something on the lines of the first option for change would be the natural first step; and that change could be accomplished over a period of about three years.

7.75. Because of the number of assumptions that have had to be made and the variety of imponderables in the calculations, these conclusions must be treated with caution and can be taken as no more than broad guidelines to the resource costs of the options for change available. We think it realistic to suppose that there is unlikely to be any saving through consequential reductions in police establishment. The reductions will be spread thinly over the whole country and in comparison with the total police budget are relatively small. Further the officers released back to general duties will be men of rank and experience whom the service will wish to use to the full; and it has to be remembered that the proposals we have made in chapters three and four for enhanced police supervision of investigative activity will increase the duties of officers of this kind. We noted also that since the change was made in British Columbia in 1974 the availability of the extra police manpower has been seen as one of its consequential benefits. We further consider that the process of transition to the first stage of change may take rather longer to achieve across the whole country than three years. In particular the problems consequent upon the substantial increases of professional staff that would be required in the Metropolitan police district (perhaps a three fold increase) will need very careful handling. We are also impressed by the implications for man-management and therefore for the skills that the Crown prosecutors will have to develop and show if transition is to be smoothly and effectively achieved. All of this points to the need to have flexible machinery for giving effect to any proposals for change.

7.76. Nonetheless we consider that the information that we have gathered enables the resource costs of change to be assessed with more confidence than hitherto. We are no longer guessing in the dark. The possible cost of the changes we propose are, we believe, worth paying to achieve a fairer, more open and more efficient system, which will have the confidence of the public in whose name it will operate.

CHAPTER 8

Bringing a case to trial

Introduction

8.1. Our terms of reference also require us to review the process of prosecution. We take this to include the means by which prosecutions are started; the means for ensuring that only adequately prepared cases and those in respect of which prosecution is justified come to trial; and the procedures which should govern getting cases into a state of readiness for trial. In our consideration of this loosely linked group of subjects we shall concentrate on the broad principles upon which detailed procedures can be devised in the new context to be provided by the statutory establishment of a prosecution service on the lines we have proposed. The discussion that follows is largely in terms of the Crown prosecutor service but the principles could be applied to any new arrangements for a statutorily established prosecution service. Such arrangements will, in our view, contribute to the achievement of more open, fairer and more efficient procedures for bringing a case to trial.

The means by which prosecutions are started

Existing provisions

8.2. Under these arrangements the initial decision to prosecute will continue to be taken by the police. Proceedings begin at that point and the case then formally passes into the jurisdiction of the court and, under our proposals, its conduct becomes the responsibility of the Crown prosecutor. How should the initial decision be given effect? At present proceedings are started by the police either by way of summons or by way of charge, and there is, notionally, some judicial scrutiny of the decision to proceed in one of those two ways.[1] We have reviewed the present procedures for starting police prosecutions and consider that they could be simplified in the interests of efficiency without any loss in fairness and openness.

The Commission's proposals

8.3. Proceedings are now initiated either by preferring a charge or by issuing a summons. We do not think the distinction need be retained. The present procedure for charging has no basis in statute and is an administrative arrangement. Yet for many people it is the first formal intimation that they are to be prosecuted and in a number of police forces it is the way in which the great majority of proceedings against adults for indictable offences are set in

[1]A full account is given at paras 175–183 of the *Law and Procedure Volume*.

motion. Cases proceeded with by way of charge are not subject to any form of detailed judicial consideration before being brought before the court. Nor is there in practice any such consideration, whatever the law may say, when the police decide to proceed by way of summons.[1] It is not clear how the police have acquired this autonomy. It may have stemmed from the sheer pressure of business on the courts, and from confidence in the way that the police have exercised their discretion to bring proceedings. Although the position seems not to have given rise to any procedural difficulties, we consider that it should be rationalised. The adoption of a single procedure should serve to define the point at which criminal proceedings start and at which responsibility moves from the police to the Crown prosecutor.

8.4. We therefore recommend that there should be a single procedure for initiating proceedings which should be by way of making an "accusation". This would be used whether or not the person has been arrested and whether or not, if arrested, the police take the decision to institute proceedings while he is still detained at the police station. The point at which an accusation is formally made would mark the commencement of criminal proceedings. The accusation could be couched in a form analogous to the present charge or summons, specifying the name of the accused person and details of the offence of which he is accused. It should give the time and place of his first court appearance. When the police decided to proceed while the person was still detained in custody, the accusation procedure would replace the present procedure for charging. The accusation would also replace the summons and could be used in all the circumstances in which the summons is at present used. We also propose removal of the requirement that cases where the police decide to prosecute should first be subject to consideration by a magistrate or justices' clerk. This has become a virtual dead letter in practice and should be removed from the law. We think that the same arrangements for making accusations should be used for official prosecutions: those by other agencies of central or local government. These are responsible bodies which can be made accountable for improper prosecutions. Our proposals in respect of non-official prosecutions, that is prosecutions by other organisations and private individuals, are set out in chapter 7; either the Crown prosecutor would make the accusation or, if he declined to do so, the matter could be taken to the magistrates' court.[2]

8.5. In reviewing the summons procedure we noted the use of what are called "appearance notices" in the Canadian province of Ontario. We have already discussed the use of these for requiring a person to attend a police station.[3] In Canada they are also used in respect of certain classes of offence as a way of starting proceedings by enabling the police to issue a notice on the street requiring a person to appear at court. This is not markedly different from the procedure developed by the Cheshire police for dealing with minor motoring offences. It has some advantages, for example of preventing long delays between people being told that they will be reported for summons and

[1] See the *Law and Procedure Volume*, para 181 and Gemmill and Morgan-Giles, *op. cit.*, pp 34–35.
[2] See paras 7.50 and 7.51.
[3] See para 3.80.

their being told whether they are in fact going to be prosecuted,[1] and also of saving resources, since at present, we believe, much police and court time is taken up with ensuring that notice of summons in respect of such offences has been properly served. It would also add to the flexibility of the police response to offences on the street. However there are practical difficulties that would have to be overcome; for example, adequate police supervision would have to be arranged, consideration would need to be given to how cautioning practice would be affected and arrangements would have to be made for liaison between the police and courts over listing of cases. We consider that, especially in the light of our proposal for the accusation, the possible benefits of such a procedure merit its being introduced more widely on an experimental basis to test its general feasibility.

The criteria for prosecution

8.6. The present procedures for the commencement of proceedings were, presumably, developed to enable the court to apply appropriate criteria for allowing a prosecution to be launched. As we have recognised, this check is now almost always a formality. In the written submissions made to us we received substantial comment upon what the criteria for prosecution should be and in our discussion of the present arrangements for prosecution in chapter 6 we observed that one of the standards of fairness by which a prosecution system should be judged is whether prosecutions are brought only in those cases where these criteria are met.[2] This raises issues of great political and social importance; it reflects the interplay between the law enforcement agencies, prosecutors, the courts and society at large in ever-changing circumstances; there can perhaps be no absolute answers. A statutory prosecution service will promote a greater measure of openness and accountability and will stimulate, and provide the forum for, the development of agreed and consistent criteria for the exercise of the discretion to prosecute. We therefore offer some comments upon what these criteria should cover.

8.7. It has long been accepted that not all incidents thought to have involved breaches of the law can or indeed should be visited with prosecution. At the minimum, prosecution should follow only if it is thought that an offence known to the law has been committed. However repugnant or anti-social a person's behaviour, a prosecution should not be launched unless he has committed an offence under the law. There must also be evidence to support the accusation; in the absence of such evidence a person should not be accused of an offence and brought before a court simply to allay public disquiet or to satisfy public demand or prejudice. The English system permits arrest and investigation when there is suspicion but not necessarily evidence in the full legal sense. Our proposals for the institution of proceedings, and the criteria for exercise of coercive powers such as arrest, do not affect this. The decision to prosecute, however, is in practice a series of decisions from the initial arrest (or report of an incident for consideration of prosecution) up until the trial. The further down the path towards prosecution a case has travelled the more important it becomes that whoever takes the decision to continue proceedings should satisfy

[1]See Gemmill and Morgan-Giles, *op. cit.*, Table 3:12, p 25.
[2]See paras 6.9–6.11.

himself that there is evidence by which the offence could, if necessary, be proved. This is particularly important in the English system of criminal justice which allows accused persons by pleading guilty to waive their right to have evidence produced against them.

8.8. There are at present differing views among prosecutors as to what constitutes enough evidence to justify a prosecution. The minimum standard (which all seem to agree is a necessary, although some do not consider it a sufficient, test) is often referred to as the existence of a *prima facie* case: that is, evidence upon the basis of which, if it were accepted, a reasonable jury or magistrates' court would be justified in convicting the accused of the offence alleged. The Director of Public Prosecutions is one of those who consider the existence of a *prima facie* case a necessary but not sufficient condition for prosecution. In cases where his Department is involved, the Director has told us that the test used is whether or not there is a reasonable prospect of conviction; in other words, whether it seems more likely that there will be a conviction than an acquittal.[1] This test requires the prosecutor, in reaching his decision, to go beyond consideration of whether there exists a *prima facie* case and to consider whether the evidence that comprises it is, in fact, likely to be accepted. To do this he needs to assess all the available information, including any explanation or further information forthcoming from the prospective defendant. To this end it may be advantageous to the defendant or his legal adviser to disclose as much as possible to the prosecutor. This may sometimes result in the preferring of less serious charges or the abandonment of the prosecution.

8.9. There is an underlying rationale in the application of this standard which, in our view, justifies its adoption as the minimum requirement for prosecution in any case. Someone should not be put on trial if it can be predicted, with some confidence, that he is more likely than not to be acquitted, since it is both unfair to the accused and a waste of the restricted resources of the criminal justice system. It does not follow that no case where the prosecutor has doubts about its strength should be prosecuted. We accept, as was often put to us, that in such doubtful cases the prosecutor should "let the court decide", and in many instances the prosecutor does not know until the actual trial shows it that there was a doubt about the strength of his case. But those where it is apparent to the prosecutor, that is the police at their stage in the process or the Crown prosecutor at his, that there is no reasonable prospect of conviction can hardly be described as doubtful. In such cases the prosecutor should take responsibility for deciding not to prosecute, as the Director does now.[2] We therefore suggest that the prosecutor should have to satisfy himself that there is a reasonable prospect of conviction before going ahead with a prosecution. The test applied to the Director's cases should be extended to all cases, and applied by all who make the decisions that bring a case to court.

8.10. The Director also told us that he takes into account factors other than the nature of the evidence and whether there is a reasonable prospect of conviction.[3] The factors which properly can be taken into account are difficult

[1] See the *Law and Procedure Volume*, Appendix 25.
[2] *Ibid.*
[3] *Ibid.*

to enumerate exhaustively, but some commonly accepted ones have emerged from the evidence submitted to us by the police service, the Director, and other prosecuting agencies. Among these are the staleness of the offence, the youth or age of the offender, and any mental illness or stress affecting the offender. It is also sometimes proper to take into consideration the attitude of the victim and the relationship of the victim to the offender. But there are undoubtedly other factors which may indicate that no useful purpose would be served by instituting a prosecution. These cannot be comprehensively listed; they depend to some extent on the circumstances of individual cases. We consider, however, that an attempt must be made under the auspices of the Director of Public Prosecutions to develop and promulgate throughout the police and prosecution services criteria for the exercise of the discretion to prosecute.

8.11. Within that framework it will always be possible that a prosecutor will be subjected to criticism over the way he has exercised his discretion. But the possibility of criticism cannot be a justification for starting a prosecution against any individual if the criteria are not met. It must also be recognised that the impartial administration of the criminal law does not mean that every offender will or should be prosecuted. The decision to prosecute or to discontinue proceedings must be seen for what it is, a decision on whether prosecution is justified, on the basis of the evidence, and, as appropriate, taking into account the sort of factors outlined in the previous paragraph. Nor can the process of prosecution be used primarily to determine what occurred during incidents of serious disorder or to allay public disquiet. It may be that some other means of doing this needs to be found, but that is not for us to determine. We confine ourselves to the observation that if there is such a gap in our present arrangements for ascertaining and bringing to light the circumstances of incidents that give rise to public concern, those who wish to see it filled should not look to the decision on or the process of prosecution to do it.

Disclosure

8.12. The term disclosure refers to the exchange of information between the parties before trial. That information can include names of witnesses, other material which may be evidence relevant to the offence, and information on the line of attack or defence which it is intended to pursue at trial. The standards that we have been applying throughout our discussion of pre-trial procedures apply equally to this aspect of preparing the case for trial. Openness is essential if the system is to work fairly for the accused. There are a number of critical decisions he has to make before the case comes to trial and he can make them properly only if he is fully informed; the decision whether to plead guilty or not guilty is only the most obvious of these. Similarly those decisions and disclosure of certain information by the defence (an alibi, for example) can affect the way the prosecution prepare their case and the resources they devote to it. The prior disclosure of matters that could take up time at trial can be of great importance in securing the efficient use of the resources of the police, prosecutors and the courts. Accordingly it is our view that provision should be made for the fullest disclosure possible, but any arrangements for disclosure must be consistent with the overriding features of the accusatorial

system, particularly that it is for the prosecution to prove guilt and not for the accused to establish his innocence.

Disclosure by the prosecution

The present law and practice

8.13. No one has represented to us that disclosure by the prosecution, when practicable, is not desirable. Disclosure is well established for cases tried in the Crown Court in respect of the evidence which the prosecution propose to call, by way of the supply of witness statements and depositions, but less well so in respect of other relevant material, for example statements taken from witnesses whom the prosecution does not intend to call.[1] Nor has there yet been any formal framework or uniformity of practice for disclosure in cases tried in magistrates' courts.[2] Comparatively recently, Parliament has established the principle of entitlement to disclosure in such cases by enacting s. 48 of the Criminal Law Act 1977 which enables rules to be made requiring the prosecutor to give advance information of matters he proposes to adduce as evidence in summary trials; these rules have yet to be made.

The Commission's proposals

Disclosure in summary proceedings

8.14. We endorse the principle now established in statute that the requirement for disclosure by the prosecution should also apply in cases tried in magistrates' courts. The existence of a Crown prosecutor will mean there will almost always be some written documentation since this will be needed to assist the prosecutor in conducting the case. Already in some forces in the generality of cases a short form summary of the case (which gives the substance of the case against the accused) is prepared for the use of the prosecuting solicitor in court. The use of the short form could spread with the establishment of Crown prosecutors, and it might be feasible merely to copy it for disclosing to the defence. The principle has already been established in the provision of the summary of facts in cases where people can plead guilty by letter, but these tend to be the most minor offences and the summaries to be relatively formal. For cases which may be more serious or contentious it may be necessary to develop a rather different format. We accept that the prosecution cannot be bound by the summary since the conduct of the case sometimes has to be decided on the spur of the moment in the course of the trial. A significant departure from the summary should, however, constitute grounds for adjournment at the request of the defence.

8.15. The requirement for disclosure should operate only on request by the defence. It is not, in our view, essential to make it a requirement in all cases, since these will include some where the defence will neither need nor wish for disclosure. But problems could arise where disclosure has not been requested either because the matter is relatively simple and has come very speedily to trial, or because the defendant is unrepresented. We suggest that these might

[1]See the *Law and Procedure Volume*, paras 194 ff for a full discussion of disclosure of evidence by the prosecution, in particular the effect of *R v Leyland JJ ex parte Hawthorne* [1979] 2 WLR 28.

[2]See the *Law and Procedure Volume*, paras 203 ff.

be overcome by altering the procedure for taking a plea of guilty on summary trial. At present the summary of facts is usually read out after the plea of guilty has been taken. We propose that a plea of guilty should not be formally entered until after the accused has heard the facts outlined by the prosecutor. If the accused does not accept the summary of the facts (other than in a minor and unimportant particular) this should be regarded as a request for disclosure.

8.16. For the purposes of disclosure we propose that advantage should also be taken of the procedure for police officers to conclude interviews of suspects with a summary of the main relevant points.[1] A copy of this or of a written statement if one is taken should be given, on request, to the accused as soon as practicable (a specific time limit may have to be prescribed). As well as the summary of facts and any statement made to the police, a list of all the witnesses whose statements are intended to be used in evidence should also be available on request. If on consideration of this material the defence wish to have copies of the statements of witnesses, these should be made available either by copying or for inspection. Requiring disclosure of other relevant material raises particular problems which are more appropriately considered in the context of disclosure in the Crown Court, but we would remark here, in anticipation of the discussion of that subject,[2] that we recommend that the same principles should apply to trials at both levels of court.

8.17. By drawing these provisions in this way the costs of disclosure in magistrates' court cases should be kept to a minimum. We have not been able to assess what these will be, since they will be affected by the existence of a statutorily based prosecution service on the lines proposed. That should mean the costs will be rather less than would otherwise have been expected.[3] Parliament established the principle of disclosure in these cases in 1977. For the reasons we have given, we consider that its implementation should now receive priority.

Disclosure at the Crown Court

8.18. By comparison with the position in magistrates' courts, the procedure for disclosure at the Crown Court is well established. Existing provisions require the disclosure of evidence the prosecution propose to call by the supply of witness statements, provided such evidence is tendered at the committal proceedings, as it usually is. However where the prosecution propose to call evidence not tendered at the committal proceedings, the prosecution should (not must) supply the defence with a copy of that evidence. We think the position should be clarified and that the defence should be entitled (subject only to the provisions on sensitive information referred to in the following paragraph) at least to a copy of any statement made by any witness the prosecution proposes to call at the trial; it should be supplied a reasonable time before the trial. It has been argued that such a rule would not go far enough. The prosecution may have available to it information which it does not intend

[1]See para 4.13.
[2]See paras 8.18–8.19.
[3]We note that an official working party has been set up by the Home Office to examine the resource implications of implementing s. 48 of the Criminal Law Act 1977 but we have not been able to obtain any information from it on the cost in general terms of implementing the requirement.

to use but which could be helpful to the defence. The withholding of that information could lead, and it is alleged has led in particular instances, to miscarriages of justice. A working party set up to examine this question in relation to cases tried on indictment reported at the end of 1979.[1] The report was referred to the Royal Commission by the Home Secretary and the Attorney General, who indicated that action on it would await the Commission's recommendations.

8.19. The working party recognised this possible gap in relation to disclosure by the prosecution but on the grounds of cost alone decided against any rule that the prosecution should as a matter of routine furnish copies of every single statement. The main thrust of its proposals was that disclosure of material beyond that at present required should be at the discretion of the prosecutor. This places on the prosecutor the responsibility of having to decide what might be relevant or useful to the defence. Since there are difficulties with such a proposal, we considered whether there might be scope for allowing the defence in such cases to apply to a judge to determine whether and if so what additional material should be disclosed. However if the judge were to be able to determine what would be relevant or useful, the defence would first have to disclose its case. Such a requirement seems to us inconsistent with the central feature of the accusatorial system that it is for the prosecution to prove guilt without assistance from the defence. Furthermore, the proposal would make such demands on scarce judicial manpower as to render it impracticable. We therefore conclude that the discretion whether to disclose additional material must remain with the prosecutor. We recommend that he should be obliged, in addition to the present requirements, to copy or make available to the defence on request statements or documents which "have some bearing on the offences charged or the surrounding circumstances of the case" (adapting a phrase used by the working party). Clearly he would be in a better position to assess which material falls into this category if the defence makes its case known to him in advance. But for the reasons we have given, this cannot be made a categorical precondition. The working party also proposed that the prosecutor should have discretion not to make available certain sensitive material (information which, for example, could lead to interference with witnesses or which of its nature should not be disclosed, for example because it contained the names of informers) or statements by witnesses who in the prosecutor's opinion might wilfully give false evidence on behalf of the accused. We support the working party's conclusions that where this is so only the name and address of such a witness would have to be disclosed and that sensitive information could also be withheld provided that it did not go towards establishing innocence. If it did, the prosecution should either have to find some means of making it available or accept that it would have to offer no further evidence in the case. We recommend that these proposals for additional disclosure on request in certain cases and the limitations in respect of sensitive material be implemented in respect of cases tried at the Crown Court. They should apply equally to magistrates' courts.

[1] *Report of the Working Party on Disclosure of Information in Trials on Indictment* (November 1979).

Disclosure by the defence

8.20. Under the present law there is no specific requirement for the defendant to give advance information to the prosecution except in the case of an alibi defence (and this is limited to cases tried on indictment). But even if there is no legal requirement, there can be advantage for the defendant in mentioning at an early stage a line of defence on which he intends to rely. Although the court cannot draw an inference of guilt solely from failure to do so, it is a matter to be taken into account in deciding what weight is to be given to the evidence introduced at a late stage, particularly if it is so late as to preclude the police from inquiring into its truth. The objection of principle that the burden of proof is upon the prosecution applies to any formal requirement of general disclosure by the defence, and there is the problem that it is impossible to devise effective sanctions against a defendant who fails to comply with the requirement. He could not subsequently be prevented from adducing evidence which demonstrated his innocence. The failure might not even be a matter under his control, arising for example from inadvertence or from an omission on the part of his solicitor.

8.21. Even if there were not these objections, there is some doubt whether requiring disclosure by the defence would save much time and expense during trial (which is one of the arguments adduced in support of the proposal). There is no firm information, for example, on how much time is wasted because the defence produces surprise evidence. Baldwin and McConville found that major new facts were adduced at trial by about 10 per cent of the defendants in their sample (370 contested cases in one Crown Court). Police officers interviewed by the researchers considered that in only about 1 per cent of cases did new facts of themselves lead to an acquittal which was thought unjustified.[1]

8.22. There is however one existing, limited requirement for defence disclosure and we think that there may be scope for extending it. At present advance notification of alibi in trials in the Crown Court is required. This seems to us to be based upon the principle that the introduction of a defence of this kind can take the prosecution by surprise at trial, in that they could not reasonably have anticipated it and would have had no opportunity to carry out the investigation required to confirm or rebut it. It would be reasonable for the judge in such circumstances to grant an adjournment for that purpose. The requirement for advance notification is designed to avoid the inconvenience and expense of such adjournments. We consider that this principle could be extended to other defences which by taking the prosecution by surprise can cause the trial to be adjourned while investigation is carried out to confirm or disprove them. The obvious examples are defences depending on medical evidence or expert forensic scientific evidence which the prosecution needs an opportunity to evaluate or on which it may wish to call its own expert witnesses. Consideration will need to be given to the specific defences to which advance notification should apply if the principle is to be extended as we propose.

[1]We are grateful to Drs Baldwin and McConville for allowing us to quote this at present unpublished material.

8.23. Our concern with disclosure has been partly motivated by our wish to improve the efficiency of the prosecution process. And in this context we believe that the defence may be the more willing to make elements of their case known once a system for fuller and more certain prosecution disclosure has developed. The arrangements for pre-trial reviews that are being developed in various Crown Court centres may have a part to play here,[1] as may the provision in s. 10 of the Criminal Justice Act 1967 for admission of facts by the defence. Development of this procedure could achieve to some extent the objectives of disclosure by the defence without the drawbacks mentioned in the previous paragraphs. The prosecution should, in our view, be more active in seeking admissions by the defence under the section and the experiments with pre-trial reviews should continue and be encouraged.

Committal proceedings

The existing provisions

8.24. An offence tried in the Crown Court is almost always preceded by committal proceedings at a magistrates' court. These proceedings will consist either of a hearing at which the magistrates decide whether or not there is enough evidence to send the accused for trial or of a formal committal without consideration of the evidence by the magistrates. The accused has an absolute right to the former (a hearing) so that he may hear and cross-examine witnesses or submit that there is no case to go for trial (or both). However, if the accused is legally represented and, on the advice of his solicitor, accepts that there is a case to go for trial, he may waive this right and agree to be formally committed for trial, as the vast majority of accused persons do.[2]

8.25. The function of committal proceedings according to the Divisional Court is to ensure that no one shall stand trial unless a *prima facie* case has been made out.[3] Committal proceedings also serve other purposes. They provide the discipline of a date by which prosecution and defence should have prepared the case, and the prosecution have complied with the existing requirements for disclosure of information to the defence. They provide an opportunity for the making of witness orders (requiring a witness to attend the trial on a specified date), and for the question of bail to be examined.

The main issues and the factual background

8.26. How effective are committal proceedings in preventing inadequately prepared and selected cases going to the Crown Court? Committal, it is said, is all too often just an automatic procedure, since magistrates are reluctant to dismiss cases. Statistics for 1978 show that more than 84,000 defendants were committed for trial and over 2,000, or just over 2 per cent, were discharged because there was not sufficient evidence to put the accused on trial in the Crown Court.[4] There are no national figures on the proportion of committals where there is a hearing of the evidence, but it is thought to be very small. In a sample of cases going to one Crown Court, Baldwin and McConville

[1] See the *Law and Procedure Volume*, para 200 and Appendix 27.
[2] See the *Law and Procedure Volume*, paras 184–193.
[3] *R v Epping and Harlow JJ, ex parte Massaro* [1973] 1 QB 433 reaffirmed in *R v Grays JJ, ex parte Tetley* (1980) 80 Cr App R 11.
[4] *Criminal Statistics 1978, op. cit.*, Table 1(a), pp 192–210.

discovered it was less than 1 per cent.[1] This seems low in comparison with national figures showing that magistrates do not commit in about 2 per cent of cases, but the latter figure includes cases in which the prosecution has offered no evidence as well as those which are dismissed on full committal. It is further argued that because there is such a high proportion of cases sent to the Crown Court in which the judge orders an acquittal before the case is even put to the jury or, the evidence having been laid before them, directs the jury to acquit, committal proceedings are ineffective as a screening procedure. Ordered and directed acquittals in 1978 were over 40 per cent nationally, and as high as 54 per cent in one area.[2] The reasons for such acquittals are discussed at paragraphs 6.17–6.22. As was pointed out there, they have to be seen against the background of all cases dealt with by the Crown Court. Baldwin and McConville argue that a significant proportion of weak cases are committed for trial which could have been weeded out at committal. That they are not is in their view attributable to lack of effective scrutiny of the case by prosecution and defence (who may often only receive the papers on the day of the hearing).

The Commission's proposals

8.27. It will be one of the responsibilities both of the police and of the Crown prosecutor to ensure that there is sufficient evidence against the defendant to justify a prosecution. Committal proceedings date from a time when the magistrates were the check upon unfounded cases coming to court. That function has gradually fallen into disuse. We have considered whether there is any need to retain a filter other than that provided by the Crown prosecutor of cases coming to the Crown Court (or indeed before any court), taking into account our proposal for removing the requirement for judicial approval for the initiation of police and other official prosecutions. The requirement of fairness in the prosecution system demands that so far as possible no one should be required to stand trial in the absence of good cause and that the defence should have an early opportunity to assess whether such good cause exists. This is particularly important where there will be delay in the case getting to trial. Further, as a principle it applies to cases wherever they are to be tried. Although an offence may be regarded as less serious and therefore appropriate to be tried in a magistrates' court, the fact of being prosecuted of itself can have serious consequences for the defendant. Over the years growing pressure on the Crown Court has brought a tendency for the magistrates' jurisdiction to be extended to take in more serious cases. Even in magistrates' courts waiting times for trial are now such that prosecution can lead to prolonged waiting and consequently considerable strain for the defendant.

8.28. Our proposals for disclosure in all cases should enable the defence to make some assessment whether there is sufficient evidence on paper to justify the case going to trial. If the defence wishes to challenge this, it should, unless the case will be brought to trial within a specified period, have the option of a hearing before the magistrates at which to make a submission of no case to

[1]Again we are grateful to Drs Baldwin and McConville for allowing us to use this as yet unpublished information.
[2]*Judicial Statistics 1978, op. cit.*, Table B.7(d), p 32.

answer. We call the new procedure "application for discharge". Since it is the delay which has undesirable consequences and not whether the case is to be tried summarily or on indictment, the possibility of applying for discharge should be available in respect of all cases which are triable on indictment or either way where the delay before trial will exceed the specified period. Discharge at this stage would have the same effect as discharge under the present committal proceedings.

8.29. We have considered what is a tolerable period for a person to have to wait for trial without having the right to apply for discharge. There is no national information about waiting times for trial in magistrates' courts. A recent study by the Vera Institute of Justice of a limited sample of cases in a small number of courts suggests, however, that waiting times in magistrates' courts can be considerable.[1] Only about 15 per cent of contested cases were adjudicated in less than six weeks from the date of arrest or summons, and even guilty pleas took several weeks to come to court. Our own research shows that, in addition, there can be considerable time elapsing between the first contact with the police and the issue of summons.[2] Thus it is not only cases tried in the Crown Court, where current delays have provoked widespread concern, that delay may be experienced. A final decision on the tolerable period of waiting for trial will depend upon what time limits can realistically be set for the fuller disclosure that we are proposing. We would hope that no one should have to wait for trial longer than eight weeks from the receipt of the accusation without having the option of challenging whether trial is justified.

8.30. We propose that the application for discharge should replace the procedure for committal hearings on consideration of the evidence. And we see no case for retention of the procedure for committal without consideration of the evidence. To the extent that sifting is necessary, it will be undertaken by the Crown prosecutor or by the magistrates if there is an application for discharge. There is no reason in principle why the Crown prosecutor (or other official prosecutor) should not send cases that are to be tried on indictment direct to the Crown Court. We recognise that provision will have to be made for other matters to be resolved by the magistrates, including the questions of bail and witness orders and, in certain cases, the mode of trial. Provision will also have to be made for the unrepresented defendant to be informed of his right to make an application. It has been represented to us that modification of committal proceedings in this way will remove a discipline on defence and prosecution to prepare for trial, and on the prosecution to comply with the requirement for disclosure. That could be overcome by the imposition of a period on the supply of the papers to the defence and a time limit within which the request for an application for discharge hearing must be made.

8.31. There is the further question of the way in which the application for discharge should be heard. It could either be by way of an examination of the case on paper or by an oral hearing with witnesses being called to give evidence

[1] *Waiting Times in Magistrates' Courts—An Exploratory Study*, Vera Institute of Justice, London Office, December 1979 (mimeo).
[2] See Gemmill and Morgan Giles, *op. cit.*, Table 3:11, p 24.

and cross-examined upon it. Requiring the magistrates to reach their decision on the basis of the prosecution's case set down in writing would remove the right of the defence at this stage to challenge by cross-examination the credibility of the prosecution's witnesses and this might be thought undesirable. However, on balance, the majority of us doubts whether the magistrates need to take their decision upon the basis of oral evidence tested under cross-examination. The magistrates will be concerned to check the Crown prosecutor's assessment that on the evidence available, which will be in the form of written statements and other information set down in writing, there is a case to be answered. They will not be required to decide, as they are not now under full committal proceedings, whether they would at that stage convict or acquit. Furthermore, concern has been expressed to us about the possibility of abuse of the existing full committal hearing, as a rehearsal for trial or to wear down witnesses. This is said to be a particular problem in cases where the giving of evidence is a stressful experience for the witness, especially young children, the elderly and the victims of sexual assaults. For this reason also those of us who take this view consider that, although this may only comparatively rarely occur, it ought to be avoided if at all possible. However, should a full hearing be retained we recommend that consideration be given to protecting witnesses from the possibility of repeated examination when this is likely to occasion stress. In Sweden a tape recording of an interview with such a witness may be used in court and we recommend that the possibility of introducing such a procedure in this country should be explored.

Time limits during the bringing of proceedings

8.32. Our proposals for disclosure and for modifying committal proceedings will place a discipline upon the prosecution to prepare cases for trial as expeditiously as possible. We have indicated in chapter 7 the arrangements we propose to ensure that the Crown prosecutors' departments achieve acceptable standards of efficiency. The establishment of an inspectorate and a system for monitoring performance should enable delays to be identified and, as appropriate, remedial action to be taken. These proposals reflect our concern over the current delays in bringing cases to trial. The problems of cases becoming stale, of the distress and inconvenience caused to witnesses, victims and suspects, particularly innocent ones and those remanded in custody who do not subsequently receive a custodial sentence, have been much discussed in the evidence submitted to us. These features of present arrangements detract from the fairness of the system and point to the inefficient use of resources in it.

8.33. We have therefore considered whether the introduction of any other fixed time limits would contribute to the reduction of delay. Proposals for fixed time limits appear to be based on an assumption that delays arise from lack of action by individuals at various points in the process which a fixed limit would prevent. The operation of such time limits as we have been able to examine suggests, however, that the imposition of a time limit of itself achieves little. There is already one time limit in our system, that of eight weeks on the period from committal to trial under the Courts Act 1971. If that is exceeded, the accused can be tried only with the consent of a judge; but we understand this is invariably forthcoming. We discovered on our visit to San Diego, California,

that the operation of time limits has had only limited success in diminishing delays. At the federal level it has required the introduction of expensive and complex mechanisms to monitor the progress of cases and the development of an elaborate set of reasons for allowing the time limit to be waived. In the state system, the waiver of the limit seems to be the rule rather than the exception. In the Netherlands the limit can be extended by commencing the trial and seeking an adjournment and this seems to be a routine procedure. There is also a limit in Scotland but it applies to time spent in custody rather than awaiting trial as such. It has been represented to us that this achieves priority for custody cases but at the expense of those where the accused is on bail. Further, if the limit looks like being overrun, the accused can be released on bail to enable the trial to continue, even though bail was previously considered undesirable.

8.34. We would favour precedence being given, as now, to cases where the defendant is in custody, but this should not be enforced by means of a fixed time limit. For a limit to have effect we believe breach of it would have to be associated with an immunity from prosecution. If this were so, the Crown prosecutor might have to decide which of the cases coming up to the limit should be dropped in order to ensure that the most important were tried. And defendants might deliberately adopt delaying tactics in the hope of avoiding trial. We consider this possible consequence highly undesirable.

8.35. The speed with which cases are brought to trial is, in our view, determined almost entirely by the volume of business and the resources available to deal with it. We have not examined the practical or resource implications of a limit. But experience of time limits in other jurisdictions suggests to us that a time limit of itself does not automatically attract adequate resources and in their absence it tends to result in adjustments of the system to circumvent it. While we favour a greater element of discipline in the system than exists at present and have made proposals to this end, we do not recommend that any other fixed time limits should be introduced.

Plea bargaining

8.36. A substantial minority of those who submitted evidence to us voiced concern about the practice known as plea bargaining. In the sense that the accused might be given a promise by the court that he would receive a less severe sentence if he were to plead guilty, plea bargaining is forbidden. Any conviction obtained in this way will be quashed by the Court of Appeal. Only the court can determine the sentence so that no one else is in a position to guarantee what the sentence will be. However, the expression "plea bargaining" is sometimes used in broader terms to refer to the practice whereby defendants plead guilty to at least one charge in exchange for the withdrawal of one or more other charges, or where a plea of guilty is encouraged by the hope that it will result in a lighter sentence (the so-called sentencing discount). This gives rise to concern on the following argument. Sentencing discounts (or, at least, the consequences of each type of plea presented to defendants by their legal advisers) constitute unacceptable pressure to plead guilty. The sentencing discount clearly has an impact on earlier parts of the process; if the possibility of a diminution of sentence for a plea of guilty is explained to the suspect in

the police station he may find it a strong inducement to confess, and this will be so even if the police officer behaves with the utmost propriety. It is clear that the existence of a sentencing discount to reward a guilty plea can constitute a considerable pressure on accused persons whose lawyers advise them that their defence is of doubtful strength. But it is by no means the only factor which may operate as such a pressure. The possibility of speedy disposal offered for a guilty plea contrasted with the certain delay involved in a contested case may be equally if not more important. Indeed, it may be that the legal concept of complete freedom of choice over plea fails to acknowledge the realities of the situation. But we consider the general question of discretion in sentencing, including any discount for guilty pleas, to be outside our terms of reference. Accordingly since we are not in a position to give comprehensive consideration to the complex issues of principle and policy at stake, we have concluded that we should refrain from making any recommendations on this subject.

CHAPTER 9

Summary and conclusions of Part II: the prosecution of offenders

9.1. In this Part of our report we have considered the existing arrangements for the prosecution of offenders on the basis of the standards of their fairness, their openness and accountability, and their efficiency (6.1–64).[1] We have concluded that there are certain defects which make the case for some change (6.65). But we also recognise that change cannot be sudden or root and branch; we must build on existing institutions. And any change must be assessed in terms of its organisational consequences and the resources it will require (7.1).

9.2. Our proposals build on the changes in the arrangements for prosecution that have been occurring since the Report of the Royal Commission on the Police in 1962 (7.2). We recommend that there should be no further delay in establishing a *statutorily based prosecution service* for every police force area (7.3). We suggest that the prosecutor should have the title of Crown prosecutor (7.8) and recommend that the statute should specify his functions: the conduct of all criminal cases once the decision to initiate proceedings has been taken by the police, the provision of legal advice to the police on prosecution matters, and the provison of advocates in the magistrates' court and briefing of counsel when appropriate (7.5). We recommend that the point of charge or issue of summons should mark the division of responsibilities between the police and the prosecutor (7.7). The majority of us considers that after that point the latter should have complete discretion to alter or drop charges, but three of us would favour giving the prosecutor the final word on whether to proceed only in respect of the legal elements of the decision, in order to reflect their view that the chief constable is in a better position to take account of other aspects of the decision. The majority thinks that such a distinction should not or cannot be drawn for practical purposes; the relationship between the chief constable and the Crown prosecutor will be no different in principle from that with the Director of Public Prosecutions and the police will continue to have the discretion whether to initiate proceedings (7.17).

9.3. We recommend that the police should no longer act as *advocates in magistrates' courts* (7.18). Where peaks occur in workload which cannot be met from the Crown prosecutor's own staff, he should make use of barristers or solicitors in private practice.

9.4. *The prosecution service should be locally based*, but with certain national features. All but one of us consider that a centralised national system

[1]References in this chapter are to the relevant paragraph numbers.

would involve a large bureaucracy and tend to lead to slow and remote decision taking. Any advantages that such a system might have can be effectively achieved with the organisation we propose (7.24). A majority recommends that the Crown prosecutor should be accountable to a police and prosecutions authority, a development of the police authority. It should be similarly constituted and have the same territorial basis as the existing police authority (7.29–30). The Crown prosecutor should be accountable to it for the management and resources of his department and the efficiency and competence of his staff (7.26). It would not consider decisions in individual cases. Special arrangements will be required for London (7.33–37).

9.5. *The Minister responsible* for the prosecution service should be the Home Secretary or the Attorney General, for each of whom there are strong arguments. Making the Attorney General responsible for it would serve to underline the independence of the service from the police (7.66). On advice from a small prosecutions inspectorate, the Minister would set national standards for staffing and review standards of performance. Arrangements for training should be centrally coordinated and funded (7.60). We recommend that the prosecution service should be part locally and part centrally funded (7.38). The provisions requiring the consent of the Attorney General or the Director of Public Prosecutions to prosecution should be rationalised (7.56). The Director will have a vital part to play in the development of the new service and in the promulgation of national guidelines on prosecution matters (7.55). His role as a prosecutor will be affected by the establishment of the new service and should be reviewed in the light of experience of its operation (7.57). The Home Secretary, as Minister responsible for the police service, should take steps to achieve greater consistency of police practices in relation to prosecution, especially cautioning (7.59).

9.6. *Ministerial accountability to Parliament* should extend to those aspects of the prosecution system for which Ministers are responsible: the Home Secretary for the principles on which the police should initiate prosecutions and the development of alternatives to prosecution; and the Attorney General for the ethical and professional standards of local prosecutors and prosecuting policy in general. The Minister responsible for the management of the prosecution service should be accountable to Parliament and should publish the annual reports of the prosecutions inspectorate (7.67). The prosecutor will be *accountable to the courts* for prosecutions which he brings. On balance, the majority of us considers that the Crown prosecutor should not need to obtain the leave of the court to withdraw a charge but he should be required to notify the court of his action and the reason for it (7.68).

9.7. The Crown prosecutor should not take over *responsibility for prosecutions by official agencies*, but he should conduct such cases where the normal practice is for the police to initiate them or conduct them on behalf of the agency (7.44). We recommend that the right to apply to bring a private prosecution should be retained, but it should be to the Crown prosecutor in the first instance. If the latter refuses to take the case, the private prosecutor should be able to make an application to a magistrates' court for leave to commence proceedings himself (7.50–51).

9.8. In the light of our proposals for a statutorily based prosecution service we have reviewed in chapter 8 the means by which prosecutions are started, the means for ensuring that only adequately prepared cases for which prosecution is justified come to trial and the procedures governing their preparation.

9.9. We see no case for retention of the present different *procedures for starting prosecutions* (by charge or summons). We recommend a single procedure, called an accusation, which should not require the consent of the magistrates in cases initiated by the police or other official prosecutors (8.4).

9.10. There should be agreed and consistent *criteria for the exercise of the discretion to prosecute.* The criteria cannot be exhaustively enumerated; they must take account of varying circumstances. We would recommend the adoption for all prosecutions of the test at present applied by the Director of Public Prosecutions. The prosecutor should have to satisfy himself that there is a reasonable prospect of conviction before going ahead with the prosecution: the existence of a *prima facie* case would not of itself be sufficient (8.9–10).

9.11. We endorse the principle now established in statute that the requirement for *disclosure by the prosecution* should also apply to cases tried in the magistrates' courts, and recommend a framework for facilitating such disclosure (8.14–17). At the Crown Court, disclosure of material additional to that at present required should be the responsibility of the prosecutor. Subject to a discretion to withhold sensitive material, he should be under a duty to copy or make available statements or documents having some bearing on the offences charged or the surrounding circumstances of the case (8.19). We rule out any formal requirement of general *disclosure by the defence*, on grounds both of principle and of practicability (8.20), but recommend the extension of the provisions relating to the notification of alibi to certain other defences (8.22).

9.12. The *formal committal* of cases for trial seems to us unnecessary. But some procedure is required where there will be delay in bringing a case to trial in which the defendant wishes to challenge the justification for prosecution. That applies as much to cases tried in magistrates' courts as in the Crown Court. A new procedure should be devised to enable the defendant, whether represented or not, to make a submission to the magistrates of no case to answer in all either way or indictable cases, if the delay before trial will exceed a specified period, which might be set at eight weeks (8.28–30).

9.13. Other ways of improving the procedures for preparing a case for trial were put to us in evidence, but for the various reasons given in the body of the report we have not considered these in any detail. It would, in our view, be more sensible to allow the new arrangements for prosecution to settle down before any further wide examination of these other matters is undertaken.

Conclusion

CHAPTER 10

Our proposals and the future

10.1. When, in 1828, Sir Robert Peel asked the House of Commons to appoint a Select Committee on the Police of the Metropolis, he contended that "the country has outgrown her police institutions, and the cheapest and safest course will be found in the introduction of a new mode of protection". We have asked whether, in 1980, our country is not again at a point at which its existing pre-trial procedures, its traditional assumptions about policing and popular conceptions about the place of the police in our system of criminal justice require systematic review. It is not the responsibility of the police alone to detect offences and maintain order. Our studies have highlighted the vital part played by members of the public in the reporting of offences and the identification of offenders. If they are to continue to play that part it is important to ensure that the public has confidence in the procedures for investigating and prosecuting offences. That, we have argued, requires those procedures to be fair, open, workable and efficient. The procedures must be applied equitably to all members of the community and without discrimination in respect of ethnic and other minorities. We have striven to produce a coherent and logically integrated set of arrangements, and one which displays an appropriate balance between individual rights and the community's interest, manifested in its fairness, openness and workability. In the light of the injunction in our terms of reference to take into account the need for the efficient and economical use of resources, we have also considered carefully the resource implications of our proposals.

10.2. Before we sum up the main features of the report, we would draw attention to the following points. When the Government announced the establishment of the Royal Commission the Prime Minister said that it would be concerned essentially with matters of principle. We have followed this prescription in trying to develop the framework for reformulating pre-trial procedures, and have gone into detail only to the extent necessary to test the practicability of our proposals and to illustrate how they might work. Secondly we have been very aware of the need to keep in mind the special position of juveniles. But rather than singling them out for separate discussion at one point we have considered in relation to each aspect of pre-trial procedure whether additional protection was required. We believe that the cumulative effect of our proposals for the treatment of all suspects, adults and juveniles alike, and for making existing safeguards for juveniles more effective will substantially enhance the protections they are afforded. Thirdly our experience

throughout our work has confirmed the intractability of many of the problems with which we have been faced. And this is reflected in the balance of argument in our report and in the various differences of view that it manifests.

10.3. These differences of view are most sharply exposed in Part I of the report in relation to the investigation of offences. Two of our number have reservations about the general and particular effects of the proposals of the majority in this part of the report, and our readers will have noticed these expressed on particular proposals. Their objections are on three main fronts. The first relates to the oversight of police powers. They consider the external control of the magistrates' court as of real and not just notional importance. The mere fact of having to apply to an outside, independent body must act as a check on the police use of their powers. The supervision by magistrates of police powers may not be as effective a safeguard as it should be; they believe that the solution should be to attempt to improve that supervision, where it is inadequate, rather than to abandon it. The exercise of supervision by senior police officers is supervision of a quite different nature, for it allows the police, rather than lay people, to authorise the use of police powers. And the sanction for abuse of those powers is left in the hands of the police themselves, except for civil action in the courts, a right few members of the public are likely to exercise. Lack of enforcement powers was the main problem which restricted the operation of the Judges' Rules, yet enforceability of a statutory code of suspects' rights, in their view, will in effect be left to the police themselves through their internal disciplinary procedures. The second element of their reservation relates to any response to abuse of police powers, or to too wide an application of police powers. They believe that this should not be to extend police powers to "regularise" the situation, but to give the police no more powers than they need, and can be clearly justified. If the police are, in practice, using more powers than they really need, then the response should be to attempt effectively to limit those powers. They do not consider that it is good enough to accept the *de facto* extension of police powers and to be content with requiring that the exercise of those powers should be better documented. This reservation applies in particular to powers of stop and search, arrest, and procedures on arrest, such as fingerprinting and photographing even of ten-year old children. Without adequate safeguards the rights of vulnerable groups such as the young, the mentally handicapped and the ethnic minorities cannot be protected. Thirdly they would have liked to have seen a greater recognition in the proposals that without the cooperation of the public the police are unable to do their job properly. This approach necessarily would lead to measures to limit the power of arrest and an acceptance that any part of "sus" must not be replaced; citizen oversight of police powers should be ensured wherever possible; the recruitment and training of police should be designed to create a closer understanding of the problems of the working population and the unemployed, and in particular to improve relationships with the minority population especially the black and brown youth in the deprived areas; those who are most vulnerable under interrogation must be protected; and some certain sanction must be provided if the rules laid down in statute are breached (as they see it this requires the automatic exclusion of evidence,

or of confessions improperly obtained in addition to civil action in the courts, if justified).

10.4. The position stated in the previous paragraph clearly demonstrates the nature of the dilemma with which we have been faced. The rest of the Commission is at one with their two colleagues on the broad objectives that underlie that position. They differ from them only in the perception of how these objectives are to be attained and of the effect that the proposals on investigative powers will have in practice. This has been argued in the body of the text. For example, the majority of us considers that, in relation to certain powers, requiring magisterial supervision enables the police to avoid taking full responsibility for decisions which are theirs in practice and ignores the likely pressures that this can place on the suspect. It will therefore provide less rather than more protection for suspects and for the public at large. Similarly, while sharing their colleagues' view that the police should be given only those powers which can be shown to be justified, they consider that leaving powers unspecified and unregulated gives far less protection to the public and much greater scope for abuse than attempting to specify precisely the circumstances in which they should be available and the safeguards to which they should be subject. They agree with their two colleagues that sanctions for breach of the rules must be certain and effective, but they have concluded that supervision and sanctions applied close to the event and across the whole range of police activity will be more effective in securing compliance with rules for the protection of all suspects than an exclusionary rule which can bite only upon a tiny proportion of police investigative activity. In their view the approach they have adopted in Part I of the report, which aims to give both the public and the police a clear awareness of their rights and duties, will strike the appropriate balance and secure the confidence of all sections of the community. In sum, they believe that their approach on the investigation of offences is in practice more likely to achieve the objectives which they share with their colleagues.

10.5. The majority has taken the following approach in Part I of the report. The pre-trial process has two distinct but inter-dependent phases; the police should have primary responsibility in the investigative phase and the Crown prosecutor in the prosecutorial phase. That division of responsibility and function of itself provides a safeguard to the liberty and rights of any person who becomes involved with it. The investigative phase, and therefore the function of the police within it, is concerned with the identification and rejection or development of a suspicion that a particular person or persons have committed a specific criminal offence. In order to fulfil that function the police require certain investigative powers. The basic principles are that such powers should generally be used only on suspicion based upon reasonable grounds that a criminal offence has been committed and that the person against whom they are used has committed a criminal offence. That alone can warrant intrusion upon a person's privacy and ultimately deprivation of his liberty. Powers should be exercised only where justified by the circumstances of the case and decisions to exercise them must be capable of review. The powers and responsibilities of those who take decisions should be clear. They should, where practicable, give and record the reasons for their decisions, so

that if police officers exceed their powers or exercise their judgment arbitrarily, that is readily apparent and the appropriate remedies are available. These arrangements are essential to the openness and fairness of the system.

10.6. Prior to arrest there should be no intrusion upon the privacy of a citizen's property without consent or legal authority and, for searches for evidentiary as opposed to prohibited material or stolen goods, such authority should be given only in respect of grave offences as we have defined them. Powers to stop and search and arrest should be capable of being exercised, if the sytem is to be workable, upon the personal authority of the police officer concerned, but only with substantially increased safeguards upon their use. Here the balance between avoiding excessive intrusions upon personal liberty and producing workable and effective means of detecting offenders and bringing them before the courts is very delicate. The majority of us has made proposals which, in their view, will put the powers of stop and search and of arrest without warrant upon a consistent and modern footing, with the same basis nationally. They have also proposed that arrest without warrant should be exercised only on the basis of the necessity principle and in respect of offences which carry the penalty of imprisonment upon conviction or, for other offences, if essential to bring a person before a court to answer a criminal charge. Arrest without warrant should be subject as soon as possible after it has taken place to review by another officer to consider whether it is necessary. As arrest is prolonged so the degree and independence of supervision should be increased.

10.7. In addition to the right not to be subject to coercive powers other than on reasonable grounds for suspicion, three rights should be absolutely protected. They derive from the respect that a civilised, free society should give to its citizens. A person's property should be protected from general searches. No-one should be compelled by the application of legal sanctions to incriminate himself. And when a person is in the hands of the officials of the State he should not be subjected to violence or other inhuman or degrading treatment. Although other rights, for example to legal advice, can in exceptional circumstances be withheld, their general availability must be ensured so that they cannot be arbitrarily or improperly withheld and that civil remedies are available if they are.

10.8. The means of securing that these procedures are complied with are of paramount importance in achieving fairness, openness and workability. Their importance in political and constitutional terms demands that they should be endorsed by Parliament and therefore be placed on a statutory footing. The most effective way of securing compliance with these statutory provisions is the most immediate way: through police supervision and disciplinary procedures on the spot, supported by a complaints system that has public confidence. The courts also must be involved, to test and review the reliability of evidence produced by the prosecution, to provide proper redress for civil wrongs and to protect the rights that we have indicated.

10.9. In Part II of the report we started from the position that the police function as investigators continues at least until they have assembled sufficient evidence to accuse a named person of a specified offence or to dismiss him

from their enquiries. To ensure efficiency and effective law enforcement and to produce a workable system they should retain control of the procedures up to and including the point of accusation. Beyond it a new dimension is added. The variety of decisions that have to be made after that point and the nature of the task of preparing a case properly for trial require review by a legally qualified person if the prosecution system is to work fairly and efficiently. Responsibility for the conduct of prosecutions is to be given to the Crown prosecutor, so that he can be fully accountable for his performance during that phase of the process (a small minority of us considers that the responsibility should be confined to the legal aspects of the case). The system has elements both of local and national accountability and control within it. We are not suggesting that there should be any political influence on the individual decision to prosecute but that the application of general policies and the efficient use of resources by prosecuting lawyers should be the object of outside and independent scrutiny and discussion. This should be on the same footing as police accountability for their performance within the investigative phase. As we have indicated, the new prosecution service will need to be set up by statute.

10.10. The opportunity provided by the development of the new prosecution service should be used to review and modernise the procedures for bringing a case to trial. In particular, to promote efficiency, those procedures, of laying an information and of full committal proceedings, which are the relics of the mid-nineteenth century system could be dispensed with, provided safeguards, including fuller disclosure to the defence, are available against malicious or ill-conceived prosecutions.

10.11. Although we have spoken of a system of pre-trial procedures based upon a coherent set of principles our proposals are based upon existing procedures and to a great degree existing institutions and manpower. They cannot be other than that if a workable system is to be developed. Nonetheless we recognise that they will involve substantial change. This will not merely be change in the law and the procedures which derive from it. It will alter the working methods and the received attitudes of all those who are involved in pre-trial procedure. We ourselves have come only gradually through the study of our research and of our written and oral evidence, and through the experience of our visits to perceive the need for something more than minor tinkering with the system, and that what is required is a complete reformulation and restatement of the procedures for bringing a person before a criminal court. If this is to be achieved, that perception must be shared by central and local government, by Parliament and those who work within the system. This is the challenge which they will have to face and it is a substantial one.

10.12. Responding to the challenge will place particular demands upon the police. Their success in assimilating change is of critical significance. They are already under pressures that derive from the increased use of criminal sanctions to cope with the changes associated with urbanisation and with the ubiquitous motor car, from new modes of deception and from new threats of violence in society. In their evidence to us they have expressed anxiety lest our proposals should make their work even more difficult than it is now. We have been impressed in the annual reports of chief officers and HM Chief Inspector of

Constabulary and on our visits by the efforts of the police to adapt to changing circumstances. Innovation is most apparent in the technical field, with the introduction, for instance, of the personal radio, command and control systems, television, computers, and traffic speed monitors. But in many forces experiments with new styles of policing have also been taking place. We believe that the implementation of our proposals will give the police powers for the investigation and prosecution of crime better fitted to the multiplicity of tasks which modern society lays upon them. But we acknowledge that changes of the kind we recommend will impose upon them yet further disciplines. Accordingly the process of modernisation will have to be extended to the procedures and working relationships which permeate and control the investigative work of the police. That will require the development of further research and training programmes.

10.13. It is for Parliament to decide how the fundamental balance in pre-trial procedures is to be defined and maintained; but the duty of preserving it in daily practice will fall principally upon the police and major changes usually have their unforeseen and unintended consequences. In our view it is desirable that research should be carried out to monitor the effect of these changes and identify accurately any point of difficulty. Research mounted by the Royal Commission has been pursued in over half the police forces of England and Wales, and has been of critical significance to us in formulating our proposals. We believe that if the development of procedures in future is to be systematic rather than *ad hoc*, both descriptive and evaluative research will continue to be necessary. If the police are to play their full part in the development of procedures they will need systematic information about the experiences and problems of policemen at every level; they will also need to consult within and between forces so that "best practices" can be ascertained and assimilated by every police officer in the service.

10.14. In the light of our recommendations some review of the initial police training may be found to be necessary. Police officers have often expressed to us an understandable dislike of paperwork, but it has to be accepted that an up-to-date system of investigation requires that they command skills in making notes of interviews, in producing minutes and summaries of relevant facts, and in stating brief, reasoned explanations of actions proposed or taken. In order properly to carry out these central procedures, police officers will require a certain standard of educational attainment and adequate provision will have to be made for formal and in-service training. With the recent increase in police recruitment the time is particularly opportune for the training of a new generation of police officers. But retraining and readjustment of attitudes will also be required throughout the service and this will produce stresses as the new procedures are assimilated. The balance of subjects taught in detective-training schools will also need scrutiny. Courses at these schools necessarily deal in detail with the content of and changes in the criminal law, but it is equally important to convey to the detective in training a sharper awareness of the psychology of custody and interrogation and some basic analysis of and skills in methods of interviewing. Detectives rightly point out that these skills can only be fully learnt and practised "on the job", but that is not to gainsay the value and relative efficiency of acquiring by way of formal training a

broader understanding and some framework of reference within which personal experience can be fitted and tested.

10.15. Our observations on the significant role which research and training should play in developing new procedures and systems apply with equal force to the prosecutors as to the police. The modest programme of training for them, organised at present by the Prosecuting Solicitors' Society, will need to be developed to meet the needs of the new system. Training for management as well as advocacy will be required. A suitably reshaped and renamed Society will have a role to play in this in partnership with central Government advised by the small central inspectorate which we have proposed.

10.16. Ultimately however society faces and will always have to face an ineluctable problem. The nature of the criminal justice process is such that there will continue to be areas in which pressures meet, where interests conflict, where checks and safeguards may have been provided but prove inadequate to deal with a particular situation. The tensions that these pressures create cannot always be relieved by the application of good sense and reconciliation or by *ad hoc* and informal adjustments. The role of the police in society and their relationship with the public are, in our view, too important for that. If the fundamental balance in pre-trial procedures is to be held firmly and steadily within the limits of public understanding and tolerance, and if the best use is to be made of scarce resources, a critical responsibility falls on Parliament. Our proposal for regulating in a comprehensive statutory framework arrangements for the investigation of offences and the prosecution of offenders affirms that Parliament has the duty of striking the fundamental balance and of keeping it under regular review.

ALL OF WHICH WE HUMBLY SUBMIT FOR YOUR MAJESTY'S GRACIOUS CONSIDERATION

CYRIL PHILIPS *(Chairman)*
MICHAEL BANTON
EDWARD EVELEIGH
W A B FORBES
PAUL FOX
DAPHNE GASK
DIANNE HAYTER
JACK JONES
CECIL LATHAM
JOHN C K MERCER
W H MERRICKS
DOUGLAS OSMOND
RICHARD H PAMPLIN
ARTHUR PETERSON
JOAN R STRAKER
WILFRED D WOOD

C J TRAIN *(Secretary)*

B M HINDLEY *(Assistant Secretary)*

JOAN MACNAUGHTON *(Assistant Secretary)*

26 *November* 1980

APPENDIX

The work of the Commission

Acknowledgements

1. Before outlining the course of our work, we wish to acknowledge the contribution of the members of the secretariat. We are particularly indebted to Detective Superintendent David Gearon, seconded to the Commission from the Metropolitan Police, who provided insight into the work of the police and helpful liaison with police forces generally; and to Mrs Mollie Weatheritt (Home Office), our research officer, who prepared original studies, supervised the large programme of research and saw through the press the Commission's research series. Lastly, we record with gratitude and pleasure the help given by the assistant secretaries, Mrs Brenda Hindley (Lord Chancellor's Department) and Miss Joan MacNaughton (Home Office), and by those supporting staff who have looked after the organisation of the Commission's papers, the arrangements for our visits and the multitude of services which have enabled the Commission's work to proceed smoothly. Our greatest debt is to our Secretary, Mr Christopher Train (Home Office), who has been an outstandingly successful leader of this team, and has made a notable contribution to the work of the Commission; his patience and skill in following the development of our thinking and his assistance in giving it expression have earned the admiration of us all.

Meetings

2. The Royal Warrant establishing the Commission[1] was signed on 3 February 1978 and the Commission met for the first time on 15 February. We have held 50 full meetings. In addition we set up three committees: a Research Committee, which engaged in preliminary formulation of a research programme for approval by the full Commission; a Law and Procedure Committee, which prepared the volume of our Report which describes the present law and procedure; and a Drafting Committee which developed drafts of this Report for the full Commission. The Committees held a total of 28 meetings.

The written evidence

3. We began by inviting written evidence from those who had expressed an interest in the Commission's work and from other persons and bodies who we thought might have such an interest. For this purpose a memorandum was

[1] A list of members is at Annex A.

prepared, which included a breakdown of the terms of reference into 24 topics.[1] This provided a framework for the preparation of written evidence by our witnesses. Additionally several of the national newspapers and periodicals carried letters from the Chairman inviting submissions of evidence, or articles announcing the start of the Commission's work.

4. We received 447 written submissions; a full list of those making such submissions is at Annex C.[2] We are grateful to all who took such trouble to prepare evidence, which was indispensable to our work. We made use of three other main sources of information: a programme of research; visits, both at home and abroad; and the taking of oral evidence.

The research programme

5. Our initial examination of the subjects within our terms of reference impressed upon us the paucity of the relevant research. We came to recognise early on that we would be contributing both to our own better understanding of the area under discussion and to informed public debate if we could go some way towards making good this lack. From our own point of view the main purposes of the research were to supplement and fill the gaps in the factual material contained in the written evidence and to obtain information of a type unlikely to be dealt with at all in the evidence. The major part of this research has been published in the research series.[3] In addition, we had the benefit of a number of small scale studies, carried out largely by our secretariat. Some of this material has been incorporated into the volume on the present law and procedure.

6. The major constraint, other than of resources, within which we had to operate in commissioning research studies was that of timing. We aimed from the beginning to report within three years of commencing our work. This created considerable problems even for descriptive research and made very difficult evaluative research, that is, research designed to test the likely impact of possible policies in order to assist in the making of decisions on their desirability. Much new ground had to be broken in terms of research method and subjects. We would like to pay great tribute to all those who carried out research studies for us, since despite these difficulties they were able to present their reports on time. We are very grateful to them all. We are also much in the debt of the police officers at all ranks, prosecuting solicitors, court staff and others (far too numerous to mention individually) who gave so freely of their time and patience and who cooperated so fully in the research.

Visits

7. In the course of our work we have made numerous visits in England and Wales and in other countries, in order to examine on the ground the relevant aspects of the English and other criminal justice systems and to gain an impression, in an informal setting, of the views of those who work in them. Over the last three years one or more of us (accompanied in many cases by a

[1] At Annex B.
[2] Such evidence as was not submitted in confidence (the overwhelming majority) is to be deposited at the Public Record Office and in certain libraries.
[3] A list of the studies is at Annex D.

member of the Secretariat) has visited every police force in England and Wales. In the course of these visits we have been to police stations of all kinds and had discussions with police officers at all levels, with many prosecuting solicitors, and with a number of chairmen of police authorities. A number of visits were made to a variety of criminal courts.

8. During the summer of 1979 groups of us made visits to other jurisdictions for purposes as follows:

(a) Northern Ireland: the work of the Department of Public Prosecutions for the province.

(b) Scotland: the procurator fiscal system both centrally and locally.

(c) The Republic of Ireland: the prosecution system, and police powers and their implications for court procedure and judicial attitudes.

(d) The Netherlands, Denmark and Sweden: the different systems of public prosecution, and, in Sweden, the tape recording of police interrogations.

(e) USA (St Louis, Missouri, and Columbus and Cincinnati, Ohio): the use of tape and video recorders during police interrogations, the use of the polygraph (lie detector) and the impact of the "*Miranda*" warnings.

(f) USA (San Diego, California) and Canada (Vancouver, British Columbia, and Toronto, Ontario): the prosecution system in each jurisdiction. In San Diego: the operation of the Federal Speedy Trial Act, the federal and state systems of pre-trial hearings, and the public defender system.

(g) Australia (Sydney, Canberra, Melbourne and Brisbane): the prosecution system, the impact of the Australian Law Reform Commission's Report on Criminal Investigation, and the reports of other bodies at state level; and the use of tape recorders by the police.

9. On each of these visits discussions were held with a wide range of officials and other interested parties and organisations: police officers, prosecution and defence lawyers, judges, academics, politicians and others. On all these visits we were met with unfailing courtesy, frankness, understanding and kindness. We are very grateful to all of our hosts.

10. In addition, one of us, accompanied by the Secretary, visited in June 1980 Northern Ireland, to assess changes in police practice consequent upon the publication in February 1979 of the *Report of the Committee of Inquiry into Police Interrogation Procedures in Northern Ireland* (the Bennett Report),[1] particularly the use of closed circuit television for the supervision of interrogations, and in August 1980 Scotland to study the tape recording experiment at Falkirk and Dundee police stations.

11. While it would be foolish to try to make direct comparisons between criminal procedure in different jurisdictions, this programme of visits gave us a perspective on and a perception of our own problems that was indispensable

[1]London HMSO Cmnd 7497.

to our work. We have acknowledged this explicitly at various points in the report.

Oral evidence

12. We concentrated the taking of oral evidence[1] in the autumn of 1979, and the early part of 1980, rather more than halfway through our work. By this time our gathering of views through written evidence was largely complete, the results of some of our research were to hand, and our programme of visits to other jurisdictions was over. Accordingly the primary purpose of oral evidence for us was not to obtain new information, but to test opinion on the key issues which we had identified in the terms of reference and on some options for change which we had been able to sketch out. This purpose governed both the choice of witnesses and the form of our sessions with them. We held twenty full or half day sessions to take oral evidence. Our main criterion for inviting witnesses to give evidence was the importance of the part they play in the operation of the present system and their consequent close involvement in any alterations to it. We also sought to cover a representative range of views.

13. We arranged the sessions so that the witnesses had notice of the questions which they would be asked to address. To this end we circulated to our oral witnesses (and other interested parties) a consultative paper setting out questions on the major issues which we wished to probe further.[2] We express our thanks to those who responded to it in writing, as well as to those who came to talk with us about it. We are arranging for copies of the minutes of the oral evidence to be placed with the written evidence.

The scope of the report

14. As will be clear from our report, we have concentrated our attention upon the two central areas in our terms of reference: the investigation of offences and the organisational arrangements for the prosecution of offenders. But our terms of reference were drawn widely enough to encompass many other matters and some of those who submitted evidence to us have pressed us for action upon a broader range of subjects than we have dealt with in our report. Some of the matters have been the subject of recent detailed scrutiny or are under separate review by the Government, for example bail by the court and identification procedures; on the evidence submitted to us we considered that a further review by us was not required. Other matters, such as the decriminalisation of regulatory offences and diversion (that is using non-penal means of dealing with detected offenders) would quickly have taken us far beyond our terms of reference. And others were of so detailed a nature that consideration of them would have risked diffusing the impact of our recommendations on the central issues and dissipated our effort. It would be discourteous to those who submitted evidence on these subjects and inconsiderate of their views if we did not acknowledge that we have not discussed them in detail or at all. However we considered that the importance of the central issues warranted our restricting the scope of our report in this way.

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[1]Those witnesses who gave oral evidence are marked with an asterisk in Annex C.
[2]Reproduced at Annex E.

The members of the Royal Commission

Professor Sir Cyril Philips	Vice-Chancellor of the University of London 1972–76. Professor of Oriental History in the University of London.
Professor Michael Banton JP	Professor of Sociology, University of Bristol.
Rt Hon Lord Justice Eveleigh	A Lord Justice of Appeal.
Mr W A B Forbes QC	A Law Commissioner. A Recorder of the Crown Court.
Mr Paul Fox	Managing Director of Yorkshire Television.
Mrs Daphne Gask OBE JP	Vice-Chairman of Drayton Justices and a member of the Executive Committee of the Magistrates' Association for many years until 1980.
Ms Dianne Hayter JP	General Secretary of the Fabian Society.
Mr Jack Jones CH MBE	General Secretary of the Transport and General Workers' Union 1969–78.
Mr Cecil Latham OBE	Stipendiary Magistrate, Greater Manchester since 1976. Clerk to the Manchester City Justices 1965–76.
Mr J C K Mercer	Solicitor. Partner in the firm of Douglas-Jones and Mercer, Swansea.
Mr Walter Merricks	Solicitor. Director of Camden Community Law Centre 1972–76. Lecturer in Law at Brunel University.
Sir Douglas Osmond CBE QPN	CHIEF CONSTABLE OF SHROPSHIRE 1946–62 AND OF HAMPSHIRE 1962–77.
MR RICHARD PAMPLIN OBE	Secretary of the Police Federation 1967–75.
Sir Arthur Peterson KCB MVO	Permanent Under Secretary of State at the Home Office 1973–77.
Miss Joan Straker MBE JP	Personnel Services Controller, North Eastern Cooperative Society, Gateshead-on-Tyne.
The Reverend Canon Wilfred Wood JP	Vicar of St Lawrence, Catford. Chairman of the Martin Luther King Memorial Trust.

Annex B

Invitation to submit written evidence

This memorandum is about the submission of evidence to the Royal Commission on Criminal Procedure in England and Wales. It is being sent to everyone who has expressed an interest in the Commission's work and to a number of persons and bodies who it is thought may have such an interest. It is intended to explain the scope of the Commission's enquiry and to give some guidance to those who wish to submit evidence on the form in which it should be submitted.

The members of the Royal Commission are:

Professor Sir Cyril Philips *(Chairman)*
Professor Michael Banton JP
Rt Hon Lord Justice Eveleigh
Mr W A B Forbes QC
Mr Paul Fox
Mrs Daphne Gask OBE JP
Ms Dianne Hayter JP
Mr Jack Jones CH MBE
Mr Cecil Latham OBE
Mr J C K Mercer
Mr Walter Merricks
Sir Douglas Osmond CBE QPM
Mr R H Pamplin OBE
Sir Arthur Peterson KCB MVO
Miss Joan Straker JP
The Reverend Canon Wilfred Wood JP

The terms of reference of the Royal Commission are:

"To examine, having regard both to the interests of the community in bringing offenders to justice and to the rights and liberties of persons suspected or accused of crime, and taking into account also the need for the efficient and economical use of resources, whether changes are needed in England and Wales in

(i) the powers and duties of the police in respect of the investigation of criminal offences and the rights and duties of suspects and accused persons, including the means by which these are secured;

(ii) the process of and responsibility for the prosecution of criminal offences; and

(iii) such other features of criminal procedure and evidence as relate to the above;

and to make recommendations."

The Commission sees the two central areas of its remit as

(i) all the circumstances that surround the police investigation of a criminal offence, and

(ii) the prosecution system.

It will consider procedures at and other aspects of a criminal trial to the extent that they affect or are affected by the conduct of events before the trial.

The Commission has decided that at this stage of its work evidence should be submitted in writing. In order to help witnesses in arranging their evidence, the Commission has broken down its terms of reference into a series of particular topics. These are set out in the Annex to this memorandum.

Witnesses are asked to use them as the broad framework for presenting their evidence. They should not however be deterred from raising, at an early stage or later, other issues, either of principle or practice, which fall within the Commission's terms of reference. Nor should they feel that they are required to express views on all of the topics listed. The Commission cannot intervene in individual cases, but it will be pleased to receive evidence relating to specific matters which indicate a need for general reform.

Evidence on any particular topic should, if possible, contain the following elements:

(i) such factual material—including statistical, manpower and financial data—about the present arrangements (law, procedure, practice) as seems necessary;

(ii) comment upon the adequacy or otherwise of the present arrangements;

(iii) proposals for change, if deemed necessary; these should be costed, where possible.

In preparing their evidence and any proposals for change, witnesses are asked to keep in mind the balance between the community's interest in bringing offenders to justice and the rights of those who become involved in the criminal process, and to take into account the need for the efficient and economical use of resources.

Evidence should be sent to the Secretary of the Royal Commission, 8 Cleveland Row, London SW1A 1DH by 1 September 1978. If this date cannot be met, it is requested that the Secretary be informed of the date by which the evidence will be available. Witnesses should not feel it necessary to delay submission of evidence on particular groups of subjects, eg the prosecution system, until all their evidence is complete.

The Secretary of the Royal Commission (Tel No 01-930 0334/8) will be glad to offer advice about or clarify any points arising on this memorandum.

February 1978

The terms of reference by topic

POLICE POWERS	(a)	powers to stop and search a person or vehicle;
	(b)	powers to enter and search premises and to seize property;
	(c)	powers of arrest.
THE SUSPECT AT THE POLICE STATION: THE APPLICATION OF THE JUDGES' RULES	(d)	detention for questioning;
	(e)	the questioning of suspects, including cautioning, the taking of statements and confessions, and the possibility of tape-recording or otherwise recording interviews;
	(f)	the right of silence during investigation;

(g) the right of the suspect to have access to legal advice and to other persons;

(h) the particular rights of juveniles;

(i) photographing, fingerprinting and medical examinations of suspects or accused persons;

(j) identification procedures;

(k) the means by which the powers and duties of the police are secured and enforced;

(l) the means by which the rights of suspects are guaranteed and made effective;

(m) bail from a police station.

THE PROSECUTION SYSTEM AND PREPARATION FOR TRIAL

(n) bail by a court;

(o) the criteria for prosecution;

(p) the decision to prosecute;

(q) the responsibility for the conduct of prosecution;

(r) organisational arrangements for the present prosecuting system, including the status of prosecuting solicitors' departments;

(s) the function and duties of the Director of Public Prosecutions;

(t) the role of the Attorney General;

(u) the activity of other prosecuting agencies;

(v) the right of private prosecution;

(w) preparation for trial, including the mutual disclosure of the evidence and proposed line of argument, whether at committal proceedings or otherwise, and changes of charge and plea.

ASPECTS OF THE TRIAL

(x) such matters arising at the trial as bear on the investigation stage, in particular the tests to be applied to the admissibility of evidence against the accused, and the accused's right of silence at the trial.

Annex C

List of Witnesses

The following organisations and individuals made written submissions to the Royal Commission (those marked with an asterisk also gave oral evidence):

Organisations

Amnesty International.

*Association of Chief Police Officers.

Association of the Company of Veteran Motorists.

Association of County Councils.

Association of Directors of Social Services.

Association of Law Teachers.

Association of Magisterial Officers.

Association of Metropolitan Authorities.

Association of Police Surgeons of Great Britain.

Association for the Prevention of Theft in Shops.

Association of Scientific, Technical and Managerial Staffs.

Automobile Association.

Birmingham Trades Council.

Black People Against State Harassment.

Board of Inland Revenue.

British Academy of Forensic Sciences.

British Council of Churches.

British Juvenile and Family Courts Society.

British Legal Association.

British Motorcyclists Federation Limited.

British Psychological Society.

British Society of Criminology.

British Security Industries Association.

Camden Community Law Centre.

Campaign for Homosexual Equality.

Campaign to Police the Police.

Catholic Commission for Racial Justice.

Central Council of Probation and After-Care Committees.

Child Poverty Action Group.

Cleveland Constabulary.

*Commission for Racial Equality.

Commons, Open Spaces and Footpaths Preservation Society.

Community and Youth Service Association.

Conference of Chief Probation Officers.

Cooperative Security Services Association.

*Council of Her Majesty's Circuit Judges.

*Criminal Bar Association.

HM Customs and Excise.

Department of the Environment.

Department of Health and Social Security.

Department of Transport.

Eccles, Manchester & Salford Magistrates' Benches.

Fabian Society.

Festival Welfare Services Trust.

Foy Society.

Friends of the Earth.

Frontier Youth Trust.

General Assembly of Unitarian and Free Christian Churches.

Greater London Council.

Greater Manchester Legal Services Committee.

Guild of British Newspaper Editors.

Hackney Legal Action Group.

Haldane Society.

*Home Office.

*Institute of Race Relations.

Joint Council for the Welfare of Immigrants.

*Justice.

Justice Against Identification Laws.

*Justices' Clerks' Society.

Justice for Children.

Kensington Labour Party.

Labour Campaign for Gay Rights.

Labour Party.

Labour Party/Greater London Regional Council.

Lambeth Central Labour Party.

*Law Centres' Federation (formerly Law Centres' Working Group).

*Law Society.

Law Society/Young Solicitors Group.

League of Jewish Women.

*Legal Action Group.

Liberal Lawyers Association.

London Borough of Brent/Working Party on Race Relations.

London Churches Group/London Voluntary Service Council.

London Criminal Courts Solicitors' Society.

London Gay Activist Alliance.

London Magistrates' Clerks Association

Lord Chancellor's Department.

*Magistrates' Association.

Medway Towns Victims Support Scheme.

Metropolitan Stipendiary Magistrates.

MIND (National Association for Mental Health).

Ministry of Defence.

Multiple Shops Federation.

National Association for the Care and Resettlement of Offenders.

National Association of Citizens' Advice Bureaux.

National Association of Probation Officers.

National Association of Schoolmasters/Union of Women Teachers.

National Chamber of Trade.

National Consumer Protection Council.

*National Council for Civil Liberties.

National Council for Civil Liberties/Northumberland and Durham Group.

National Council of Social Service.

National Council of Voluntary Child Care Organisations.

National Council of Women of Great Britain.

National Federation of Women's Institutes.

National League of Young Liberals.

National Society for Crime Reduction and Social Justice.

National Society for the Prevention of Cruelty to Children.

National Union of Conservative and Unionist Associations/Women's National Advisory Committee.

National Union of Teachers.

National Youth Bureau.

Nationwide Festival of Light.

New Approaches to Juvenile Crime.

Norfolk and Norwich Incorporated Law Society.

Nottingham Counselling Centre.

Nottingham Legal Action Group.

No 3 Regional Crime Squad.

Paddington Campaign Against Racism.

*Police Federation of England and Wales.

Police Federation/Sussex Police Joint Branch Board.

Police Superintendents' Association.

Portia Trust.

Post Office.

Press Council.

Prisoners' Wives Service.

*Prosecuting Solicitors' Society of England and Wales.

Rape Counselling and Research Project.

Release.

Religious Society of Friends.

Renewal Programme.

Residential Care Association.

Royal Automobile Club.

Royal College of Psychiatrists.

Royal Society for the Prevention of Cruelty to Animals.

Royal Society for the Protection of Birds.

*Runnymede Trust.

Scrap Sus Campaign.

Secondary Heads Association.

*Senate of the Inns of Court and the Bar.

Shaftesbury Project.

Society of Conservative Lawyers.

Society of County Secretaries.

Society of Labour Lawyers.

Society of Post Office Executives.

Society of Provincial Stipendiary Magistrates.

Staffordshire Police Authority.

Standing Conference on Asian Organisations in the UK.

Trades Union Congress.

United Kingdom Immigrants' Advisory Service.

Voluntary Euthanasia Society.

West Indian Standing Conference.

Young Womens' Christian Association of Great Britain.

Youth Counselling Development Unit.

Individuals

G Abrahams

M Ackerye

Hon Mr Justice Ackner

Mr Robert Adley MP and others

J C Alford

D K Allen

P Allen

Julie Anderson

Mr Armstrong

Mr Jack Ashley MP

Dr A J Ashworth

Drs J M Atkinson, J C Heritage and D R Watson

Lt R Baillie-Smith

Drs J Baldwin and M McConville

W Bannister

L Barltrop

B W Barrett

Det Chief Superintendent Barton

J A Barwell

A Beck

His Honour Judge Bell

C Bell

W Bell

Francis Bennion

B J Benzimra

S P Best

G Billainkin

S W Blunt

J Boaks

R Bolton

R G Booth

Professor N Borg

N F Bradshaw

R A Brennan

P E Bridge

B Broadley

M A Brown

Mrs D G Buggs

J L F Buist

His Honour Judge Bulger

Dr R W Burnham

Mrs G Burns

F Burrett

P Burrett

A J P Butler

Mrs M Butterworth

I E M Buttress

His Honour Judge Buzzard

R C Cais

David Calcut QC

Mrs E Callaghan

D Campbell

Duncan Campbell

M Carmel

I M Chapman

Chief Taxing Master of the Supreme Court

Mrs C M Chinkin

H R Clark

A H N Clatworthy

R G Cobb

*Commissioner of Police of the Metropolis

M M Conroy

Mrs E Constable

J Cornell

Mrs D N Cowen

R A Crabb

Mrs V Crotty

D J Cunningham

Mr George Cunningham MP

D Currie

P K L Danks

Christie Davies

E M M Davies

Mrs R Dawson

K De Courcy

The Rt Hon Lord Devlin

F G Dewhirst

*Director of Public Prosecutions

Mrs J M Dixon

W H Dixon

B E Dore

J Doyle

Miss M D Edwards

W P Willmott Elwell

P Emerson

A C Fairbrother

S Farrant

Farrars Building (Barristers' Chambers)

G P Fathers

Dr M A Fazal

W Feagins

J Friel

W Frost

The Rt Hon the Lord Gardiner CH

R W Gardner

Messrs Geffens Solicitors

R Gentil

Gersten & Co

E R Giles

Mrs C Goodman

P Grafton-Reed

V W Grand

Mrs K Green

S F Greenfield

J A Griffith

His Honour Judge Griffith-Jones

R V Grobler

W E Gutteridge

M Habernoll

Peter Hain

S C Hambly

Mrs R Hanks

I T Harold

R Harper

G W Harris

E Hartley

Mrs B Haseler

Dr Lionel R C Haward

R A Henderson

R M Hickling

S Higgins

H Hill

Dr F Hilton

A E Hodgkiss

Dr Simon Holdaway

K E Holmes

Mrs E M M Horsman

D Howell

G A Hurdley

Mrs M Imhof

Ms Marquita Inman

Professor R M Jackson

M Jacobs

D L James

W P Jaspert

T Johnston

G S Jonas

His Honour Judge Jones

V Frost Jones

N Joseph

A I Kajee

Mr Kalibala

A M P Kellam

J W Kelly

Ludovic Kennedy

N Kesselman

Lord Kilbrandon

The Hon Mr Justice Kilner Brown

L Landau

B Langstaff and others

Mr Ivan Lawrence MP

The Rt Hon Lord Justice Lawton

Mrs E J M Leek

D Leggatt

Dr L H Leigh

T Lemon

Dr M Levi

K W Lidstone

Professor K Lindsay

F J Linell

V J Lissack

Dr K Little

J E Livesey

Lord Lloyd of Hampstead QC

Dr M E Long

J M Loosemore

Mr Lynch

Miss S A Lynn

Mrs Doreen McBarnet

C McCulloch QC

A Maddocks

J Maloney

G Marriott

Mrs L Marsen

E A Marsh

S B Marsh

K F Mather

H F E Mathews

Rev E Matkovich

Mr Michael Meacher MP

C Mercer

J W Meredith

Mrs M Merrick

H Miall

Mrs B Mitchell

B Moor

Professor R Moore

Sir David Napley

N L Neale

Mrs L Nixon

Offenbach & Co

M Ogden QC

Mrs A I Oland

D Osborne

Osmond Gaunt & Rose

G H Owen

J S V Oxford

Mrs E Palmer

B J Palmer-Jones

A Parkin

P H Parkinson

C Parrish

Det Constable D S Parsons

J H Patterson

D R Pedley

Mrs P Philips-Wollescote

L Phillips

Dr R J Phillips

Miss J M Pick

His Honour Judge Pickles

His Honour Judge Pigot

J Pilkington

L D Pitts

His Honour Judge Malcolm Potter

K E Pottle

Mr Christopher Price MP

Miss D Price

J W Rant

S P Raymond

T Reddock

D R Reidy

R E Rhodes

D Roberts

A K Robinson

Robinson, Tarling & Co

D G Robson

Mrs G Rodgers

M R Rose

J Ross

J Royle

J K Rundle

Dr K V Russell

W Russell

T Saggs

A Samuels

J C Sawtell

R Seifman

Dr Joanna Shapland

F A Shayl

D Sheehan

The Rt Hon The Lord Simon of Glaisdale

W Simpson

J K Sirotkin

G W Smith

Penny Smith & Philip A Thomas

R R Smith

Professor B Smythe

Somers & Leyne

Mrs U R Sood

G C H Spafford

R B Starkey

R Stead

S J Stewart

E Stoddard

M Swain

C Swinson

Mrs E M Szmyrko

The Hon Mr Justice Talbot

J D Thickett

D B Thomas

R McC Thoresby

Mrs E Thurgood

M Thynne

His Honour Judge Tibber

E L Tibbitts

W J C Todd

G Tomkins

G H Townsend

P Treanor

I R Valentine

Dr A Vetta

Dr A P Walker

Professor N D Walker

A Wall

The Rt Hon Lord Justice Waller

F P Walsh

P M Warren

J Weatherill

J A Welsh

J D Wheeler

Ben Whitaker

His Honour Judge Wild

Professor L T Wilkins

Mrs A Wilks

D G Williams

Sgt Dewi Williams

Professor Glanville Williams

Professor J E Hall Williams

R Williams

G Wilson

S C Wilson

David Wolchover

His Honour Judge Woods

A J Wright

R Wright

Appendix

T P Young

Professor M Zander

Some authors requested the withholding of their names and are not included on the list. There were also some anonymous submissions. Copies of the written submissions which dealt with the topics identified in the Call for Evidence (Annex B) and of the minutes of oral evidence are available for inspection at the Public Record Office.

The following also gave oral evidence to the Royal Commission:

The Rt Hon Sam Silkin QC MP Attorney-General 1974–79.

The Rt Hon Peter Archer QC MP Solicitor-General 1974–79.

The Rt Hon Sir Michael Havers QC MP Attorney-General 1979-

Annex D

The Research Series

Research Study Number	Title
1 and 2	*Police Interrogation: The Psychological Approach* by Barrie Irving and Linden Hilgendorf, and *Police Interrogation: A Case Study of Current Practice* by Barry Irving with the assistance of Linden Hilgendorf.
3 and 4	*Police Interrogation* by Pauline Morris and *Police Interrogation: An Observational Study in Four Police Stations* by Paul Softley with the assistance of David Brown, Bob Forde, George Mair and David Moxon.
5	*Confessions in Crown Court Trials* by John Baldwin and Michael McConville.
6	*Contested Trials in Magistrates' Courts: The Case for the Prosecution* by Julie Vennard with the assistance of Karen Williams.
7	*Uncovering Crime: The Police Role* by David Steer.
8	*Police Interrogation: Tape Recording* by J A Barnes and N Webster.
9	*Arrest, Charge and Summons: Current Practice and Resource Implications* by R Gemmill and R F Morgan-Giles.
10	*Prosecutions by Private Individuals and Non-Police Agencies* by K W Lidstone, Russell Hogg and Frank Sutcliffe in collaboration with A E Bottoms and Monica A Walker.
11 and 12	*The Prosecution System: Survey of Prosecuting Solicitors' Departments* by Mollie Weatheritt in collaboration with Joan MacNaughton and *The Prosecution System: Organisational Implications of Change* by David R Kaye with the assistance of R L Redman and G J Brennand.

THE ROYAL COMMISSION ON CRIMINAL PROCEDURE

ORAL EVIDENCE

CONSULTATIVE PAPER

August 1979

8 Cleveland Row
LONDON SW1A 1DH

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ORAL EVIDENCE: CONSULTATIVE PAPER

THE PROGRESS OF THE ROYAL COMMISSION

The Royal Commission on Criminal Procedure invited written evidence in February 1978. Over three hundred submissions have been received in response to that invitation, and since September 1978 the Commission has been engaged in sifting and weighing the evidence contained in them. The Commission is currently undertaking a number of visits to study relevant aspects of criminal procedure in other countries, and it has also established a substantial research programme to obtain information of the sort that the written evidence was unlikely to provide. The results of that programme should be in by the end of this year.

2. The Commission has now decided to invite a limited number of witnesses to give oral evidence. It intends to use oral evidence as a means of testing the opinion and exploring the experience of selected witnesses on matters and issues that it considers require fuller and further examination than their written evidence has provided. Where from the written evidence opinions are known and well defined and firm information is available, the Commission does not consider it necessary to cover this ground again. This paper sets out the various topics the Commission wishes to cover in oral evidence.[1] It is necessarily selective. *The Commission wishes to stress that the omission or inclusion of any matter does not imply that it has decided to make a particular recommendation or any or no recommendations at all in respect of it.*

3. In working on its written evidence the Commission has for convenience dealt with the prosecution system first. The order of topics in the paper reflects this approach.

THE PROSECUTION SYSTEM

4. The Commission has received many proposals that the prosecution system should be changed. Broadly they seek to achieve one or more of the following objectives:

(a) the division of the investigative and prosecutorial function;

(b) fuller availability of legal expertise during the development of a case;

(c) increased or total control by lawyers over the decision to prosecute;

(d) greater uniformity of prosecution policy in general and more consistency as between decisions in individual cases; and

(e) greater accountability in the system both in relation to general policy and to particular cases.

In the written evidence the arguments for change have usually been associated with proposals for a different organisational structure for the prosecution system. The proposals span the range from the maintenance of the present arrangements with only minor modifications to the establishment of a corps of prosecuting officials who would also have responsibility for overseeing the investigative process (the most commonly cited model has been the Scottish

[1]For ease of reference, questions are numbered sequentially in the margin.

procurator fiscal system). To throw into relief the principal issues that these proposals raise the Commission thought it would be helpful to focus on three options for change to the prosecution system. These are set out schematically below. *The Commission would emphasise that in describing the three options in this way it is not precluding consideration of variants of them or of altogether different proposals.*

	OPTION A: *LOCALLY BASED PROSECUTING SOLICITOR*	OPTION B: *LOCALLY BASED INDEPENDENT PROSECUTOR*	OPTION C: *NATIONAL PROSECUTION AGENCY*
I	Responsibility for prosecution decisions is with Chief Constable, with uniformity of policy being sought through ACPO consultative machinery	Reponsibility for prosecution decisions is with Area Prosecutor, with uniformity of policy being sought through some newly devised consultative machinery	Responsibility for prosecution decisions is with officials of a national prosecution agency, with control of prosecution policy at national level, probably by Department of central Government under a Minister. The DPP's office might provide the basis of this Department
II	Police have initiative in and control over cases until entry to court system	Police have initiative in and control over cases up to point of charge	Police have initiative in and control of cases up to point of charge
III	Certain categories of cases required to be referred to prosecuting solicitor for advice on legal aspects; others referred at the discretion of police	All cases required to be referred to Area Prosecutor's Department, on whose authority this requirement could be waived in certain categories of cases	National prosecution agency has complete discretion to accept, modify or reject charges in all cases
IV	Prosecuting solicitor has responsibility for conduct of cases once they have come to court, but cannot drop or alter charges or veto proceedings except on legal grounds or with consent of police	Area Prosecutor has veto on whether to proceed on any grounds	National prosecution agency has veto on whether to proceed on any grounds
V	Prosecuting solicitor attached to police force	Area Prosecutor for multiples of local government areas (usually three or four, except in respect of the very largest local authority units where there could be one or two). There would on this basis be about 10–15 Area Prosecutors' Departments. Criteria for area units to include size of police forces serviced, population, crime rate, and geographical area to be covered. Local offices in each police force in the area covered	National prosecution agency with regional offices responsible for servicing all forces in their area

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	OPTION A: *LOCALLY BASED PROSECUTING SOLICITOR*	OPTION B: *LOCALLY BASED INDEPENDENT PROSECUTOR*	OPTION C: *NATIONAL PROSECUTION AGENCY*
VI	Duty on all police authorities to provide prosecuting solicitors' department, analogous to that of providing police force	An Area Prosecutor's Committee would be established, comprising nominated members of the related local authorities and others appointed by a responsible Minister. It would be responsible for providing the prosecutors' department in the same way as the police authority is for the police	Responsibility for provision and maintenance of the service to rest on central Government
VII	Funded locally, but with central assistance through a specific rate support grant	Funded locally, but with central assistance through a specific rate support grant	Funded out of departmental moneys voted by Parliament
VIII	DPP would: (a) be an impartial national figure for dealing with cases having an element of local notoriety; (b) give advice and expertise in difficult cases (eg large-scale fraud); (c) conduct cases involving the national interest (official secrets, terrorism etc); (d) offer guidance on policy in cases where effect of legislation is uncertain or complex	DPP would likewise: (a) be an impartial national figure for dealing with cases having local notoriety; (b) give advice and expertise in difficult cases (eg large-scale fraud); (c) conduct cases involving the national interest (official secrets, terrorism, etc); (d) offer guidance on policy in cases where effect of legislation is uncertain or complex; Cases would, however, need to be referred to him much less frequently than at present since the Area Prosecutor would acquire considerable expertise (and thus capacity for handling most difficult cases); and should be of such status as to handle most locally notorious cases	See I

5. Each of these Options has features which are intended to meet some or all of the objectives identified in paragraph 4. But before turning to consideration of these the Commission would like to deal with three other points.

6. First, each Option will have significant and different *resource implications.* The Commission is undertaking a study of these, to the extent that is possible, and, until that is complete, it does not consider there would be value in raising this aspect with witnesses.

7. Secondly, the Options are framed for the present on the assumption, made by most witnesses, that the different organisations would be responsible only for what might be called police prosecutions and not for *prosecutions by other agencies and private individuals.* Some witnesses have, however, proposed that a national prosecution agency should be responsible for the decision to prosecute and the conduct of prosecution in all cases (on the model of the Scottish system). If regard is had to the objectives that are hoped to be

achieved by changing the current arrangements for prosecution by the police, witnesses are invited to consider

whether a national prosecution agency (Option C) and possibly the locally based independent prosecutor (Option B) should take on responsibility for all prosecutions. Q.1

8. This raises the third point, on *private prosecutions*. The retention of the private citizen's right to have access to the criminal courts is seen by most witnesses as an essential safeguard against official inertia, incompetence or corruption. If there is to be some sort of independent local or national system of public prosecutor,

(i) should the access to the courts in the first instance be through him for private persons or organisations as for public agencies such as the police? Q.2

(ii) If it is, should there be a right of appeal against a refusal to proceed? To the courts? Or through the official hierarchy? Q.3

(iii) Should that right of appeal be available to the police as well as to the private citizen? Q.4

9. In relation to *the broad objectives* of change to the prosecution system described in paragraph 4, the Commission would invite witnesses to consider the following general questions:

(i) Would the withdrawal from the police of their responsibility for the decision to prosecute affect their ability to maintain law and order? Q.5

(ii) Responsiveness to local conditions and considerations of humanity in individual cases seem to be regarded as significant factors in the development of prosecution policy in general and in the disposal of particular cases. That being so, to what extent are general uniformity in prosecution policy or individual consistency realisable objectives? Q.6
And also, should the lawyer's role in the prosecution decision be regarded as of paramount importance? Q.7

(iii) What is meant by "accountability" in the context of the prosecution system? In particular, should it include a requirement to make prosecution policies publicly known? Q.8

10. Features of the Options will now be examined in relation to the particular objectives which it is thought they may achieve.

Division of the investigative and prosecutorial function and the fuller availability of legal expertise in prosecution process

11. It can be misleading to regard the decision to prosecute as a single event. From the time that an offence is detected until the prosecution opens its case at court, there is a sequence of decisions which are taken by the prosecution side (and by different actors on that side), any of which could bring the case to a close. And, in practice, a particular decision is not necessarily an event in which one person alone is involved; it may well be the result of consultation. But for the sake of simplicity the Options identify a single person as responsible for the decision to prosecute. Option A recognises

that considerations of social policy and in particular of crime control have a part to play in the decision to prosecute and gives the Chief Constable the ultimate responsibility for deciding to take the case to trial; but when the case is being committed for trial or tried legal considerations become paramount. Options B and C vest in the prosecutor, once the police investigation has established a *prima facie* case, the ultimate responsibility for the decision both on social policy and on legal grounds. Against the background of these explanatory remarks, the Commission would like to explore the following questions:

(i) If the police were to have initiative in and control over cases until entry to the court system (Option A) or up to point of charge (Options
Q.9 B and C), would this create any practical difficulties in defining the areas of responsibility of the police and the prosecutor?

(ii) Would the division of responsibility (under Option A) for the conduct of the case once it had come to court between the prosecuting solicitor
Q.10 (in respect of legal aspects) and the police (for other aspects) be workable? Is a distinction between legal grounds and other grounds one that could be used in practice?

(iii) Option B assumes that responsibility for prosecution can be left with
Q.11 the police for minor offences. On what criteria could those offences be selected?

Uniformity of policy and accountability

12. Each of the Options would require some machinery (existing or newly constructed) to secure uniformity of prosecution policy, and some greater or less central and local government responsibility (depending on the nature of accountability desired) and each envisages the possibility of some modification to the present roles of the Director of Public Prosecutions. The Commission would like witnesses to consider the following questions:

Q.12 (i) Who should be *the responsible Minister*, for what reasons, and what should his responsibilities be?

Under Option A there would seem to be some merit in its being the Home Secretary in view of his responsibilities under the Police Act 1964. Under the other Options a case could be made for the Attorney General and he has been favoured by many of those witnesses who argue in their written evidence for a national prosecution agency. Or responsibility might be given to a Minister who could be seen as quite independent of the prosecution system but with related responsibilities, the Lord Chancellor.

Q.13 (ii) To what extent and how could *local accountability* be achieved under each of the Options?

(iii) Each Option assumes, to varying degrees, a greater availability of legally qualified and experienced prosecutors at the local level than at present. If there were machinery (for example, either through ACPO on Option A, or through the responsible Minister under Option B) to produce some uniformity of prosecution policy, would it be necessary

or desirable for *the DPP* under these Options to have any role other than that specified? Q.14

Other features of the Options

13. The Commission would also welcome views on certain other features of the Options as follows:

(i) There is at present a variety of arrangements *for funding* local services in the criminal justice field and the method of financing prosecuting solicitors' departments is not uniform.

Is there a preferred choice between

(a) direct central funding,

(b) part central and part local on the lines of present police funding, Q.15

(c) or notionally local with substantial central assistance by way of a specific rate support grant?

(ii) The likely demand for professional legally qualified *staff* under each Option cannot, at this stage, be fully assessed, but is the lack of suitable staff likely to be a problem, and how and over what period could it be solved? Q.16

(iii) In order to achieve *the independence of the prosecutorial function*, is it practicable, desirable, or necessary, to try to break the link between prosecutors' departments and the police at the local level (a distinction that might be developed between Option A and Option B) by making prosecutors' regions not coterminous with police force areas or groups thereof? Q.17

(iv) In the matter of *prosecution advocacy*, would there be merit in giving prosecuting solicitors or prosecutors in a national agency a limited (or complete) right of audience at the Crown Court? Q.18 In a national agency would there be merit in having a cadre of barristers who alone may prosecute in the higher courts—on the analogy of the Scottish Advocates Depute? Q.19

PREPARATION FOR TRIAL

14. The Commission has received substantial written evidence on committal proceedings, disclosure and plea bargaining. In relation to these subjects it would like witnesses to discuss the following questions:

(a) Committal proceedings

(i) In cases to be tried on indictment, is there any need to retain a preliminary hearing? For example, could the present procedures for committing cases for trial on indictment be dispensed with if the defence were given the opportunity, on receipt of the prosecution case, to request a pre-trial judicial review of whether or not there was a case to answer? The hearing might be before a nominated judge. Q.20

(ii) Could such a hearing also be used for the purpose of plea bargaining and to deal with questions of admissibility of evidence and other legal submissions that might be dealt with pre-trial? Q.21

Q.22 (iii) In cases to be tried on indictment could a guilty plea be ascertained earlier than at present?

(b) Disclosure

If committal proceedings were dispensed with, some other means of providing disclosure of the prosecution case would have to be developed. In respect of disclosure generally (but with particular reference to summary trials),

Q.23 what is the potential of the development of a system of "narrative charging"? By this is meant a system whereby the accused would be charged by way of a narrative of the salient facts relevant to proving the commission of the offence and not by way only of a formal recital of the offence. This might be associated with a provision that at court instead of taking a plea the accused is asked to admit or deny the facts alleged in the narrative or he may refuse to answer.

(c) Plea bargaining

Q.24 (i) Is it possible to prohibit or limit negotiations between prosecution and defence, so long as there is either a sentencing discount for a guilty plea or a discretion as to charge?

Q.25 (ii) Are these issues important to magistrates' courts?

THE POWERS OF THE POLICE IN THE INVESTIGATION OF CRIME

15. Over the whole range of police powers there is little dissension among witnesses that the law requires clarification and simplification, that law and practice should, to the extent possible, be made to coincide and that the police should have sufficient powers to perform their functions effectively. But what is a sufficiency of power or effective performance? No witness has sought to challenge the role of the police as investigators of crime or, in this context, the need for questioning in custody, in appropriate circumstances and under properly controlled conditions. But, again, the dilemmas lie in that last phrase. On these subjects the Commission is faced most sharply by the problem of balance, set out in its terms of reference, between the interest of the community in bringing offenders to justice and the protection of the rights and liberties of those suspected of having committed criminal offences. The arguments for altering the balance in whatever manner have been fully deployed in the written evidence. Furthermore, some of the Commission's most important research projects are focused upon police questioning and it hopes that the fruits of that research will assist in the formulation of its proposals. At present, therefore, the Commission wishes only to raise issues which it considers have so far not been fully elucidated or upon which its research programme will not directly touch. Thus in the following paragraphs no mention is made, for example, of the tape recording of police interviews.

(a) *Powers inside the police station*

Detention for questioning

16. A distinction may be drawn between on the one hand arresting a person on the grounds that he is reasonably suspected of having committed an offence which carries the power of arrest and then questioning him while he is under

arrest and on the other detaining a person for the purpose of questioning him in connection with an offence that has been committed (he may be a witness, or be implicated, or be thought to have relevant information). That distinction is not always made in the written evidence and the Commission would ask:

Should there be a power for the police to *detain for questioning* about an offence on a criterion other than that the person is reasonably suspected of having committed an "arrestable" offence? If so, what should that criterion be? Q.26

17. Much of the evidence presented on this subject concentrates upon the time for which people can be held involuntarily at the police station before being charged or being brought before the court. Various *time limits* are suggested. The Commission hopes that its research will throw some light on current practice, but it would ask in the meantime:

(i) What factors should influence the decision on the limit, if any, that should be set? Q.27

(ii) Should a time limit be set on the questioning itself? If so, on what criteria? Q.28

(iii) As an alternative to the imposition of time limits on detention, should magistrates' courts be empowered to adjudicate upon applications for release of persons detained? Q.29

18. Concern is expressed about people "*voluntarily helping police with their enquiries*".

(i) Is it realistic to try to produce a definition of "genuine voluntariness"? Q.30

(ii) Would it be practicable to afford all suspects, whether formally under arrest or not, the same safeguards for their rights? Q.31

Right of silence

19. The Commission has noted with interest the reference made by a number of witnesses to the notion that when the parties are on "equal terms" the prohibition on drawing adverse inferences from a person's refusal or failure to answer questions or to exculpate himself can be substantially removed and evidence of the question and response is admissible (*Parkes v R.* [1976] 3 All ER 380 and cases there cited). It would like to explore this concept further:

Could any circumstances be thought to place the parties on "equal terms" (i) during investigation, eg tape recorded questioning in the presence of a fully briefed solicitor, (ii) after disclosure of the prosecution's case and full opportunity to take legal advice, or (iii) at the trial, eg after presentation by the prosecution of a *prima facie* case? Q.32

Access to legal advice at the police station

20. In the written evidence the role at the police station of the suspect's legal adviser has not always been clearly defined. It seems that three functions are envisaged: as a source of legal advice to his client, as the protector of his client from oppressive questioning or otherwise improper treatment, and as an independent witness (and validator) of the product of the police questioning. The following questions arise:

Q.33 (i) Is the advice to be given of the sort that requires a solicitor to give it?

Q.34 (ii) How would a solicitor perform the task of validating the product of police questioning?

(iii) Will the performance of the third function (as an independent witness)
Q.35 give rise to any difficulties over the performance of the first and second (on behalf of a client) or *vice versa*?

The special rights of juveniles and other vulnerable groups under questioning

21. Some practical difficulties appear to arise from time to time because of the requirement of the Judges' Rules for a juvenile to be questioned in the presence of a parent or guardian or independent third party. A general question has first to be asked:

Q.36 What is the purpose of such adult presence?

On the practicalities, working parents may not be available during the daytime and this can lead to juveniles being held for longer periods than is necessary before being questioned. And some juveniles of sixteen may have left the family home (or even be married).

Q.37 Is there any case for allowing a juvenile to waive the present rule in certain circumstances? If there is, what might those be?

22. A difficulty of a different kind has arisen over the provision that is designed to protect the mentally handicapped suspect. Whether a person is mentally handicapped can often be a matter only for expert clinical diagnosis. But under present Administrative Direction 4A the judgment is left to the investigating police officer.

Q.38 Is there any solution to this dilemma?

(b) *Powers outside the police station*

Arrest

23. On arrest the Commission wishes to examine one issue.

Q.39 Which approach to *justifying an arrest* will work better in practice: that by reference to the maximum penalty that can be exacted on conviction, or that by reference to the circumstances of the particular offence and suspect, set out in general guidelines, for example doubt about name and address of the suspect, the likelihood that he will abscond, the need to prevent further offences, the need to make further enquiries or to recover property?

Stop and search

24. In relation to police powers to stop and search without arrest, the Commission invites witnesses to consider the following questions:

(i) Is there a single basis upon which a police power to stop and search could be based, eg a reasonable suspicion that the person concerned is
Q.40 in possession of a "prohibited, stolen or dangerous article or substance"? Would it be desirable and practicable to attempt to define
Q.41 "reasonable suspicion"?

(ii) If a national power were to be given to the police to stop and search persons, should that power be extended to vehicles? Q.42

(iii) Certain safeguards against the abuse of a power to stop and search have been suggested to the Commission, for example monitoring the success rate of stops and searches, or the provision of a form giving reasons for and the date, time and place of the stop and the number of the police officer concerned. Are such safeguards likely to be effective and workable? Q.43

Search and seizure

25. There is concern over searches conducted allegedly with the consent of the occupant of the premises.

Would it be practicable to obtain consent in writing? Q.44

It is also asserted that magisterial supervision over the issue of search warrants is more apparent than real. If it is to be retained:

(i) What means could be devised for rendering it more effective? Q.45

(ii) What effective alternatives are there? Is there, for example, scope for extending the use of the superintendent's warrant under section 26 of the Theft Act 1968? Q.46

Other areas of concern

26. Some of the evidence submitted to the Commission suggests that particular problems arise in respect of certain groups, for example, young black persons and homosexual males, in the exercise by police of their powers. Taking into account the need for the police to have adequate powers to prevent and to investigate crime,

do witnesses have any proposals whereby criminal procedure may better protect the rights of suspects who belong to such minorities? Q.47

(c) Control of the exercise by the police of their powers

27. Running as a common thread through all the evidence on police powers in the investigation of crime is the question of how the exercise of those powers can be effectively controlled. Here again there is a balance to be struck between effective and efficient law enforcement and the due protection of individual's rights. Where the balance lies is a matter of conviction and judgment. On this subject also the lines of argument are already clearly drawn. The Commission would at present raise only three points:

(i) Do witnesses have views on the relative merits of contemporaneous as opposed to *ex post facto* controls on police activity, comparing, for example, improved police supervision of questioning with the application of an exclusionary rule? Are there dangers in combining different types of control, allowing, for example, the application of police disciplinary procedures, the use of an exclusionary rule as to evidence improperly obtained, and the availability of compensation through the civil courts, all in respect of the same event? Q.48 Q.49

(ii) The Australian Law Reform Commission in its report in 1975 on

criminal investigation proposed the introduction of what it called a reverse onus exclusionary rule; that is that there should be automatic exclusion of any illegally obtained evidence unless the prosecution can satisfy the court that it should be admitted in the public interest, on the grounds of, for example, the triviality of the breach, the exigencies of the circumstances of the investigation, or the seriousness of the offence being tried. Some written submissions have advocated the
Q.50 adoption of this proposal in England and Wales. What are the views of witnesses upon it?

Q.51 (iii) What is the scope for a "citizens' code", which would set out in readable and easily accessible form a citizen's rights and duties in this field and, at the same time, provide a standard against which the conduct of police officers might be judged? What other means are
Q.52 there for notifying the citizen of his rights, which are workable in practice and can be economically provided?

OTHER MATTERS

28. The Commission has reviewed the evidence it has received on the subject of *bail* and considers that major recommendations on this subject should await the outcome of the Home Office's review of the operation of the Bail Act 1976. It is bringing the written submissions on this subject to the personal attention of the Home Secretary.

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References are to chapter and paragraph numbers.

"Royal Commission" refers to this Royal Commission.

The Royal Commission on Criminal Procedure

Chairman: Sir Cyril Philips

THE INVESTIGATION AND PROSECUTION OF CRIMINAL OFFENCES IN ENGLAND AND WALES: THE LAW AND PROCEDURE

Presented to Parliament by Command of Her Majesty
January 1981

Introduction by the Chairman

In this volume we offer a description of the processes that lead up to a criminal trial in England and Wales. We have drawn together this account of the relevant law and procedure covered by our terms of reference in order to allow us to concentrate in our report on the analysis of the strengths and weaknesses of the existing arrangements and to develop our proposals.

There are areas of doubt and controversy in the relevant law and considerable variety in procedure in different parts of the country. We have not attempted to discuss or describe these in detail. The volume also deals only to a limited extent with practice, which is more fully covered in our research studies.

The main source we have used is the published evidence of the Home Office and we acknowledge with gratitude our debt to their work. We have updated and amended it where necessary and supplemented it with material from other sources.

Cyril Philips
October 1980

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CHAPTER 4

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APPENDICES

CHAPTER 1

Background

A. The main functions of the police

1. The Royal Commission on the Police, in its Final Report in 1962,[1] listed the main functions of the police as follows:

> "First, the police have a duty to maintain law and order and to protect persons and property.
>
> Secondly, they have a duty to prevent crime.
>
> Thirdly, they are responsible for the detection of criminals and in the course of interrogating suspected persons they have a part to play in the early stages of the judicial process acting under judicial restraint.
>
> Fourthly, the police in England and Wales (but not in Scotland) have the responsibility of deciding whether or not to prosecute persons suspected of criminal offences.
>
> Fifthly, in England and Wales (but not in Scotland) the police themselves conduct many prosecutions for the less serious offences.
>
> Sixthly, the police have the duty of controlling road traffic and advising local authorities on traffic questions.
>
> Seventhly, the police carry out certain duties on behalf of Government Departments—for example, they conduct enquiries into applications made by persons who wish to be granted British nationality.
>
> Eighthly, they have by long tradition a duty to befriend anyone who needs their help and they may at any time be called upon to cope with minor or major emergencies."

2. The terms of reference of the Royal Commission on Criminal Procedure require it to consider the powers and duties of the police[2] in relation in particular to the third, fourth and fifth of those functions. The law and procedure relating to them will be elaborated in this volume. It opens with a brief description of the constitutional position of the officers who perform these functions, from constable to chief constable, of the powers and duties of central and local government in relation to the police, and of the duties of citizens.

[1] London HMSO, Cmnd 1728, paragraph 59.

[2] Throughout this volume, except where otherwise specified, the term "the police" is used to cover the 43 police forces in England and Wales subject to the supervision of the Home Secretary under the Police Act 1964. Other police forces (for example the British Transport Police) are referred to where necessary.

B. The constitutional position of the police

a. The status of the constable

3. In England and Wales the individual police officer holds the office of constable under the Crown. He is thus independent in that his legal status is not, strictly speaking, that of an employee. But he is subject to a code of discipline laid down in Regulations approved by Parliament and is supervised by his superior officers. Above all, he is subject to the law for the way he carries out his duties. The traditional view of policing arrangements stresses this independence and the integration of the police with the community they serve. The essence of it is to be found in the report of the Royal Commission on Police Powers and Procedure of 1929[1] (and approved by the Royal Commission of 1962):

> "The police of this country have never been recognised, either in law or by tradition, as a force distinct from the general body of citizens. Despite the imposition of many extraneous duties on the police by legislation or administrative action, the principle remains that a policeman, in the view of the common law, is only 'a person paid to perform, as a matter of duty, acts which if he were so minded he might have done voluntarily'.
>
> "Indeed a policeman possesses few powers not enjoyed by the ordinary citizen, and public opinion, expressed in Parliament and elsewhere, has shown great jealousy of any attempts to give increased authority to the police."

4. This is too simple a view of the position now. The police officer is, as already noted, subject to a statutory scheme of control by his senior officers in addition to the general criminal and civil law. He does have greater legal powers than the ordinary citizen, as will become clear from the later parts of this volume, and he is a member of a large, disciplined and technologically advanced service, with all the resources and authority that brings.

b. The position of the chief constable

5. Each of the 43 police forces in England and Wales is headed by a chief officer, known as the commissioner in the case of the two London forces, and elsewhere as the chief constable. Chief officers are responsible for the control of their forces in the enforcement of the law and, subject to regulations made by the Home Secretary, for appointments, discipline and promotions at chief superintendent level and below.[2] (The procedure for senior appointments is described at paragraph 9.) The Home Office view is that chief officers are answerable to police authorities and to the Home Secretary for the general efficiency of their forces, but are alone responsible for the way in which they decide to investigate and prosecute offences. The one qualification of the chief officer's independence in these matters is the right of the Director of Public Prosecutions to take over or conduct a prosecution and the requirement for the consent of the Attorney General or the Director to prosecution in certain classes of offences. The Director may also require a chief constable to report to him in any particular case, and complaints by the public against police officers

[1]London HMSO Cmnd 3297, paragraph 15.
[2]Police Act 1964, ss. 5 and 7; for the Metropolitan force, at commander level and below.

have to be reported to the Director unless the chief officer is satisfied that no criminal offence has been committed.

6. The case of *R v Metropolitan Police Commissioner ex parte Blackburn* (No 1)[1] has been seen as confirming that the decision to institute criminal proceedings rests primarily with the chief officer concerned. The constitutional principle that no branch of the executive or judiciary can direct a police officer to bring a prosecution (or not to do so) in a particular case has been re-stated by Lord Denning in the following terms:

> "I hold it to be the duty of the Commissioner of Police of the Metropolis, as it is of every chief constable, to enforce the law of the land . . . He must decide whether or not suspected persons are to be prosecuted; and, if need be, bring the prosecution or see that it is brought. But in all these things he is not the servant of anyone, save of the law itself. No Minister of the Crown can tell him . . . that he must, or must not, prosecute this man or that one. Nor can any police authority tell him so. The responsibility for law enforcement lies on him. He is answerable to the law and to the law alone."[2]

This was not to be taken as implying, however, that the discretion not to prosecute was absolute. Lord Denning went on:

> "[The chief officer] can also make policy decisions and give effect to them, as, for instance, was often done when prosecutions were not brought for attempted suicide. But there are some policy decisions with which, I think, the courts in a case can, if necessary, interfere."

Lord Denning gave as an example a hypothetical decision by a chief officer not to prosecute for thefts of goods under the value of £100. If such a decision were taken,

> "I should have thought that the court could countermand it. He would be failing in his duty to enforce the law. . . . A question may be raised as to the machinery by which he could be compelled to do his duty . . . This duty can be enforced, I think, either by action at the suit of the Attorney General or by the prerogative writ of *mandamus* . . . No doubt the party who applies for *mandamus* must show that he has sufficient interest to be protected and that there is no other equally convenient remedy. But once this is shown, the remedy of *mandamus* is available, in case of need, even against the Commissioner of Police of the Metropolis."

7. This operational independence of chief officers from central government and local police authorities was preserved by the Police Act 1964. The Secretary of State and his advisers, in particular HM Inspectorate of Constabulary, and the local authority elected members and magistrates represented on the police authorities exercise responsibilities for the maintenance of efficient police forces and influence the general manner in which they

[1][1968] 2 QB 118.
[2]At p 136.

operate. But their role stops short of any responsibility for enforcing the law in individual cases.[1]

c. Police forces and police authorities

8. Under the Police Act 1964 the Home Secretary has ministerial responsibility for the 43 police forces in England and Wales. Except for the Metropolitan Police District, police forces are based on local authority or combined local authority areas. Each force is subject to general oversight by a police authority, which outside London is either a committee of the local authority or a separate body consisting of representatives of a number of authorities. In either case the authority is a statutory body independent of the local authority and, in addition to local authority members, one third of its members is drawn from magistrates for the area. In London, the Home Secretary is the police authority for the Metropolitan Police; the police authority for the City of London Police is the Common Council of the City of London. There are a number of other forces, for which the Home Secretary is not responsible, set up under legislation other than the Police Act. Their members have the powers of a constable within a limited jurisdiction; they include the Ministry of Defence Police, the British Transport Police, the UK Atomic Energy Authority Constabulary and various ports and parks police forces.

9. The duties and powers of the police authority are set out in the Police Act 1964. Its major duty is to maintain an adequate and efficient police force for its area. Some of its powers are exercised independently, and some are subject to the approval of the Home Secretary. Subject to his approval, it appoints and, if it should prove necessary in the interests of efficiency, dismisses the chief officer and his immediate subordinates; in respect of the Metropolitan Police the Home Secretary advises the Queen on such appointments. The police authority also determines the size of the force and the quantity of accommodation and equipment, and controls its expenditure, 50 per cent of which is met from local authority funds and 50 per cent from the Home Office vote.[2] It receives an annual report from the chief officer, and may also call for a report on any matter connected with the policing of the area; though, if the chief officer considers that it is not in the public interest to disclose the information or that it is not needed for the discharge of the functions of the police authority, the request falls unless confirmed by the Home Secretary. In addition, the police authority is under a statutory duty to keep itself informed about the handling of complaints in its area.

d. Ministerial responsibility

10. As noted above, the Home Secretary is the police authority for the Metropolitan Police, and his duties and powers as such towards the Metropoli-

[1]This wide view of the independence of chief officers from the control of central and local government has been challenged, particularly on its historical basis. See for example Geoffrey Marshall: *"Police Accountability Revisited"*, in *Policy and Politics, ed. D Butler and A H Halsey*, London, MacMillan Press Ltd, 1978.

[2]The "local" 50 per cent attracts an element of rate support grant, which is centrally financed. Overall, some 61 per cent of police expenditure was centrally financed in 1979–80.

tan Police Commissioner are broadly similar to those of other police authorities towards their chief constables.

11. But he also has more general responsibilities in relation to the policing of England and Wales. His primary function in relation to the police is, in the words of the Police Act 1964, to "exercise his powers . . . in such manner and to such extent as appears to him to be best calculated to promote the efficiency of the police". The means at his disposal include the right to approve, or initiate, schemes for the amalgamation of police forces; to approve the decisions of police authorities regarding the size of forces and the appointment and removal of chief officers; and, subject to consultation with representative bodies and to Parliamentary approval, to make regulations governing the conditions of entry into the police service, the promotion procedure, the disciplinary code and the pay and conditions of service of police officers. In addition, he provides and maintains common police services such as initial training of recruits, telecommunications services, the Police National Computer, the Police College and Forensic Science Laboratories. The cost of these services is met by central government in the same proportion as is other local authority expenditure through the rate support grant system. The Home Secretary is advised in the discharge of these functions by the Chief Inspector of Constabulary and his staff, who inspect forces (other than the Metropolitan Police), report to him on their efficiency and make an annual report, which is laid before Parliament.

12. Under the provisions of the Police Act 1964, the Home Secretary may require a chief officer to submit a report to him on any matter connected with the policing of his area. He also has power to set up an inquiry into any matter connected with the policing of any area. If he is not satisfied that the service is being effectively maintained, he may either require the police authority to remove a chief officer or withhold the normal 50 per cent Government grant towards police expenditure until improvements are made. These powers are used very rarely but they underpin his efforts to foster uniform methods and standards of policing and cooperation between forces. In addition, the Home Secretary provides guidance on various aspects of the substantive and procedural criminal law and on good police practice by means of Home Office Circulars to the police.

c. The citizen and the enforcement of the criminal law

13. This section deals briefly with the part that the citizen can play in enforcing the criminal law. The citizen's rights when he is suspected or accused of an offence are described where relevant in the later parts of the volume.

14. The involvement of the individual and the local community in the enforcement of the law did not entirely disappear with the establishment of a professional police force. The private citizen continues to have a right to bring private prosecutions, although it is subject to considerable restriction and is relatively rarely exercised nowadays (see paragraph 171). Some powers of arrest are also still exercisable by the private citizen,[1] although these too are

[1]See, for example, Criminal Law Act 1967, subsections 2(2) and 2(3), which are reproduced at paragraph 44.

rarely exercised except in particular circumstances, such as the arrest of suspected shoplifters by store detectives. Once a citizen has effected an arrest he is required to deliver the arrested person to a constable or magistrate. He has no power to detain or charge him. In exercising his power to arrest or the right to prosecute, the citizen is, to some extent, protected by law. Otherwise, he might be liable for torts such as assault, false imprisonment or malicious prosecution. In the law of tort the citizen has a right to "abate a nuisance" which is causing injury to his property; necessity, self-defence (or defence of someone else) and defence of the common weal are recognised as justification for action taken.

15. It remains a breach of the common law for a citizen not to give assistance to a constable if called upon to do so. Halsbury's Laws of England[1] states that:

> "A constable who sees a breach of the peace committed or who is assaulted or obstructed when making an arrest may, if there is reasonable necessity, call upon private persons for assistance; a person who refuses, without lawful excuse, to assist a constable [in these circumstances] commits an indictable offence.
>
> "At a time of riot, it is the duty of magistrates to keep the peace and restrain the rioters, and to pursue and take them; to this end a magistrate may call upon any of The Queen's subjects to assist and they are bound to comply upon reasonable warning."

16. Prosecutions for this offence are rare. There was a case in Gwent in 1969, arising from an incident in which a constable attempting to arrest a man for being drunk and disorderly became involved in a struggle with him and a number of other men who came to his assistance. The officer appealed to a person present to assist him, but he refused. This person was subsequently charged with the offence, convicted and fined £50.

17. There are some further offences (leaving aside perjury and attempting to pervert the course of justice) which may be relevant to the duty of the citizen to assist or refrain from hindering the police. Very briefly, it is an offence:

(a) to accept or agree to accept anything in consideration for refraining from disclosing information concerning the commission of an arrestable offence (Criminal Law Act 1967, s. 5(1));

(b) to do anything without lawful authority or reasonable excuse with intent to impede the apprehension or prosecution of a person who has committed an arrestable offence (Criminal Law Act 1967, s. 4(1), replacing the offence of being an accessory after the fact to felony);

(c) to cause wasteful employment of the police by making a false report of an offence (Criminal Law Act 1967, s. 5(2)); and

(d) to make hoax bomb threats (Criminal Law Act 1977, s. 51(2)).

But apart from these exceptional cases, the private citizen is under no general and legally enforceable duty to assist the police to discover or apprehend an

[1]Fourth Edition, Vol 11, paragraph 105.

offender. It used to be the law that someone who knew that a felony had been committed and failed to bring it to the notice of the authorities committed an offence. This duty was abolished in 1967. The only surviving offence of this type relates to treason; it is punishable with life imprisonment.

18. For the purposes of the law, the citizen's duty to report crimes has thus almost entirely disappeared. His sole remaining duty is not to frustrate the investigation and punishment of such crimes by active concealment. There is a statement in the preamble to the Judges' Rules that the rules do not affect the principle "That citizens have a duty to help a police officer to discover and apprehend offenders . . .". Professor Antony Allott, of the University of London,[1] has commented that "if by 'duty' the judges mean a legal duty, then there is no warrant whatever under the current law of England for this statement; there is no legal duty". This was firmly stated by Lord Parker, C.J., in the case of *Rice v Connolly*.[2] He said:

> ". . . the sole question here is whether the appellant had a lawful excuse for refusing to answer the questions put to him. In my judgment he had. It seems to me quite clear that though every citizen has a moral duty or, if you like, a social duty to assist the police, there is no legal duty to that effect, and indeed the whole basis of the common law is that right of the individual to refuse to answer questions put to him by persons in authority . . . In my judgment there is all the difference in the world between deliberately telling a false story, something which on no view a citizen has a right to do, and preserving silence or refusing to answer, something which he has every right to do."

As the case illustrates, there is a distinction to be drawn between social or moral responsibility (not enforceable) and legal obligation (enforceable).

19. There are some specific respects in which the citizen is under a legal duty to provide information. They include provisions under the road traffic and public order legislation as well as more widely known requirements under tax law. For example, a person at a public meeting may be required to give his name and address to a police officer.[3] Another important exception is in the Prevention of Terrorism (Temporary Provisions) Act 1976. Section 11(1) of the Act provides that a person who has information which he knows or believes might be of material assistance in preventing an act of terrorism, or in securing the apprehension, prosecution or conviction of any person for an offence involving the commission, preparation or instigation of such an act of terrorism, and who fails without reasonable excuse to disclose that information as soon as reasonably practicable to a constable is guilty of an offence. Acts done to obstruct the police in the execution of their duty may be offences such as refusal to move away when told to do so by police trying to disperse a dangerous public assembly.[4] Refusal of information is not generally an obstruction of the police in the performance of their duty,[5] although giving false information may be.

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[1]In a paper prepared for the Royal Commission on Criminal Procedure in 1978 (unpublished).
[2][1966] 2 QB 414.
[3]Public Order Act 1936, s. 6.
[4]*Duncan v Jones* [1936] 1 KB 218.
[5]*Rice v Connolly* [1966] 2 QB 414; *Gelberg v Miller* [1961] 1 All ER 291.

CHAPTER 2

Police powers and procedures outside the police station

A. Stop and search

20. The police have no general authority to search members of the public. They may only do so where the person concerned agrees or in certain limited circumstances prescribed by law. A search in the absence of authority or consent will constitute an assault, and an action in the civil or criminal courts may follow. There are two situations in which a person may lawfully be searched against his will: where there is specific statutory authority to stop and search short of arrest, and in certain circumstances where he has been arrested.

21. A number of statutory provisions give the police power to stop and search persons without arresting them (though arrest may follow if evidence justifying it is discovered during the search). A list of them is at Appendix 1. The provisions which apply throughout England and Wales may be distinguished from those of limited, or local, application. The national powers are concerned with a wide range of articles, from drugs and firearms to wild plants and birds, and depend on there being reasonable suspicion that the person concerned is in unlawful possession of an article of the type specified in the statute. The local powers are directed against persons reasonably suspected of being in possession of stolen or unlawfully obtained goods.

22. An example of a local provision is s. 66 of the Metropolitan Police Act 1839 which gives a constable power to "stop, search and detain . . . any person who may be reasonably suspected of having or conveying in any manner any thing stolen or unlawfully obtained". Powers of this kind have long existed in English law and were originally linked with provisions making it an offence to be unable to account for unlawful possession of the relevant article. For example, s. 24 of the Metropolitan Police Courts Act 1839 provided that:

> "Every person who shall be brought before any of the said magistrates charged with having in his possession or conveying in any manner any thing which may be reasonably suspected of being stolen or unlawfully obtained, and who shall not give an account to the satisfaction of such magistrate how he came by the same, shall be deemed guilty of a misdemeanour . . ."

Thus if a constable, having exercised the power under s. 66, found a person in possession of something which he reasonably suspected to have been stolen or unlawfully obtained, he could take him before a magistrate, and, if the person

could not satisfy the magistrate that he was in lawful possession of the article, he would be convicted of an offence.

23. Except for one or two provisions of limited geographical application,[1] this is not now the law. The power to stop, search and detain remains, but the offence provision has been repealed. Parliament refused to renew s. 54(2) of the British Transport Commission Act 1949 (a provision broadly similar to s. 24 of the 1839 Act) when this came before it in 1976.[2] The main concern was that offences of this kind reversed the onus of proof, requiring the defendant to prove his innocence rather than the prosecution his guilt. The Government announced its intention to repeal all the similar provisions in public general legislation (including s. 24 of the Metropolitan Police Courts Acts 1839) as soon as an opportunity presented itself; and this was done in the Criminal Law Act 1977. Similar offences in local legislation will shortly lapse under the Local Government Act 1972 (unless Parliament were to agree to their renewal).

24. The repeal of s. 24 of the 1839 Act and other similar provisions does not affect such powers as the police have to stop, search and detain persons suspected of being in unlawful possession of stolen goods; but any subsequent charges now have to be brought under the Theft Act 1968 which requires the normal standard of proof.

25. The police have wide powers to stop motor vehicles (and pedal cycles) for example to examine the mechanical condition of the vehicle. The police officer is not required to have any prior suspicion that an offence has been committed. These powers are conferred by the road traffic legislation primarily to ensure conformity with that legislation. By s. 159 of the Road Traffic Act 1972, however, a police constable in uniform may require any person driving a motor vehicle to stop the vehicle, and this is a general power. The constable must be acting in the execution of his duty, that is to say his conduct must be authorised by statute or recognised at common law and not involve any unjustified use of the powers associated with the duty. In the case of *R v Waterfield*[3] it was stated that an attempt by a constable to require a stationary car not to move so the police could examine it in order to obtain evidence would be an invalid exercise of the power to stop under s. 159 of the 1972 Act. It was implied, however, that had the driver (or other person associated with the car) been arrested for an offence, detention of the car as prospective evidence would have been a proper exercise of the constable's duty. Of this case, Lord Denning, M. R.[4] said: "The decision causes me some misgiving . . . My comment on the case is this: the law should not allow wrongdoers to destroy evidence against them when it can be prevented." There is no correspondingly general power to search vehicles, but there is a number of statutes which gives the police specific power to do so. Under these statutes, for example, the police may search a vehicle when a person is arrested on

[1]Port of London Act 1968, s. 157(2), and The Mersey Docks and Harbour (Police) Order 1975, Art. 5(2).
[2]Under the terms of the Act the provision was subject to a time limit which had previously been extended on a number of occasions since 1949.
[3][1964] 1 QB 164.
[4]*Ghani v Jones* [1970] 1 QB 693 at p 708.

suspicion of poaching or of possessing a controlled drug; also they may search a vehicle when a person is suspected of possessing stolen property either if he is stopped in certain places, for example railway premises, or under local legislation.[1] Uniformed officers also have powers to stop a vehicle and require its driver to take a breath test under the breathalyser provisions of the drink and driving law.[2]

26. Comprehensive statistics on the exercise of powers to stop and search are not collected centrally, except in the case of searches for controlled drugs under the Misuse of Drugs Act 1971. Statistics on the use of this power and its results are at Appendix 2. In addition, at the Royal Commission's request the Metropolitan Police provided information from its own records on the number of stops of persons and of vehicles made under s. 66 of the Metropolitan Police Act 1839. In two one month periods in 1978 and 1979 over 40,000 and 35,000 such stops were recorded respectively. The numbers of arrests which resulted were over 5,000 and 4,000, giving arrest rates of 13 per cent and 12 per cent. Detailed figures, broken down by district within the Metropolitan Police area, are at Appendix 3.

27. The power to search an arrested person in certain circumstances is a common law power. Halsbury's Laws of England[3] states the law as follows:

> "There is no general common law right to search a person who has been arrested, but such a person may be searched if there are reasonable grounds for believing (1) that he has on his person any weapon with which he might do himself or others an injury or any implement with which he might effect an escape, or (2) that he has in his possession evidence which is material to the offence with which he is charged".

The availability of the power of arrest is not justification for such search; the arrest must have been effected.

> "The right to a personal search is clearly dependent not upon the *right* to arrest, but the *fact* of arrest and that at the time of a search the person is *in custodia legis*."[4]

B. Entry to and search of premises and seizure

28. Unless affirmative justification exists in law, a police officer or any other person may not enter private premises without the permission of the occupier. This right was established by the cases of *Leach v Money*[5] and *Entick v Carrington*[6] in the mid-eighteenth century. Any entry without permission or lawful authority is a trespass, and the trespasser is liable to a civil action for damages. There are, however, a considerable number of circumstances in which entry may lawfully be made by police officers or officials of public authorities without the consent of the occupier. Appendix 4 sets out the more

[1] For a list of some of these statutory provisions see Appendix 1.
[2] Road Traffic Act 1972, ss. 5–12.
[3] Fourth Edition, Vol 11, paragraph 121. The cases cited as authority for this summary are *Bessell v Wilson* (1853) 20 LTOS 233, *Leigh v Cole* (1853) 6 Cox CC 329, *Dillon v O'Brien & Davies* (1887) 16 Cox CC 245, *Tyler & Witt v London & South Western Railway Company* (1884) Cab & E l 285, and *Elias v Pasmore* [1934] 2 KB 164.
[4] *Barnett and Grant v Campbell* (1902) 2 NZLR 484, 493, *per* Cooper, J.
[5] (1765) 19 State Tr 1001.
[6] (1765) 19 State Tr 1029.

important statutory provisions giving powers of entry to officials of public bodies; some of these can be exercised by a constable as well as by the particular public official. Those which relate solely to the police are described in paragraphs 29 to 41 below.

a. On arrest

29. The law on whether a constable has power to search the premises of an arrested person is not certain. He is empowered to search areas under the immediate control of the prisoner, as the right to search on arrest described in paragraph 27 suggests. This certainly covers the room in which he is arrested.[1] Beyond this the law is unclear. There does, however, seem to be a right on arrest to search the premises of the arrested person even if the arrest took place elsewhere. But such a search is unlawful if there is no connection between it and the offence for which the prisoner was arrested.[2]

b. Under authority of a search warrant

30. Many statutory provisions give magistrates power to issue warrants authorising entry to and search of premises. Not all of these fall to be executed by the police, as Appendix 4 indicates. A list of statutory provisions empowering magistrates to issue search warrants which usually fall to be executed by the police is at Table 5.1 of Appendix 5. One of the provisions under which search warrants are most frequently issued is s. 26 of the Theft Act 1968, which may be taken as an example. It reads:

> "(1) If it is made to appear by information on oath before a justice of the peace that there is reasonable cause to believe that any person has in his custody or possession or on his premises any stolen goods, the justice may grant a warrant to search for and seize the same; but no warrant to search for stolen goods shall be addressed to a person other than a constable except under the authority of an enactment expressly so providing . . .
>
> "(3) Where under this section a person is authorised to search premises for stolen goods, he may enter and search the premises accordingly, and may seize any goods he believes to be stolen goods."

31. The decision whether or not to issue a warrant is a matter for the magistrate concerned. The Lord Chancellor has advised those responsible for the training of magistrates that:

> (a) it is the duty of a magistrate before issuing a search warrant to satisfy himself that in all the circumstances it is right to issue it;
>
> (b) a magistrate may question the person swearing the information to this end; and
>
> (c) although a police officer who applies for a warrant should not be expected to identify his informant, the magistrate may wish to know whether the informant is known to the officer, and whether it has been

[1] *Dillon v O'Brien & Davies* (1887) 16 Cox CC 245.
[2] *Jeffrey v Black* [1978] 1 QB 490. (Though in line with other recent authorities, evidence obtained during the search in this case was admitted at trial despite the unlawfulness of the search.)

possible to make further enquiries to verify the information and, if so, with what result.

Chief officers of police have been informed that this advice has been given, and the Home Office has stressed the need to take all reasonable steps to check the reliability of information before applying for a search warrant.

32. There is no provision for recording why in any particular case the magistrate authorised a search. No form of information for a search warrant is prescribed by law. The following is a precedent suggested by *Oke's Magisterial Formulist*

> "Information for search warrant for stolen goods (Theft Act, 1968, s. 26(1)).
> In the [county of Petty Sessional Division of]. The information of A.B. of who upon oath [or affirmation] states that he has reasonable cause to believe that C.D. of has in his custody or possession or on his premises at certain stolen goods within the meaning of s. 24 of the Theft Act, 1968, namely, (specify stolen goods)."

This is a purely formal document as is the prescribed information for an offence set out in paragraph 177. It is not a deposition. In *Herniman v Smith*[1] the House of Lords disapproved an information in the technical language of the warrant; the better practice would be for the information to be taken in the form of a deposition stating shortly the facts (see further at paragraph 183).

33. A constable or some other person may be named as the person who may execute the search warrant. But whoever is named, the warrant may be executed by any constable acting within his police area by virtue of subsection 102(2) of the Magistrates' Courts Act 1952. The warrant (unlike a warrant of arrest) must be in the possession of the person executing it. A number of statutory provisions specifically authorise the use of force, but there is probably common law authority for the use of force to execute a search warrant provided admission has been demanded and refused.[2]

34. The law relating to the seizure of items of possible evidential value discovered in a search of premises is described in Archbold, *Pleading, Evidence and Practice in Criminal Cases*[3], as follows:

> "Where the police enter a person's house by virtue of a warrant, or arrest a man lawfully, with or without a warrant, it is settled law that the police are entitled to take any goods which they find in his possession or in his house which they reasonably believe to be material evidence in relation to the crime for which he is arrested or for which they enter. If in the course of their search they come on any other goods which show him to be implicated in some other crime, they may take them provided they act reasonably and detain them no longer than is necessary."

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[1] [1938] AC 305.
[2] *Launock v Brown* (1819) 2 B and Ald 592.
[3] 40th Edition, paragraph 1410. Cases cited in support include *Chic Fashions (West Wales) Ltd v Jones* [1968] 1 All ER 229 and *Garfinkel and Others v Metropolitan Police Commissioner* [1972] Crim LR 44.

35. A more general power to seize items of possible evidential value was stated by the Court of Appeal in *Ghani v Jones.*[1] While re-affirming the common law rule against arbitrary search the court held that, where no person has been arrested or charged, property may be seized if the following conditions are satisfied:

1. the police must have reasonable grounds for believing
   (a) that so serious an offence has been committed that it is of the first importance that the offenders should be caught and brought to justice;
   (b) that the article is either the fruit of the crime or the instrument by which it was committed, or material evidence to prove its commission;
   (c) that the person in possession of the article has himself committed or is implicated or is an accessory to the crime or at any rate that his refusal to hand over the article is quite unreasonable;
2. the police must not keep the article or prevent its removal for any longer than is reasonably necessary, and if it is a document and a copy will suffice, one must be taken and the original returned;
3. the lawfulness of the conduct of the police must be judged at the time and not by what happens subsequently.

c. Under other forms of written authority

36. A number of statutory provisions gives the police power to enter premises under a form of written authority other than a warrant. These are listed in Table 5.2 of Appendix 5. Under most of the provisions the power to issue the relevant authority is conferred on senior police officers.

d. To execute a warrant of arrest

37. A constable has authority to enter premises (forcibly if need be) in order to effect an arrest under warrant in cases where the accused is known to be on the premises[2] but it is less clear whether he has that power if he only has reasonable cause to believe that the wanted person is on the premises.

e. To execute an arrest without warrant

38. No general power, either at common law or in statute, exists for a police officer to enter premises to make an arrest without warrant, but subsection 2(6) of the Criminal Law Act 1967 provides that:

> "For the purpose of arresting a person under any power conferred by this section a constable may enter (if need be, by force) and search any place where that person is or where the constable, with reasonable cause, suspects him to be."

The power of entry applies to all "arrestable offences" (defined in s. 2 of the Act, which is reproduced at paragraph 44). Other powers of arrest without

[1] *Ghani v Jones* [1970] 1 QB 693.
[2] *Launock v Brown* (1819) 2 B and Ald 592.

warrant do not generally carry a power of entry but there are one or two exceptions, for example certain offences of remaining or entering on property.[1]

f. Other statutory powers of entry without warrant

39. There is in addition a number of statutory powers of entry without warrant where the purpose is neither to search the premises for the proceeds of crime nor to arrest an offender. Most of these powers apply to special premises, such as cinemas and betting shops rather than dwelling houses, and many are linked to systems of licensing the premises for particular activities. They may be regarded as powers of entry for the purpose of inspection. In some cases the person given the power of entry is a constable (see Appendix 6), but in many others the power of entry is given to an official of the local authority or some other public body (see Appendix 4).

g. Other common law powers of entry

40. Police officers possess some further powers of entry at common law. Most of these apply to situations which by their nature require urgent action. They may be summarised as follows:

(a) to deal with or prevent a breach of the peace. The power of entry to deal with a breach of the peace was established by the early nineteenth century. Legal authority for the power of entry to prevent a breach of the peace was not however established until this century in the case of *Thomas v Sawkins*.[2]

(b) In fresh pursuit of an escaped prisoner. Entry is permitted only where there has been a lawful arrest and the constable is in immediate pursuit. In other cases a warrant of arrest must be obtained, unless the offence is an arrestable one and entry is permitted under the Criminal Law Act 1967 (see paragraph 44).

(c) To save life or limb, or to prevent serious damage to property. The power extends to persons other than constables and entry must be made in a reasonable manner.

41. As with stops and searches of persons and vehicles, there exists no centrally collated information on searches of premises. Nor, as far as could be ascertained, do police forces keep their own records of such searches. At the Royal Commission's request, ten forces conducted a special survey of all searches of premises carried out in specified areas within their force boundaries. Information was collected on, amongst other things, the type of offence under investigation at the time the search was made; whether the search was conducted on warrant; and whether evidence was discovered which implicated the suspect in the offence under investigation, or any other offence. Nearly three-quarters of the searches were carried out in connection with offences of theft and handling or burglary, and approximately one-tenth in relation to drugs offences. The remainder were for a range of offences, some of them very serious and involving violence, and others relatively minor. Over half the searches were conducted before arrest with the consent of the suspect or

[1]Criminal Law Act 1977, Part II, particularly s. 11.
[2][1935] 2 KB 249.

householder or after arrest but without a warrant. A third or so of the searches were backed by a warrant issued by a magistrate, but superintendents' warrants were rarely used. In all, a little over two-fifths of the searches were successful in the sense of uncovering evidence implicating the suspect in an offence, whether that under investigation or another offence, or, in a small number of searches, resulting in material linking other persons to an offence. Fuller details of the method and results of the survey are given in Appendix 7.

C. Arrest

42. Arrest is the deprivation of liberty, a denial of personal freedom. In its ordinary sense, "arrest" distinguishes between the situation where a person is free to go as he pleases and that where he has been told he is in custody. Confusing and sometimes contradictory statements are to be found in the case law as to the meaning of arrest. For example, arrest has been described as the beginning of imprisonment.[1] Whether or not a person has been arrested has been said to depend not on the legality of the arrest but on whether he has been deprived of his liberty.[2] But it has also been said that while every arrest involves the deprivation of liberty the converse is not necessarily true. Arrest can only lawfully be effected in the exercise of an asserted authority. If a person is put under restraint arbitrarily or for some expedient motive, he is imprisoned. He may think he is under arrest if the restraint is exercised by a police officer. In the case of *R v Brown*, where two police officers detained a person who fled from them, thereby arousing their suspicions, Shaw, L. J. said:[3]

> "The officers concerned reacted to what they regarded as suspicious conduct by imprisoning him for so long as might be necessary to confirm their general suspicions or to show them to be unfounded. In the first event they could then arrest him on a specific charge; in the second event they would be bound to release him. In either case, they may have rendered themselves liable to pay damages for trespass and false imprisonment."

43. In 1978, 24 per cent of those proceeded against for indictable offences were brought before the court by way of summons and 76 per cent following arrest and charge. The corresponding figures for non-indictable offences were 87 per cent (summons) and 13 per cent (arrest and charge).[4] These figures, however, give a misleading picture of the proportions of defendants who are arrested; proceedings by way of summons may often be instituted following the arrest and release of a suspect.[5] The figures for non-indictable offences are heavily influenced by motoring offences, for the majority of which no power of arrest exists.

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[1]See *Christie v Leachinsky* [1947] AC 573 where Lord Du Parcq said at p 600: "Arrest (as is said in Dalton's Country Justice, 1727 ed. at p 580) may be called the beginning of imprisonment."
[2]See Lord Dilhorne in *Spicer v Holt* [1977] AC 987 at p 1000, and Winn, L. J. in *R v Sadler* [1970] 1 WLR 416 at p 423.
[3][1977] 64 Cr App R 231 at pp 234 ff.
[4]See Appendix 8 for breakdown by offence.
[5]For further elaboration of this point see R Gemmill and R F Morgan-Giles: *Arrest, Charge and Summons—Current Practice and Resource Implications*, (Royal Commission on Criminal Procedure Research Study No 8, London HMSO 1980). For further information on the institution of proceedings generally, see Chapter 6.

a. Arrest without warrant

44. The most important general powers of arrest without warrant are set out in s. 2 of the Criminal Law Act 1967 which provides as follows:

"(1) The powers of summary arrest conferred by the following subsections shall apply to offences for which the sentence is fixed by law or for which a person (not previously convicted) may under or by virtue of any enactment be sentenced to imprisonment for a term of five years, and to attempts to commit any such offence; and in this Act, including any amendment made by this Act in any other enactment, 'arrestable offence' means any such offence or attempt.

(2) Any person may arrest without warrant anyone who is, or whom he, with reasonable cause, suspects to be, in the act of committing an arrestable offence.

(3) Where an arrestable offence has been committed, any person may arrest without warrant anyone who is, or whom he, with reasonable cause, suspects to be, guilty of the offence.

(4) Where a constable, with reasonable cause, suspects that an arrestable offence has been committed, he may arrest without warrant anyone whom he, with reasonable cause, suspects to be guilty of the offence.

(5) A constable may arrest without warrant any person who is, or whom he, with reasonable cause, suspects to be, about to commit an arrestable offence.

(6) For the purpose of arresting a person under any power conferred by this section a constable may enter (if need be, by force) and search any place where that person is or where the constable, with reasonable cause, suspects him to be.

(7) This section shall not affect the operation of any enactment restricting the institution of proceedings for an offence, nor prejudice any power of arrest conferred by law apart from this section."

The definition of "arrestable offence" in subsection (1) covers most, but not all, serious offences including, for example, murder, wounding, theft, arson and other offences of criminal damage. Some serious offences not covered by this definition carry specific powers of arrest[1] (see further paragraph 46 and Appendix 9), but others such as indecent assault on a woman (under s. 14 of the Sexual Offences Act 1956) do not carry any power of arrest without warrant. It should be noted that the powers conferred on a constable by subsections (4) and (5) are wider than the powers conferred, by subsections (2) and (3), on "any person" (which means either a constable or a private citizen). Under the latter provisions a citizen may arrest a person only if that person is in the act of committing an arrestable offence or, in effect, only where an arrestable offence has clearly been committed. Subsection (7) preserves powers of arrest contained in other statutes (again see paragraph 46 and Appendix 9) and common law powers of arrest. The only common law power of arrest remaining is where a breach of the peace has been committed

[1]For example firearms offences, carrying an offensive weapon, and going equipped for theft or burglary.

(or is reasonably apprehended) and there are reasonable grounds for apprehending its continuance or immediate renewal.

45. Further powers of arrest are available in respect of certain offences against children or young persons specified in Schedule 1 to the Children and Young Persons Act 1933. By subsection 13(1) of that Act a constable may arrest without warrant:

(a) any person who within his view commits any of the offences mentioned in Schedule 1 to the Act if the constable does not know and cannot ascertain his name and residence;

(b) any person who has committed, or whom a constable has reason to believe has committed, any of the offences mentioned in Schedule 1 if the constable has reasonable ground for believing that he might abscond or does not know and cannot ascertain his name and address.

Some of the offences mentioned in Schedule 1 to the 1933 Act are arrestable offences under s. 2 of the Criminal Law Act 1967 (see paragraph 44), for example murder and manslaughter of a person under 17. The powers under s. 2 of the 1967 Act are presumably available in respect of such offences. But the limited power of arrest in subsection 13(1) of the 1933 Act may be contrasted with the additional power to detain under subsection 13(2) of the Act (see paragraph 67).

46. Many statutory provisions also expressly confer powers of arrest without warrant for particular offences even though their maximum penalty is less than the Criminal Law Act standard of five years' imprisonment. Some of them confer powers of arrest on persons other than, or in addition to, the police, for example the powers of arrest under s. 5 of the Sexual Offences Act 1967, s. 11 of the Prevention of Offences Act 1951, and s. 11 of the Coinage Offences Act 1936 are exercisable by anyone, not only a police officer. In other cases powers of arrest are conferred on particular persons, for example an immigration officer (Immigration Act 1971, Schedule 2) or a customs officer (Customs and Excise Act 1952, s. 274). A list of powers conferred on the police is at Appendix 9. As the list shows, the provisions vary considerably. Some apply only where a person is seen or found committing the offence specified, others where there is reasonable suspicion that the relevant offence is being or has been committed. A number of powers of arrest may be exercised only if the name and address of the suspected offender cannot be ascertained to the satisfaction of the police officer. In some of these cases the power of arrest is also (or alternatively) linked to suspicion that the person may abscond.[1]

b. Arrest under warrant

47. Several statutory provisions[2] enable magistrates to issue warrants of arrest for offences. The most frequently used is s. 1 of the Magistrates' Courts Act 1952, which reproduced earlier provisions. Subsection (1) of that section provides, in part, that:

[1]Not all offences lacking any power of arrest without warrant are necessarily technical or trivial, for example the offence of indecent assault on a woman mentioned in paragraph 44.

[2]Including the Magistrates' Courts Act 1952, s. 77, Extradition Act 1870, s. 8 and the Fugitive Offenders Act 1967, s. 6.

> "Upon an information being laid before a justice of the peace for any county that any person has, or is suspected of having, committed any offence, the justice may . . .
>
> *(b)* issue a warrant to arrest that person and bring him before a magistrates' court . . .
>
> Provided that the justice shall not issue a warrant unless the information is in writing and substantiated on oath."

A limitation has since been added by subsection 24(1) of the Criminal Justice Act 1967, which provides that:

> "A warrant for the arrest of any person who has attained the age of seventeen shall not be issued under section 1 of the Magistrates' Courts Act 1952 . . . unless
>
> *(a)* the offence to which the warrant relates is an indictable offence or is punishable with imprisonment or
>
> *(b)* the address of the defendant is not sufficiently established for a summons to be served on him."

48. This provision has three intentions: first, that where a person is alleged to have committed a minor offence the normal procedure for bringing him before a court should be by summons, rather than by arrest; second that, in general, offences which are not punishable by imprisonment should not attract arrest, which is "the beginning of imprisonment", but third, that an arrest can be justified where the summons procedure will not be effective in bringing an alleged offender before the courts.

49. Where there is power to issue a warrant, the procedure is for a police officer (or any other person) to "lay an information" before a magistrate.[1] The decision whether or not to issue a warrant is then a matter for the discretion of the magistrate. This discretion is not reviewable.[2] If the magistrate decides that it is proper to issue a warrant, he must then further consider whether or not to endorse it for bail.[3] If the warrant is so endorsed, the police are required to release the accused (subject to any conditions of bail stated in the endorsement) to appear before a magistrates' court as specified in the endorsement. If the warrant does not authorise the police to release the accused on bail then he must be brought before the magistrates' court named in the warrant immediately.[4]

c. Execution of a power of arrest

50. The mode of exercising a power of arrest is not prescribed by statute, but the courts have laid down certain requirements. Halsbury's *Laws of England*[5] summarises the law on the act of arrest as follows:

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[1]Laying an information is discussed in paragraphs 175 to 183.
[2]See further paragraph 183, where the law and practice on issuing a warrant are discussed in more detail.
[3]Magistrates' Courts Act 1952, s. 93.
[4]See the prescribed form of warrant, form 3 in the Schedule to the Magistrates' Courts (Forms) Rules 1968.
[5]Fourth Edition, Vol 11 paragraph 99

"Arrest consists in the seizure or touching of a person's body with a view to his restraint; words may however amount to an arrest if, in the circumstances of the case, they are calculated to bring, and do bring, to a person's notice that he is under compulsion and he thereafter submits to the compulsion."

51. In *Alderson v Booth*[1] Lord Parker C. J. said:

"There are a number of cases both ancient and modern, as to what constitutes an arrest, and, whereas there was a time when it was held that there could be no lawful arrest unless there was an actual seizing or touching, it is quite clear that that is no longer the law. There may be an arrest by mere words, by saying 'I arrest you' without any touching, provided of course that the defendant submits and goes with the police officer. Equally it is clear, as it seems to me, that an arrest is constituted when any form of words is used which in the circumstances of the case were calculated to bring to the defendant's notice, and did bring to the defendant's notice, that he was under compulsion and thereafter he submitted to that compulsion."

52. An arresting officer must therefore make it clear to the person arrested, either by action or words, that he is under arrest and ensure that he is aware of the ground of the arrest. Here the leading case is *Christie v Leachinsky*[2], where, in the course of his judgment, Viscount Simon set out the rules as follows:

"(1) If a policeman arrests without warrant upon reasonable suspicion of felony, or of other crime of a sort which does not require a warrant, he must in ordinary circumstances inform the person arrested of the true ground of arrest. He is not entitled to keep the reason to himself or to give a reason which is not the true reason. In other words a citizen is entitled to know on what charge or on suspicion of what crime he is seized. (2) If the citizen is not so informed but is nevertheless seized, the policeman, apart from certain exceptions, is liable for false imprisonment. (3) The requirement that the person arrested should be informed of the reason why he is seized naturally does not exist if the circumstances are such that he must know the general nature of the alleged offence for which he is detained. (4) The requirement that he should be so informed does not mean that technical or precise language need be used. The matter is a matter of substance, and turns on the elementary proposition that in this country a person is, *prima facie*, entitled to his freedom and is only required to submit to restraints upon him if he knows in substance the reason why it is claimed that this restraint should be imposed. (5) The person arrested cannot complain that he has not been supplied with the above information as and when he should be, if he himself produces the situation which makes it practically impossible to inform him, eg by immediate counter attack or by running away."

53. If arrest is resisted, force may have to be used. It has long been the law that in making an arrest a police officer is entitled to use force, but no more

[1][1969] 2 QB 216 at p. 220.
[2][1947] AC 573 at pp 587–588.

force than is necessary. The common law principle is now contained in subsection 3(1) of the Criminal Law Act 1967, which reads as follows:

> "A person may use such force as is reasonable in the circumstances . . . in effecting or assisting in the lawful arrest of offenders or suspected offenders or of persons unlawfully at large."

The subsection applies both to arrest under warrant and to arrest without warrant.

54. In exceptional cases, in order to restrain an arrested person, it may be necessary to use handcuffs. On this the Home Office has issued the following guidance to chief officers of police:[1]

> "Whether a prisoner should be handcuffed must depend on the particular circumstances, as for instance the nature of the charge and the conduct and temper of the person in custody. Handcuffing should not be resorted to unless there is fair ground for supposing that violence may be used or an escape attempted. Handcuffing cannot be justified unless there are good special reasons for resorting to it."

55. Where the police act in execution of a magistrate's warrant they are protected under the Constables Protection Act 1750 from a successful civil action. This does not apply to an action in respect of the manner of execution of a warrant where this is unlawful.

d. Detention on arrest

56. Where a private citizen effects an arrest, he must either take the arrested person before a magistrate as soon as reasonably practicable or hand him over to the police without unreasonable delay.[2] The normal (and virtually exclusive) practice today is to hand the arrested person over to the police. Where a constable arrests a person without warrant the position is governed by s. 38 of the Magistrates' Courts Act 1952 (see paragraphs 65 and 66). Where a constable arrests on warrant, he must comply with the terms of the warrant which will require either the production of the accused at court immediately or his release on bail.[3]

D. Other powers and procedures in the investigation of crime

a. Surveillance by the police

57. In essence, surveillance amounts to no more than a more intensive form of observation and/or hearing undertaken by the police as a means of confirming or dispelling a suspicion. There is in this country no specific law which prevents a person from maintaining observation upon or from seeking to overhear the activities of another person, except to the extent that the law of trespass may apply. In principle therefore the use of surveillance by the police (or by any private citizen) is not in itself unlawful; and the law does not confer

[1] *Consolidated Circular to the Police on Crime and Kindred Matters,* 1977 edition, paragraph 4.65.

[2] Archbold, 40th edition, paragraph 2806; *John Lewis and Co v Tims* [1952] AC 676.

[3] See form 3 in the Schedule to the Magistrates' Courts (Forms) Rules 1968. The requirement to bring the accused (if not bailed) before the court immediately is not qualified in any way. See further paragraph 49.

on the police particular powers or privileges which would assist them in their surveillance activities.

58. The courts will admit evidence of what an officer may have seen or heard with the aid of technical equipment which enables him to observe or hear an offence being committed by a person who is unaware of his presence. There have been a number of cases in which the courts have held that evidence obtained by eavesdropping is admissible. In *R v Ali and Hussain*[1] the police used a tape recorder to eavesdrop upon conversations between two prisoners. The Court of Criminal Appeal held that the evidence was properly admitted:

> "The method of the informer and of the eavesdropper is commonly used in the detection of crime . . . the method of taking the recording cannot affect the admissibility as a matter of law although it must remain very much a matter for the discretion of the judge."

Similarly, in *R v Stewart*[2] the Court of Appeal held that evidence of a police officer who had eavesdropped on a conversation between two suspects by sitting in a neighbouring cell was properly admitted. In *R v Keeton*[3] the court held that the evidence of a police officer who had listened to a telephone conversation which the defendant made while detained at the police station was properly admitted. There has also been a number of cases in which the courts have accepted evidence obtained by equipment used in visual surveillance. For example in a case in 1975 in which a number of workers at Billingsgate Market were convicted of stealing fish, evidence of criminal offences which took place at night-time was obtained by means of video and light amplification equipment.

59. The principles which the police should apply to the use of surveillance equipment have been developed in consultation between the Home Office, HM Inspectors of Constabulary and chief officers of police. These guidelines were commended to the police in a Home Office Circular in October 1978. As an example of how police forces have instituted procedures for the issue and use of surveillance equipment an extract from the general orders of one force is given at Appendix 10.

b. The interception of communications

60. The Government has recently reviewed the arrangements for the interception of letters and telephone calls, and has published a White Paper *"The Interception of Communications in Great Britain"*[4] which brings up to date the review by the Committee of Privy Councillors under the Chairmanship of Lord Birkett in 1957.[5] The Home Secretary's announcement in April 1980 of the publication of the White Paper is at Appendix 11.

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[1][1965] 2 All ER 464.
[2](1970) 54 Cr App R 210.
[3](1970) 54 Cr App R 267.
[4]London HMSO Cmnd 7873.
[5]London HMSO Cmnd 283.

CHAPTER 3

Police powers and procedures at the police station

A. The legal basis of detention at the police station

a. The general rule on detention

61. The relevant law is clear and is summarised in the introduction to the Judges' Rules (reproduced at Appendix 12) which states the principle:

> "that police officers, otherwise than by arrest, cannot compel any person against his will to come to or remain in any police station."

This does not preclude a person from deciding, or agreeing, to go to a police station voluntarily. But if, in such a case, the person changes his mind, it is in law open to him to leave the police station. The courts have held that if he does so and is prevented from leaving, or told that he will be prevented, he is to be regarded as being under arrest; but if it is not made clear to him that he is under arrest, then he is not to be so regarded and is entitled to leave the police station, using reasonable force to do so.[1]

62. The courts have held that powers of arrest may be exercised only where the requisite grounds of suspicion already exist, and not for the purpose of establishing such grounds. In *R v Lemsatef*[2] (a case involving customs officers) Lord Justice Lawton stressed this point:

> "it must be clearly understood that neither customs officers, nor police officers, have any right to detain somebody for the purposes of getting them to help with their enquiries."

In *R v Houghton and Franchiosy*[3] the Court of Appeal again in the person of Lawton L. J. reiterated the point. The Court wished to state

> "in the clearest possible terms that police officers can only arrest for offences. If they think that there is any difference between detaining or arresting, they are mistaken. They have no power, save under the Prevention of Terrorism (Temporary Provisions) Act 1976, to arrest anyone so that they can make enquiries about him ... Maybe the police should have powers to detain for inquiries in cases such as this. They have not got them now. Parliament might have to decide whether they should have them. The courts cannot do so."

[1] *R v Inwood* [1973] 2 All ER 645. See further, D N Clarke and D Feldman: *"Arrest by Any Other Name"*, [1979] Crim LR 702.
[2] [1977] 2 All ER 835.
[3] (1978) 68 Cr App R 197.

In short, save for the special case of the prevention of terrorism legislation, no-one may be arrested solely in order to enable the police to question him.

b. Restrictions on detention; police bail

63. When an arrested person is brought to the police station, the station officer should enquire whether the arrest is justified. If it is not, the person should be released. If there is no power to make an arrest (for example because there are insufficient grounds of suspicion to do so), the police officers concerned may be held liable in a subsequent action for damages for false imprisonment. During the period of detention, an application for a writ of *habeas corpus* may be made on the person's behalf, although in 1977 there were only 55 and in 1978 24 such applications and a large proportion of these related to detention under the immigration legislation.

64. There are restrictions on the period a person may be detained in police custody.[1] The person who is arrested under warrant on a criminal charge must be taken before the court issuing the warrant (unless it is endorsed for bail) immediately.[2] In the case of a person arrested without warrant, there are five possible outcomes.[3] First, he may be released without charge if, after making the arrest, the police discover evidence which exculpates the suspect, or they decide there is insufficient evidence to justify his prosecution.[4] Second, he may be released, the question of prosecution being still under consideration (the intention being, if he is prosecuted, that this will be by way of summons). Third, he may be released on bail to attend at a specified police station if the inquiries into the offence cannot be completed forthwith. Fourth, he may be released on bail to appear before a magistrates' court. Fifth, he may be retained in custody and brought before a magistrates' court as soon as practicable.[5] In the case of a juvenile retained in custody the requirement is to bring him before the court within 72 hours (see paragraph 91).

65. The procedure for police bail and the retention of an arrested person in custody are regulated by s. 38 of the Magistrates' Courts Act 1952 as amended by the Bail Act 1976, which states that:

"(1) On a person's being taken into custody for any offence without a warrant, a police officer not below the rank of inspector, or the police officer in charge of the police station to which the person is brought, may, and if it will not be practicable to bring him before a magistrates' court within 24 hours after his being taken into custody, shall, inquire into the case and, unless the offence appears to the officer to be a serious one, grant him bail in accordance with the Bail Act 1976 subject to a duty to appear before a magistrates' court at such time and place as the officer appoints.

(1A) Where a person has been granted bail under subsection (1) above, the magistrates' court before which he is to appear may appoint a later

[1]For restrictions on the power of private citizens to detain after arrest see paragraph 56.
[2]See paragraph 56.
[3]See Gemmill and Morgan-Giles, *op cit.*
[4]*Wiltshire v Barrett* [1966] 1 QB 312, and subsection 28(4) of the Children and Young Persons Act 1969.
[5]Magistrates' Courts Act 1952, subsections 38(1), (2) and (4), see paragraph 65.

time as the time at which he is to appear and may enlarge the recognizances of any sureties for him to that time.

(2) Where, on a person's being taken into custody for an offence without a warrant, it appears to any such officer as aforesaid that the inquiry into the case cannot be completed forthwith, he may grant him bail in accordance with the Bail Act 1976 subject to a duty to appear at such a police station and at such a time as the officer appoints, unless he previously receives a notice in writing from the officer in charge of that police station that his attendance is not required; and the recognizance of any surety for that person may be enforced as if it were conditioned for the appearance of that person before a magistrates' court for the petty sessions area in which the police station named in the recognizance is situated.

(3) [repealed].

(4) Where a person is taken into cu ody for an offence without a warrant and is retained in custody, he snall be brought before a magistrates' court as soon as practicable."

66. Where a person is not bailed or otherwise released, and is retained in custody, subsection (4) requires him to be brought before a court as soon as practicable. Subsections (1) and (4) taken together distinguish between serious and less serious cases. In both types of case the police must bring the arrested man before a magistrates' court "as soon as practicable" but in the latter they are subject to the additional requirement that they must release the man on bail if it will not be practicable to bring him before a court within 24 hours. There is, however, no definition of the terms "serious offence" or "as soon as practicable" and no reference to the proper reasons for not releasing the arrested person.

67. An additional power to detain in custody is provided by subsection 13(2) of the Children and Young Persons Act 1933. Under that provision, where a person is arrested for an offence mentioned in Schedule 1 of that Act, he shall be released on bail unless his release would tend to defeat the ends of justice or cause injury or danger to the child or young person against whom the offence is alleged to have been committed. The offences mentioned in Schedule 1 to the 1933 Act include murder and manslaughter of a child or young person and various sexual offences and offences of violence committed against a child or young person.

B. Questioning by the police and the right of silence

a. Questioning and the Judges' Rules

68. It has always been an essential part of the criminal justice system that there was some official body or person to inquire into offences. At one time it was the jury; by 1700 the function had passed to the justices of the peace, and by the early part of the nineteenth century the *de facto* power was in the hands of the police. This inquiry involved questioning people who might have knowledge of the offence, one or more of whom might well turn out to be a suspect. The questioning of suspects by the police included those who had been

arrested and were being kept in custody. Although a person cannot be arrested merely for the purpose of questioning,[1] the police may question someone who has been lawfully arrested and is in police custody. This power has never been statutorily stated, though judicial guidance has been given in decided cases and in the Judges' Rules and Administrative Directions to the Police.[2]

69. Early authoritative statements as to the powers of the police to question were made by Channell, J. who in *R v Knight and Thayer*[3] said:

> "When [a constable] has taken anyone into custody ... he ought not to question the prisoner ... I am not aware of any distinct rule of evidence that, if such improper questions are asked, the answers to them are inadmissible, but there is clear authority for saying that the judge at the trial may in his discretion refuse to allow the answers to be given in evidence."

In *R v Booth and Jones*[4] the same judge said that police officers were entitled to ask questions for information, as to whether to charge a person. But the moment a police officer had decided to charge a person or to take him into custody, he ought not to question him.

> "A magistrate or judge cannot do it, and a police officer certainly has no right to do so."

These two statements were quoted with approval by Lord Sumner in *Ibrahim v R.*[5] A similar view was stated by Lord Brampton (formerly Hawkins, J.) in his Preface to Vincent's Police Code in 1882, though he also said there:

> "[A constable] ought not, by anything he says or does, to invite or encourage an accused person to make any statement *without first cautioning him* that he is not bound to say anything tending to incriminate himself, and that anything he says may be used against him." (Emphasis added.)

And the first set of Judges' Rules, issued in 1912, make it clear that a suspect could be questioned provided he was first cautioned. The caution is:

> "You are not obliged to say anything unless you wish to do so but what you say may be put into writing and given in evidence."[6]

70. The present Rules (which are prefaced by an important note stating certain principles not affected by the Rules) were issued to the police in 1964 following a review of the earlier Rules by the judges. Appended to them is a set of Administrative Directions to the Police, drawn up by the Home Office and approved by the judges. These are concerned with particular detailed

[1]See paragraphs 42 ff; the arresting officer must have reasonable cause to suspect that the arrested person is guilty of an offence.
[2]These are at Appendix 12.
[3](1905) 20 Cox CC 711.
[4](1910) 5 Cr App R 177.
[5][1914] AC 599.
[6]An account of the history of the Judges' Rules is at Appendix 13. For research on the operation of the Rules in practice see Softley and others: *Police Interrogation: An Observational Study in Four Police Stations* (Royal Commission on Criminal Procedure Research Study No 4, London HMSO 1980); Barrie Irving with Linden Hilgendorf: *Police Interrogation: A Case Study of Current Practice* (Royal Commission on Criminal Procedure Research Study No 2, London HMSO 1980).

points arising from the Rules, including the keeping of records, the provision of refreshment, and the circumstances in which juveniles and mentally handicapped persons should be interviewed. A re-issue of the document in June 1978 incorporated some minor changes in the Administrative Directions. The general effect of the Rules may be summarised as follows. A police officer may question a suspect whether in custody or not (Rule I). He need not caution the suspect unless and until he has enough evidence to suspect that he has committed an offence (Rule II). In Rule II the word "evidence" means information of a nature that would be admissible as evidence in court: *R v Osborne*.[1] The suspect is not required to answer questions put to him by the police. As Lord Parker, C. J. said in *Rice v Connolly*[2] ". . . the whole basis of the common law is the right of the individual to refuse to answer questions put to him by persons in authority . . ." Accordingly, the caution should have a number of effects. In addition to advising him of his "right of silence" it informs the suspect that he may be in peril of prosecution; and it tends to help in showing the voluntariness of any statement subsequently made. But the Rules place no limit on the questions which may be put to a suspect before charge. And neither the Rules nor any common law principle require that if the suspect indicates that he wishes to remain silent no more questions may be asked. Further, evidence of the questions posed and the fact that the suspect did not answer, or gave an evasive answer, is admissible (see paragraph 81).

71. As soon as a police officer has enough evidence to charge the suspect (that is, enough to establish a *prima facie* case)[3] he should cause him to be charged without delay and thereafter may not question him about the offence charged (paragraph (d) of the Introduction to the Judges' Rules and Rule III). When a person is charged, or informed that he may prosecuted, he is again cautioned. The caution is similar to that quoted in paragraph 69 except that the suspect is told that anything he says will (as distinct from may) be taken down in writing (Rule III(a)).

72. If, at any stage, the suspect wishes to make a written statement, the Rules prescribe the form it should take. The statement may be written either by the person himself or by a police officer. The Rules state that in either event the statement should be in the suspect's own words, without prompting or questioning and the suspect is required to write and sign a declaration indicating that he has been cautioned and makes the statement of his own free will (Rule IV).

b. Breach of the Judges' Rules

73. The introductory note to the Rules, the Rules themselves, and the Administrative Directions are usually included together in a reference to "the Judges' Rules", and this wide meaning of the Rules applies in particular to references to a breach of the Rules. It is clear that the Rules are not rules of law.[4] It is also clear that an admission obtained in breach of them is not

[1] [1973] 1 QB 678.
[2] [1966] 2 QB 414.
[3] This is a higher standard than enough information to found a reasonable suspicion, see Lord Devlin in *Hussein v Chong Fook Kam* [1970] AC 942.
[4] *R v Voisin* (1918) 13 Cr App R 89; *R v Wattam* (1952) 36 Cr App R 72; *R v Prager* [1972] 1 WLR 260.

necessarily thereby rendered inadmissible. But, as the introductory note to the Rules states:

> "Non-conformity with these Rules may render answers and statements liable to be excluded from evidence in subsequent criminal proceedings."

The judge (or magistrates' court) has a discretion to exclude a confession or admission obtained in breach of the Rules. It was stated in *R v Prager*[1] that non-observance of the Rules "may, and at times does, lead to the exclusion of an alleged confession; but ultimately all turns on the judge's decision whether, breach or no breach, it has been shown to have been made voluntarily."

74. In the introductory note to the Judges' Rules it is stated that the Rules do not affect the principle:

> "That is a fundamental condition of the admissibility in evidence against any person, equally of any oral answer given by that person to a question put by a police officer and of any statement made by that person, that it shall have been voluntary, in the sense that it has not been obtained from him by fear of prejudice or hope of advantage, exercised or held out by a person in authority, or by oppression."[2]

75. This principle requires that a statement (which includes a confession or admission)[3] be free and voluntary and not preceded by any inducement held out by a person in authority.[4] Mere exhortations to tell the truth, or to tell what he (the suspect) knows, have been held to render an admission involuntary and therefore inadmissible. A person in authority is, in effect, anyone whom the suspect might reasonably suppose to be capable of influencing the course of the prosecution, and this will obviously include a constable.[5] An inducement made by a person not, in this sense, in authority but in the presence of a constable may render a confession inadmissible. Examples of confessions held to be inadmissible for this reason are:

(a) Where a surgeon told the suspect "you are under suspicion and you had better tell all you know".[6]

(b) Where the suspect's father said to him "Put your cards on the table. Tell them the lot. If you did not hit him they cannot hang you".[7]

(c) Where a social worker said to the suspect (who was a juvenile) "Do not admit anything you have not done. But it is always the best policy to be honest. If you were at the house, tell the officers about it. If you were concerned, tell him about it and get the matter cleared up."[8]

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[1][1972] 1 WLR 260 at p 266.
[2]This was approved as a correct statement of the law in *Commissioners of Customs and Excise v Harz and Power* [1967] 1 AC 760; and *R v Prager* [1972] 1 WLR 260.
[3]*Commissioners of Customs and Excise v Harz and Power* [1967] 1 AC 760, 817.
[4]See Cave, J. in *R v Thompson* [1893] 2 QB 12.
[5]See *Cross on Evidence*, 5th edition, p 541.
[6]*R v Kingston* (1830) 172 ER 752.
[7]*R v Cleary* (1963) 48 Cr App R 116.
[8]*The Times* January 18 1978.

76. The principle also requires that any statement obtained from a suspect must be voluntary in the sense that it has not been obtained from him by oppression.[1] In *R v Priestley*[2] Sachs, J. said that oppression:

> "... in the context of the principles under consideration imports something which tends to sap, and has sapped, that free will which must exist before a confession is voluntary ... Whether or not there is oppression in an individual case depends upon many elements. I am not going into all of them. They include such things as the length of time of any individual period of questioning, the length of time intervening between periods of questioning, whether the accused person had been given proper refreshment or not, and the characteristics of the person who makes the statement. What may be oppressive as regards a child, an invalid or an old man or somebody inexperienced in the ways of this world may turn out not to be oppressive when one finds that the accused person is of a tough character and an experienced man of the world."

And in an address to the Bentham Club in 1968, Lord MacDermott described "oppressive questioning" as:

> "questioning which by its nature, duration, or other attendant circumstances (including the fact of custody) excites hopes (such as the hope of release) or fears, or so affects the mind of the subject that his will crumbles and he speaks when otherwise he would have stayed silent."

Both of these descriptions were adopted by the Court of Appeal in *R v Prager*.[3] It must follow that an admission obtained by torture, physical or psychological, cannot be voluntary and is therefore inadmissible.

c. The right of silence

77. The so-called right of silence is, in fact, another way of stating the common law principle that no man can be required (that is compelled) to incriminate himself. In *R v Sang*[4] Lord Diplock said:

> "The underlying rationale of this branch of the criminal law, though it may originally have been based on ensuring the reliability of confessions is, in my view, now to be found in the maxim, *nemo debet prodere se ipsum*, no one can be required to be his own betrayer, or in its popular English mistranslation 'the right to silence'."

The concept is succinctly stated in the following extract from the decision of the US Supreme Court in *Miranda v Arizona*:[5]

> "The privilege against self-incrimination, which has had a long and expansive historical development, is the essential mainstay of our adversary system and guarantees to the individual 'the right to remain silent unless he chooses to speak in the unfettered exercise of his own free will',

[1] The reference to oppression was added to the introduction to the Judges' Rules in 1964 following the observations of Lord Parker C. J. in *Callis v Gunn* (1963) 48 Cr App R 36 at p 40 condemning confessions obtained in an oppressive manner.
[2] (1966) 50 Cr App R 183.
[3] [1972] 1 WLR 260.
[4] [1979] 2 All ER 1222 at p 1230.
[5] 384 US 436 (1966).

during a period of custodial interrogation as well as in the courts or during the course of other official investigations."

78. In this country this right, or privilege, is currently enforced by means of rules of evidence. As outlined above, if an admission or confession is not proved to be voluntary it is inadmissible and if obtained in breach of the Judges' Rules or otherwise unfairly, it may, at the discretion of the court, be excluded. The basic and crucial reason for the rules requiring confessions to be voluntary and refusing to allow adverse inferences to be drawn from silence (insofar as they achieve this) is the courts' awareness of the vulnerability of the suspect when questioned by the police. The rules exemplify the courts' concern that evidence of statements made by the accused to the police should be reliable and should not be the result of undue pressure.

79. Research shows that only a minority of suspects do in fact exercise the right to say nothing. Most give some kind of statement or an explanation for their conduct.[1] If a suspect does exercise his right to say nothing the prosecution may not make any adverse comment on the fact and there are limits to the comments the judge may make to the jury.

80. Nevertheless if a suspect chooses to say nothing in answer to police questions, his silence may be incriminating. A distinction must be drawn between the consequences to an accused of his silence before a caution under the Judges' Rules has been administered and afterwards. Silence before the caution has been given cannot of itself constitute proof of guilt but it may form part of the circumstances which the court has to take into account when assessing the evidence. However, once a person has been cautioned, that is told by the police that he need say nothing, the law is that it must be unsafe to use his silence against him for any purpose whatever. As regards questioning before the caution has been administered, Lawton, L. J. said in *R v Chandler*:[2]

> "The law has long accepted that an accused person is not bound to incriminate himself; but it does not follow that a failure to answer an accusation or question when an answer could reasonably be expected may not provide some evidence in support of an accusation."

That case also quoted as the law the principle stated by Lord Atkinson in *R v Christie*[3] that:

> "the rule of law undoubtedly is that a statement made in the presence of an accused person, even upon an occasion which should be expected reasonably to call for some explanation or denial from him, is not evidence against him of the facts stated save so far as he accepts the statement, so as to make it, in effect, his own. If he accepts the statement in part only, then to that extent alone does it become his statement. He may accept the statement by word or conduct, action or demeanour, and it is the function of the jury which tries the case to determine whether his words, action,

[1]The types of statements or explanations given are discussed in Softley and in Irving *op cit*. For information on statements made by defendants tried in the Crown Court, see J Baldwin and M McConville: *Confessions in Crown Court Trials* (Royal Commission on Criminal Procedure Research Study No 5, London HMSO 1980).
[2][1976] 1 WLR 585.
[3][1914] AC 545 at p 554.

> conduct, or demeanour at the time when a statement was made amounts to an acceptance of it in whole or in part. It by no means follows, I think, that a mere denial by the accused of the facts mentioned in the statement necessarily renders the statement inadmissible, because he may deny the statement in such a manner and under such circumstances as may lead a jury to disbelieve him, and constitute evidence from which an acknowledgement may be inferred by them."

81. Evidence may be given of questions put to the accused by a police officer and the accused's response thereto. The response (in addition to a straightforward answer) may be a statement to the effect "I am not prepared to comment" or it may be silence, that is, no answer at all. Where the accused exercises his right of silence in this way, it is not the law that no adverse inference may be drawn. It is clearly the law that the mere exercise of the right of silence is not *of itself* evidence of guilt; but it is equally clearly the law that the fact of the exercise of the right is admissible evidence and forms a part of the whole of the case, and it becomes part of the facts which the jury or magistrates have to consider.

82. The nature of the comment the judge may make as to silence in response to questioning before trial has been the subject of considerable and conflicting case law and has attracted much academic and other controversy.[1] The most recent case on the nature of the comment a judge may make on the accused's silence before trial is *R v Gilbert*,[2] in which the Court of Appeal (comprising in this instance two Law Lords and a *puisne* judge) noted that it was not possible to reconcile all of the earlier cases but stated:

> "It is in our opinion now clearly established . . . that to invite a jury to form an adverse opinion against an accused on account of his exercise of his right to silence is a misdirection."

The court indicated concern at the present state of the law and said:

> "It is not within our competence sitting in this Court to change the law. We cannot overrule the decisions to which we have referred. A right of silence is one thing. No accused can be compelled to speak before, or for that matter, at his trial. But it is another thing to say that if he chooses to exercise his right of silence, that must not be the subject of any comment adverse to the accused. A judge is entitled to comment on his failure to give evidence. As the law now stands, he must not comment adversely on the accused's failure to make a statement."

83. The case law is concerned only with what the judge may say to the jury about the accused's silence. It does not, indeed it cannot, prevent a jury or bench of magistrates from drawing an adverse inference. In *R v Sullivan*[3] Salmon, L. J. quoted from the judge's summing-up:

> "Sullivan refused to answer any questions. Of course bear in mind that he was fully entitled to refuse to answer questions . . . But you may think that if he was innocent he would be anxious to answer questions."

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[1] For an account of this see Home Office evidence to the Royal Commission on Criminal Procedure, Memorandum IX, Parts I and III (Home Office 1978). See, for instance, the article critical of the present rules by Professor Sir Rupert Cross, at [1973] Crim LR 329.

[2] (1977) 66 Cr App R 237.

[3] (1966) 51 Cr App R 102.

This was held to be a misdirection, but of it Salmon, L. J. said:

> "It seems pretty plain that all the members of the jury, if they had any common sense at all, must have been saying to themselves precisely what the learned judge said to them."

In *R v Gilbert*[1] Viscount Dilhorne said:

> "As the law now stands, although it may appear obvious to the jury in the exercise of their common sense that an innocent man would speak and not be silent, they must be told that they must not draw the inference of guilt from his silence."

84. The accused cannot be compelled to give evidence at his trial and the prosecution may not comment on his failure to do so. The judge, however, may, in his discretion, comment on the accused's failure to give evidence; and although the judge must exercise his discretion to ensure that the trial is fair, in some cases the interests of justice may call for strong comment.[2] The Court of Appeal has concluded[3] that the comment by the judge should in almost every case follow the statement by Lord Parker C. J. in *R v Bathurst*[4] that if the judge were minded to comment to the jury this should be to the effect that:

> "the accused is not bound to give evidence, that he can sit back and see if the prosecution have proved their case, and that, while the jury have been deprived of the opportunity of hearing his story tested in cross-examination, the one thing they must not do is assume that he is guilty because he has not gone into the witness box."

C. Access to legal advice and to other persons

a. Access to legal advice

85. Although there are no statutory provisions conferring on suspected persons any entitlement to see or consult a solicitor, paragraph (c) of the introduction to the Judges' Rules states the principle:

> "That every person at any stage of an investigation should be able to communicate and to consult privately with a solicitor. This is so even if he is in custody provided that in such case no unreasonable delay or hindrance is caused to the processes of investigation or the administration of justice by his doing so."

According to paragraph 7(a) of the Administrative Directions appended to the Rules:

> "*(a)* A person in custody should be supplied on request with writing materials. Provided that no hindrance is reasonably likely to be caused to the processes of investigation or the administration of justice:
>
> (i) he should be allowed to speak on the telephone to his solicitor or to his friends;
>
> (ii) his letters should be sent by post or otherwise with the least possible delay;

[1](1977) 66 Cr App R 237.
[2]*R v Sparrow* [1973] 1 WLR 488.
[3]*R v Mutch* [1973] 1 All ER 178.
[4][1968] 2 QB 99.

(iii) telegrams should be sent at once, at his own expense.

(b) Persons in custody should not only be informed orally of the rights and facilities available to them, but in addition notices describing them should be displayed at convenient and conspicuous places at police stations and the attention of persons in custody should be drawn to these notices."

In addition s. 62 of the Criminal Law Act 1977 states that:

> "Where any person has been arrested and is being held in custody in a police station or other premises, he shall be entitled to have intimation of his arrest and of the place where he is being held sent to one person reasonably named by him, without delay or, where some delay is necessary in the interest of the investigation or prevention of crime or the apprehension of offenders, with no more delay than is so necessary."

This section is relevant here because the person in custody might use the entitlement conferred by s. 62 to request that his solicitor be notified of his arrest.

86. Two points in particular should be noted about these provisions. First, they do not recognise any right for a solicitor to be present when a person in custody is being questioned. Second, the rights which are recognised, to have information about the arrest sent to another person (who may be a solicitor) and to consult and communicate, by various means, with a solicitor, are all subject to the provisos set out in paragraph 85 whose exercise is a matter for police discretion. Unless these provisos apply, the Judges' Rules envisage that an arrested person should not as a matter of routine be prevented from obtaining legal advice if he wishes to do so.

87. The available research shows that relatively few suspects ask to consult with a solicitor while they are in police custody. The Home Office study of police interrogation found that about one in ten did so; a third of these requests were refused by the police. The rate increased to one in five at one station where suspects were told of their right to contact a solicitor.[1] Research based on interviews with defendants tried on indictment indicates a rather higher rate of requests, but even so these occur in only a minority of cases. Such defendants frequently claimed that their requests were refused by the police.[2]

b. Access to other persons

88. As noted in paragraph 85, s. 62 of the Criminal Law Act 1977 sets out formally the entitlement of a person in custody to have information about his arrest and the place of his detention conveyed to a reasonably named person. But it provides that the execution of this entitlement may be delayed where this is necessary (but no longer than is so necessary):

> "in the interest of the investigation or prevention of crime or the apprehension of offenders."

A copy of the relevant sections of the Home Office circular to chief constables about the implementation of this provision is at Appendix 14.

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[1] See Softley, *op cit*, Chapter 3.

[2] See J Baldwin and M McConville: *Police interrogation and the right to see a solicitor* [1979] Crim LR 145; and M Zander: *Access to a solicitor in the police station* [1972] Crim LR 342.

89. Statistical information about the operation of s. 62 is limited. The fullest material deals only with the numbers of those whose requests to have someone notified of their arrest were refused after four and 24 hours and does not indicate what percentage of arrested persons made such a request (see Appendix 15). The Home Office study of police interrogation indicates that half the adult suspects observed did not want anyone informed of their whereabouts.[1]

D. Special provisions in relation to certain categories of suspect

a. Juveniles

90. Subsection 29(1) of the Children and Young Persons Act 1969, as amended, provides that where a juvenile (that is, a person under the age of 17) is arrested, with or without warrant, and cannot be brought immediately before a magistrates' court, the police officer in charge of the police station to which he is brought or another police officer not below the rank of inspector shall forthwith enquire into the case, and shall release him unless:

(a) the officer considers that he ought in his own interest to be further detained; or

(b) the officer has reason to believe that he has committed homicide or another grave crime or that his release would defeat the ends of justice or that if he were released (in a case where he was arrested without a warrant) he would fail to appear to answer to any charge which might be made.

Where a juvenile is arrested, the person who arrested him must take such steps as may be practicable to inform at least one parent or guardian (s. 34 of the Children and Young Persons Act 1933 as amended). Where a juvenile is released, his parent or guardian, if he consents to be surety for the juvenile, may be required to comply with any conditions of his release, one of which may be that the parent or guardian attend court with the juvenile (subsection 29(2) of the 1969 Act as amended and subsection 3(7) of the Bail Act 1976).

91. Where a juvenile is not released after arrest, he must be brought before a magistrates' court within 72 hours. Further, the police must make arrangements for him to be taken into the care of the local authority unless the officer who enquires into the case certifies:

(a) that it is impractical to make such arrangements, or

(b) that the juvenile is of so unruly a character that it is inappropriate to do so.

(Children and Young Persons Act 1969, subsections 29(3) and (5).)

92. Where it is necessary to take juveniles into police custody they are not usually placed in the cells. The Home Office has issued the following guidance:

> "When a juvenile has to be kept in a police station the degree of security needed will depend on a number of factors, including his age and behaviour and the reason he is in police custody. There may sometimes be no need to keep him in a secure room. Juveniles should not be placed in police cells, unless they are so unruly that they are likely to cause damage

[1]Softley, *op cit*, Chapter 3.

in a detention room or other accommodation. Secure accommodation, not in police cells, should therefore be available at any station where it may be necessary to detain juveniles overnight. Where no room can, or need, be set aside permanently for the purpose, one should be allocated to be taken into use when required."[1]

Administrative Direction 4 appended to the Judges' Rules provides that:

"As far as practicable children and young persons under the age of 17 years (whether suspected of crime or not) should only be interviewed in the presence of a parent or guardian, or in their absence some person who is not a police officer and is of the same sex as the child. . ."[2]

b. Mentally handicapped persons

93. In the last few years, partly as a result of one or two individual cases, concern has been expressed about the position of mentally handicapped persons in police custody. The substance of a circular issued by the Home Office in 1976 is now consolidated in Administrative Direction 4A to the Judges' Rules. This advises that officers should take particular care in putting questions to and accepting the reliability of answers from a person who appears to have a mental handicap. As far as practicable, such persons should be interviewed only in the presence of a parent or other independent person.

c. Suspects requiring an interpreter

94. Special provision is also made for two further groups, namely those who do not speak English (Administrative Direction 5) or who suffer from deafness (Appendix C to the Judges' Rules). In the case of the former, an interpreter is to be present who should take down the statement in the language in which it is made. This should be signed by the person making it. An official translation is to be made which will if necessary be proved as an exhibit with the original statement. When the suspect is a deaf person, Appendix C notes that it may be necessary to have a competent interpreter present. Agreement has been reached with the Royal National Institute for the Deaf and the Association of Directors of Social Services for the Director of Social Services to designate a point of contact through which arrangements can be made locally to secure the services of interpreters.

E. Powers to take photographs and fingerprints

95. There is a distinction in law to be made between photographing and fingerprinting. While fingerprinting will almost certainly require some physical contact between the police officer responsible and the person being fingerprinted, photography does not. Accordingly, whereas fingerprinting without statutory authority or the consent of the person concerned may constitute an assault, the English courts have never held the photographing of a suspect by a police officer to be unlawful, even where there is no consent or statutory authority. What statute law there is on these matters has to be seen against this background.

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[1] *Home Office Consolidated Circular to the Police on Crime and Kindred Matters* 1977 edition, paragraph 4.70.

[2] For descriptions of the operation of these safeguards in practice, see Softley, *op cit*, Chapters 2 and 3.

96. The police may only take a person's fingerprints, even if he is suspected of crime, with the person's consent or if there is specific authority to do so. If a person refuses to be fingerprinted, the police may apply to a magistrates' court for a fingerprint order. The application is made under s. 40 of the Magistrates' Courts Act 1952. Subsection (1) of that section, as extended by s. 33 of the Criminal Justice Act 1967, provides that the court may, if it thinks fit, on the application of a police officer not below the rank of inspector, order the fingerprints or palmprints (or both) of certain persons to be taken by a constable. The section applies to persons not less than 14 years old who either (a) have been taken into custody and charged with any offence before a magistrates' court or (b) appear before a magistrates' court in answer to a summons for an offence punishable by imprisonment. No criteria are laid down indicating the circumstances which the court should take into account in such an application. It seems the matter is left solely to the discretion of the court (see *George v Coombe*).[1] The Home Office has indicated that it may not always be possible for the police to give reasons because this might inferentially inform the court of the accused's previous convictions or of the fact that it was desired to use his fingerprints to determine whether these are identical with fingerprints found at the scene of other offences.[2] By s. 39 of the Criminal Justice Act 1948 a previous conviction may be proved against any person in criminal proceedings by showing that his fingerprints (or palmprints) and those of the person convicted are the fingerprints or palmprints of the same person.

97. Where an order is made for the taking of fingerprints (or palmprints) s. 40 of the Magistrates' Courts Act 1952 goes on to provide:

> "(2) Fingerprints taken in pursuance of an order under this section shall be taken either at the place where the court is sitting or, if the person to whom the order relates is remanded in custody, at any place to which he is committed; and a constable may use such reasonable force as may be necessary for that purpose.
>
> (3) The provisions of this section shall be in addition to those of any other enactment under which fingerprints may be taken.
>
> (4) Where the fingerprints of any person have been taken in pursuance of an order under this section, then, if he is acquitted or the examining justices determine not to commit him for trial or if the information against him is dismissed, the fingerprints and all copies of them shall be destroyed."

It will be noted that the effect of the terms of subsection (4) as to the destruction of fingerprints (or palmprints) is such that it does not apply to fingerprints (or palmprints) given voluntarily. Although to take the fingerprints of a suspect without such an order or his consent is *prima facie* a trespass, the prints may still be admitted in evidence.[3]

98. Section 5 of the Children and Young Persons Act 1969, which is not yet in force, provides that the prosecution of juveniles aged 14 or more will have to be preceded by a reference to the local authority for observations as to the

[1] [1978] Crim LR 47.
[2] *Home Office Consolidated Circular to the Police on Crime and Kindred Matters*, 1977 edition, paragraph 4.15.
[3] *Callis v Gunn* [1964] 1 QB 495.

suitability of criminal proceedings. Such a reference is intended to take place at the point where the police would normally charge or lay an information. Linked with this provision is s. 8 of the 1969 Act, which is also not yet in force, enabling the court to make a fingerprint (or palmprint) order, on application, before the prosecution is begun, that is before charge or summons. This is because the charge or information would in effect be deferred.

99. The police also have power under two particular statutes to take the photographs and fingerprints of persons in custody on their own authority. The Immigration Act 1971 (Schedule 2, paragraph 18(2)) gives "any immigration officer, constable or prison officer, or any other person authorised by the Secretary of State" power to "take all such steps as may be reasonably necessary for photographing, measuring or otherwise identifying" a person detained under the Act, pending his examination and pending a decision to give or refuse him leave to enter the United Kingdom. The Prevention of Terrorism (Temporary Provisions) Act 1976 (Schedule 3, paragraph 5 (3)) gives a similar power to "any examining officer, constable or prison officer, or any other person authorised by the Secretary of State" in respect of any person detained under the Act.

F. Identification procedures

100. The law and procedures relating to the holding of identity parades and the prosecution of cases involving disputed identity are detailed and complex. They are now to be found in Home Office Circular No 109/1978,[1] the guidelines applied by the Director of Public Prosecutions,[2] and in the judgment of the Court of Appeal in *R v Turnbull*.[3] These developments follow the report of the *Departmental Committee on Evidence of Identification in Criminal Cases* published in 1976[4] which was set up following public concern over several cases where convictions had resulted from mistaken identification.

G. Other aspects of the treatment of persons in police custody

a. Supervision and documentation

101. Although the detailed arrangements for the supervision and documentation of a person in custody at a police station vary from force to force and, because of the size and business of stations, from station to station, there are common features throughout the country. The account that follows reflects general good practice. The primary responsibility for the care and safekeeping of persons detained in custody rests with the station officer, who has general responsibility for the running of the station. It may happen with large and busy stations that a charge sergeant is available who has no other responsibility than the cell block and persons lodged there. Either of these officers is ultimately responsible to the divisional commander, through the sub-divisional commander.

102. The station officer is responsible for receiving the arrested person on his arrival at the police station, for recording details of the arrest and arrival,

[1] *Identification parades and the use of photographs for identification.*
[2] Written Answer by the Attorney General, House of Commons Official Report 27 May 1976 [cols 287–289].
[3] (1976) 63 Cr App R 132.
[4] 27 April 1976 HC 338 HMSO.

for searching him and recording his property, for checking on his physical condition, and for notifying him of his right under s. 62 of the Criminal Law Act 1977. This information is placed upon a document of record (variously known as a detention sheet, charge sheet or reception sheet) which is also used to record, among other things, all visits to the person (he will be seen by the station officer or one of his staff at least once an hour and every half hour if he is drunk) and the provision of meals. If he is taken from the cell for interview or to see a visitor (a friend or solicitor) that is also recorded.

b. Secure accommodation at police stations

103. Some form of secure accommodation is provided in all police stations, the extent of the provision depending on operational need. In all but the smallest stations, the complex of accommodation comprises a charge room and annexe, surgeon's room, matron's room, interview room, cells and detention rooms. In new buildings, police authorities are expected to follow the advice on specifications for cells in the Home Office *Memorandum on the Planning of Police Buildings 1966*. The detailed design of cells in older buildings sometimes varies from these recommendations, but in general they broadly meet the required specifications. In a few large urban areas, prisoners are detained locally only for a short period pending transfer to a main bridewell, which sometimes contains as many as 75 cells.

c. Refreshments

104. The police are required to provide food and drinks to persons in custody. Administrative Direction 5 appended to the Judges' Rules emphasises that:

> "Reasonable arrangements should be made for the comfort and refreshment of persons being questioned."

d. Property

105. Details of all property which comes into police possession as a result of a person being arrested is entered on the charge sheet or other record. When the property is listed the prisoner is invited to sign it as a true record. It is then countersigned by the officer in the case or the station officer. Property which is the subject of a charge or is likely to be produced in evidence is listed separately from the prisoner's property, but usually on the same document. The property is then placed in a container and locked away. During the time a prisoner is in police custody he is permitted to dispose of property provided this will not interfere with the course of justice. There is no clear statutory authority for this procedure, and the position at common law is uncertain. There is case law to the effect both that it is and is not lawful. Some of the cases deal with the common law power to search on arrest, which is limited to the circumstances described in paragraph 27 above and is not to be used as a matter of routine. One further provision is relevant. Under s. 39 of the Magistrates' Courts Act 1952 (which reproduced an earlier provision), the court has power to return property seized to the accused where it is of opinion that this can be done consistently with the interests of justice and the safe custody of the prisoner. But it is not clear what the effect of this provision is.

Certainly it does not explicitly purport to validate the seizure of any wider class of property than could be seized at common law.

106. A prisoner who is placed in a cell is allowed to retain his own clothing while in custody except that any item with which he could harm himself or another is taken away from him, for example ties, braces, belts, shoelaces (to prevent suicide by hanging), and footwear if this is heavy (to minimise the risk of attack on police officers who may visit him). If it is necessary to remove his clothing for scientific examination he is provided with alternative dress. Changes of clothing are permitted if available. In a recent case,[1] the Divisional Court held that the police had to have a very good reason for removing clothing or depriving a prisoner of property. It was their duty to take all reasonable measures necessary to ensure that the prisoner did not escape, or injure himself or others, destroy or dispose of evidence or commit some further crime (such as malicious damage to property). But where such measures involved removal of clothing, considerable justification was required. There would have to be some evidence either that all suspects of that particular category had, or that the suspect himself had shown, a tendency to use the clothing to inflict injury.

107. When a person is released from police custody, either on bail or to a court, his property is returned to him against his signature which is again countersigned by the officer releasing him. It is the usual practice to hand back to the person all that is legitimately his, but he is not given property which is subject to a charge or which may be required for evidence. Two further considerations which the police have to bear in mind in deciding whether to return property are the provisions of s. 39 of the Magistrates' Courts Act 1952, which requires police to provide the court with a list of property taken from a person who is appearing before it so as to enable the court to direct the return of the property to the accused or his nominee if this is consistent with the interests of justice and subsections 28(1) and (3) of the Theft Act 1968, which enables a court, after conviction, to order in appropriate cases that money found in a prisoner's possession on his apprehension be paid in compensation to a third party.

e. Medical examinations

108. Guidance on medical examinations of persons in police custody is contained in the *Home Office Consolidated Circular to the Police on Crime and Kindred Matters.* The relevant paragraphs are at Appendix 16. It will be noted that the guidance covers the particular position of persons who are ill or drunk and may be in need of care or attention.

[1] *Lindley v Rutter,* The Times 1 August 1980.

CHAPTER 4

The enforcement of rights and duties

Introduction

109. It is clear that the powers of the police in the investigation of crime are considerably greater than those of private citizens. Accordingly correspondingly greater safeguards are required. Allegations of improper behaviour by the police (whether by misusing or exceeding their powers) can arise in a number of ways: out of supervision by other police officers; through a member of the public; in the course of an inspection by the Inspectorate of Constabulary; or during the giving of evidence in a criminal trial. If proved, improper behaviour can be dealt with in a number of ways. This chapter describes the way in which police conduct is regulated and redress is provided for breaches of the rules. Statistical material on the exercise of the various remedies and procedures has been assembled at Appendix 17, except for civil proceedings in respect of which there are no centrally collected figures.

A. Internal discipline and police complaints procedures

a. Police discipline and control by the chief officer

110. Police officers are bound by the requirements of the criminal law and the police discipline code. In addition, each force has general orders prescribing in considerable detail the practice and procedures to be followed in the force. The discipline code is a statutory document, made under the authority of the Police Act 1964 and subject to Parliamentary approval. General orders by contrast are not public documents. They vary from force to force, although to a large extent they contain common material, extracted from, among other things, Home Office Circulars (including that which contains the Judges' Rules and Administrative Directions). They are issued on the authority of the chief officer and do not possess the status of law. The senior officers of the force are responsible for ensuring that knowledge of general orders is disseminated throughout the force. Failure to comply with general orders may amount to a disciplinary offence.

111. The discipline code (extracts from which are at Appendix 18) has traditionally proscribed a very wide range of offences, including discreditable conduct; disobedience to orders; neglect of duty; corrupt or improper practice; abuse of authority (defined as including incivility to members of the public); and criminal conduct (that is being found guilty of any act or omission prohibited by the criminal law). These offences cover most aspects of a

constable's duties (and to some extent his private life) and in theory almost any misconduct, neglect or even carelessness in carrying out his duties is potentially a disciplinary offence.

112. The law and procedure governing police discipline is complex. It is set out in detail in Home Office Circular 63/1977 and some extracts from this are at Appendix 19. In general, unless the Police Complaints Board is involved (see paragraphs 113 ff) discipline is an internal force matter and it is for the deputy chief constable to decide whether to bring a disciplinary charge. It is long established practice, however, that formal disciplinary action is normally reserved for more important matters, others being disposed of without recourse to a disciplinary hearing, for example by way of advice to or admonition of the officer concerned.

b. Complaints

113. The complaints system is the traditional means by which members of the public who are dissatisfied with the behaviour of a particular police officer have sought a remedy. Section 49 of the Police Act 1964 initiated the present system of recording and investigating complaints and a leaflet telling members of the public how they could make a complaint was first issued in 1965. The text of the latest version of this leaflet is at Appendix 20. A complaint may lead to disciplinary action against the officer concerned. The leaflet discusses, *inter alia*, the definition of a complaint, the procedure to be followed when one has been made and the role of the Police Complaints Board.

114. The complaints procedures came under increasing criticism in the 1960s and 1970s from sections of the public who felt that a system in which the investigation and consideration of complaints were undertaken by the police left them as judge and jury in their own cause and because, having made the complaint, the complainant did not, as of right, play any part in its resolution; from the police as involving a vast amount of time and effort, often on matters which were essentially trivial; and, in a narrower field, from those who argued that complaints against police officers by accused persons should normally be investigated before and not after the relevant trial or appeal (see paragraph 122). Various proposals for change were put forward in the early 1970s and in the event the system established by the 1964 Act was modified in the Police Act 1976 which, among other changes, established the Police Complaints Board.

115. The Board's functions are outlined in paragraphs 64ff of the Circular 63/1977 (which are reproduced at Appendix 19). The nature of the Board's role is shown by the following extract from its 1977 report:

> "The Board have no power to conduct investigations into complaints, although they may seek further information from the police about complaints cases submitted to them. The Board cannot take action on complaints sent to them direct except to send them straight on to the chief officer of police concerned. Nor do the Board have power to deal with questions of criminal proceedings against police officers following a complaint against them, although the Board may ask for information relating to a possible criminal offence by a police officer which comes

officially to their notice to be sent to the Director if they have reason to believe that such information has not been supplied to him.

"... To sum up, the Police Complaints Board have no positive part to play in the handling of a complaint until it has been recorded and investigated by the police and until it has been referred, if necessary, to the Director of Public Prosecutions. The Board cannot question the decision of the Director on criminal proceedings. Where the deputy chief constable decides to prefer disciplinary charges, the Board have no power to vary these charges: in such a case they are solely concerned, where the charges are denied, to decide whether or not the charges should be heard before a disciplinary tribunal. But where the deputy chief constable decides not to prefer disciplinary charges the Board, if they disagree, have power to recommend and if necessary direct that charges are nevertheless preferred. It is not the Board's function, however, to give a judgment on the merits of a complaint or to say, for example, whether or not the police officer or the complainant was at fault; and the Board cannot deal with questions of compensation or redress. Furthermore, where a justifiable complaint is found to result from a defect in procedures rather than from the actions of an individual police officer, it will be apparent that the Board's decision solely on the question whether or not disciplinary proceedings should be taken against the officer concerned can provide only a very limited response to the substance of the complaint."

116. Section 49(3) of the Police Act 1964 requires that unless a chief officer is satisfied that no criminal offence has been committed, he must send to the Director of Public Prosecutions the report of all investigations into complaints by members of the public against a police officer. Further details of this procedure are at paragraphs 47 to 50 of Circular 63/1977; paragraphs 51 to 57 set out the procedures and considerations in a case which has both criminal and disciplinary aspects (see Appendix 19). One of the major problems is that of double jeopardy: that is, whether and in what circumstances an officer should be subject to a disciplinary charge when he has already been prosecuted (and either convicted or acquitted) for a substantially similar criminal offence, or where the evidence necessary to prove the disciplinary offence has been held insufficient to justify criminal prosecution for a similar offence. By s. 11 of the Police Act 1976, he is not liable to disciplinary proceedings in the former case, and according to paragraph 56 of Circular 63/1977 he should not normally be liable in the latter case, although there are some important exceptions to this rule. For example, where money has been misappropriated by a police officer there might be insufficient evidence to justify prosecuting him under the Theft Act but adequate evidence to charge him with the disciplinary offence of failing to account properly for the money. In such circumstances, where there are additional elements involved in the disciplinary offence, the Circular advises that it would be right to deal with the matter as a disciplinary charge. There are other examples in the extracts from the Circular at Appendix 19.

117. The Police Complaints Board, in its report for 1978, drew attention to the marked variations in practice by deputy chief constables in referring complaints to the Director. In cases on the margins of criminal conduct, for example where the alleged conduct infringed some law which was no longer

enforced, the Director might be expected to decide not to prosecute, but the effect would be to preclude disciplinary action for which the facts of the case might otherwise provide justification. In its triennial review report,[1] the Board again referred to the "double jeopardy" rule and the variation of practice in referring cases to the Director. It pointed out that the "double jeopardy" rule had certain consequences. Where a case was referred to the Director, he took, for practical purposes, the decision about disciplinary action in many serious allegations. This was undesirable for the reason that the decision was not taken in a disciplinary context but on an assessment of the likely outcome of criminal proceedings. The guidance on when the same evidence as was insufficient for prosecution could properly be used to found disciplinary action appeared to be interpreted differently in different forces. The Board went on to recommend that consideration be given to removing the requirement to send cases to the Director where specified minor offences only were alleged. It also stated that, pending such a revision of the procedure, it would welcome some interim means of securing greater consistency of practice among forces in referring complaints and reports of minor infringements.

118. The Board remarked the continuing pressure from particular quarters for the creation of an independent body to investigate complaints against the police, on the grounds that independent investigators would bring greater thoroughness and impartiality to the task. The Board's experience indicated that in general the police do investigate complaints thoroughly and impartially. The Board saw considerable practical objections to a proposal for all complaints to be investigated by a body independent of the police, but it also saw room for improvement of certain aspects of the complaints procedure. It identified the main focus of discontent as unexplained injuries sustained during the course of arrest or in police custody and recognised a need to set misgivings at rest in that area. It proposed that an independent investigative body comprising experienced and well-qualified police officers on two to three year secondments and answerable to an independent lawyer be given responsibility for investigating such complaints.

B. Criminal and civil proceedings

119. This section examines briefly the application of criminal and civil law to police misconduct, including the problems which may arise when the substance of a complaint or discipline investigation is related to pending or possible criminal proceedings.

a. The criminal law

120. The criminal courts provide various checks on the activities of police officers. First, there is the general sanction of the criminal law. A police officer can be charged and convicted for offences arising out of his work, for example corruption, assault on a prisoner, careless driving in a police car, as well as for an offence not arising out of his work. For a police officer to be convicted of a criminal offence, whether or not connected with his work, is of itself a disciplinary offence. He will be subject to disciplinary sanctions and, in certain cases, may be dismissed or required to resign. Where a police officer is

[1] *Police Complaints Board Triennial Review Report 1980* London HMSO Cmnd 7966.

suspected of or charged with a criminal offence, he is entitled to the same safeguards as any other person in this situation.

121. The conduct of a police officer may also be relevant to criminal proceedings against an accused person. There can be a variety of reasons for an acquittal most of which do not represent a criticism of the police officer concerned in the case. There are some instances, however, in which the fact that the police have followed the appropriate procedures has to be established before a case can be proved. For example, a charge of assaulting an arresting officer in the execution of his duty will not succeed if it can be shown that the initial arrest was unlawful. In order to prove that a person has committed the offence of driving with more than the permitted level of alcohol, the prosecution is required to show that the police have correctly followed the procedures laid down for use of the breathalyser and for requesting a specimen for a laboratory test. The court may exclude statements which were obtained in contravention of the Judges' Rules and must exclude those where voluntariness is not established (see paragraphs 74–76). Or it may disbelieve oral confessions ("verbals") which it is alleged were invented by the police.

122. In these ways there is an in-built tendency for criminal charges against suspects to be associated with allegations or complaints from those suspects of misconduct by individual police officers. Under s. 49 of the Police Act 1964 such complaints are required to be recorded straight away, but if they are closely associated with criminal proceedings against the complainant or someone else and those charges are to be heard in court, the investigation of the complaint will not normally begin until after the court proceedings are complete. The reasons for this are set out at paragraph 39 and Annex F to Home Office Circular 63/1977, which are among the extracts from the Circular at Appendix 19. The Police Complaints Board, again, has drawn attention to the problems arising from this rule but it was unable to suggest a remedy for them. Cases affected by the rule in 1979 took over twice as long to reach the Board as other cases. The defendant may, however, request that the investigation of his complaint not be delayed pending his trial (see paragraph 9 of Annex F to the Circular). Where there is conflicting evidence it will be left to the courts to decide, either in a "trial within a trial" or in the course of the main proceedings. After his trial has been concluded, the defendant may tell the police that he does not wish his complaint to be further pursued. If so, the end of the court proceedings will normally be the end of the matter so far as the individual police officer is concerned. But, where such an allegation or complaint is pursued, it will be dealt with under the normal complaints procedure including any necessary reference to the Director of Public Prosecutions.

123. The Royal Commission on the Police, in its final Report in 1962,[1] recommended that in any case where the court criticises the conduct of a police officer, this criticism should be brought to the attention of his superior officer for consideration of possible advice to the officer or for possible criminal or disciplinary action. This recommendation was brought to the attention of chief officers by Home Office Circular 103/1963.

[1]London HMSO Cmnd 1728.

124. A further possible consequence of misconduct by a police officer is a private prosecution by the complainant. In practice, this is rare. Most of those which do occur are for common assault. Such a prosecution may follow the acquittal of the complainant on a charge of assaulting a police officer or obstructing a police officer in the execution of his duty, but it is also possible for a defendant accused of assault himself to apply for a summons against the police officer concerned alleging an assault. It is for the court to decide whether the two summonses should be tried together.

b. The civil law

125. The general civil law applies equally to the acts of police officers as to those of other citizens and, accordingly, an action for damages may lie. By s. 48 of the Police Act 1964, the chief officer is vicariously liable for such acts committed by officers "under his direction and control" when acting in the course of their duties. He is liable to be sued jointly, and any costs or damages which he is obliged to pay (including, with the approval of his police authority, out of court payment of compensation) are met from the police fund.

126. The sort of case to be brought might include a claim for damages for assault or for false imprisonment following an arrest which the plaintiff alleges to be unlawful. It is open to a person who has been prosecuted and acquitted to allege that the prosecution was launched for improper motives and claim damages for malicious prosecution. A claim for damages for trespass may be brought to challenge the legality of a police search of premises. The legality of police detention of property can be challenged in the courts by a plaintiff claiming to be entitled to possession of the property.

127. A successful claim in civil proceedings against a police officer may have wider consequences than the satisfaction of the plaintiff's claim. The court's ruling on the law may make clear the extent of police powers about which there has been some dispute and the conduct of the particular officer concerned will come to the notice of his chief officer and the police authority.

C. The work of the Inspectorate of Constabulary

128. HM Inspectors of Constabulary are appointed by the Crown on the recommendation of the Home Secretary from among the most senior officers in the police forces of England and Wales. Because of their seniority in the service they spend on average only a few years in post as Inspectors. The first Inspectors were appointed under the provisions of the County and Borough Police Act 1856. The governing statute at present is the Police Act 1964. In addition to the Chief Inspector, there are currently five Inspectors based in separate regions of England and Wales. They inspect 42 forces of the mainland, including the City of London but excluding the Metropolitan Police (the arrangements for which are dealt with in paragraph 130). By invitation they also inspect the police force for Northern Ireland (the Royal Ulster Constabulary) and the three Island forces. They are occasionally asked to advise overseas governments and other government departments in the United Kingdom on police matters.

129. In a note to the Royal Commission in 1979 the then Chief Inspector (Sir Colin Woods) described the work of the Inspectorate as follows:

"The general statutory duties of HM Inspectors of Constabulary, as set out in Section 38 of the Police Act 1964, are to inspect and report to the Secretary of State on the efficiency of all the police forces in their area and to carry out such other duties for the purpose of furthering police efficiency as the Secretary of State may from time to time direct. In practice, however, their duties extend far beyond these requirements.

"Clearly the Inspectors' primary concern is the efficiency of the maintained forces with which they sustain a close liaison and formally inspect once a year. They must also be ready to advise the Secretary of State on all matters of discipline, appeals, awards for gallantry, administration and finance, including those matters arising in connection with the Exchequer Grant in aid of police expenditure; furthermore they should always be ready to assist police authorities with all the information and advice they may require in respect of any arrangements connected with the police force of the area.

"[The main duties of the Inspectorate now include:]

(a) Planning and developing arrangements for promoting collaboration between forces particularly in the field of common ancillary services, for example regional crime squads, higher training;

(b) Ensuring that the results of central research are properly disseminated to forces and that new developments of science and technology are being applied;

(c) Forming an opinion about the adequacy of buildings, equipment and manpower provided by each police authority and advising the Police Department of any shortcomings and on the priorities which should be adopted in the allocation of resources;

(d) Monitoring the manner in which complaints from members of the public are dealt with;

(e) Reporting any misgivings they might have about the competence of individual chief police officers to the proper authorities;

(f) Advising the Secretary of State about the respective merits of candidates for senior police appointments;

(g) Advising on recommendations for gallantry and distinguished service awards;

(h) Serving as members of police disciplinary tribunals and generally advising on appeals against disciplinary findings;

(i) Acting as chairmen of various selection boards for higher training as well as being members of a wide range of committees;

(j) Being consulted about answers to parliamentary questions, policy for the criminal justice system and new legislation, relations between the police and the public, community relations and so on.

"... [The Inspectorate serves the needs of the partnership between local and central government] mainly by being a channel of communication between local government and local forces on the one hand and central government (Police Department) and Ministers on the other. Through its

position in the Home Office Police Department and regular formal and informal meetings with its senior officials the Inspectorate is kept in touch with latest policies and can draw the attention of officials to causes for concern or action which come to the Inspectorate's notice.

"HM Chief Inspectors of Constabulary visit police forces frequently but inspect rarely; their job generally is to coordinate the work of their inspectors who each has the responsibility of inspecting a number of forces in one or more of the regions. They finalise the Inspectorate advice at the national level. The HMCIC is, of course, available for urgent advice to Ministers over the whole range of professional police matters as and when immediate problems arise.

"There are four Assistants to HM Chief Inspector for England and Wales each with a broadly based specialist function as follows:

(a) Traffic, training and community relations;

(b) Computers, communications, management information systems and research;

(c) Integration and employment of women;

(d) Crime and kindred matters.

"The Assistants and their Staff Officers work in close collaboration with Inspectors and their staffs as well as with policy divisions. A specialist Staff Officer deals with recruitment, particularly of graduates, to the police service. They are perhaps of particular value through their availability to their colleagues in the Police Department for informal discussions of current matters."

130. Different arrangements apply for the inspection of the Metropolitan Police. It is an internal service, the Inspector being a serving Deputy Assistant Commissioner of the force. The arrangements are described in Appendix 21.

D. The exclusion of evidence improperly obtained

131. To what extent do the courts seek to control and regulate police conduct by excluding evidence irregularly obtained? The basic rule is that if evidence is relevant it is admissible. In *R v Leatham*[1] Crompton, J. said:

"It matters not how you get it; if you steal it even, it would be admissible."

In *Kuruma v R*[2] Lord Goddard, C. J. said:

"the test to be applied in considering whether evidence is admissible is whether it is relevant to the matters in issue. If it is, it is admissible, and the court is not concerned with how the evidence was obtained."

There is, however, the important exception to this basic rule relating to confessions and admissions, which to be admissible in evidence must be voluntary (see paragraphs 74–76). In addition the judge[3] has a discretion to exclude evidence. He may do so when a confession or admission is obtained in breach of the Judges' Rules. He may also exclude evidence that the accused

[1](1861) 8 Cox CC 498 at p 501.
[2][1955] AC 197 at p 203.
[3]In this and the following paragraph the word "judge" should be read to include magistrates.

has been convicted of other crimes (similar fact evidence) when this would otherwise be admissible to rebut a defence of accident *etc*, and may prevent cross-examination of the accused as to his previous convictions when this is permissible because the accused has attacked the character of a prosecution witness. In both these instances the judge may exclude the evidence if he is of opinion that its prejudicial effect is likely to outweigh its probative value.[1]

132. There are cases where it has been suggested that evidence improperly obtained may be excluded at the discretion of the judge. In *Kuruma v R*,[2] Lord Goddard, C. J. said:

> "No doubt in a criminal case the judge always has a discretion to disallow evidence if the strict rules of admissibility would operate unfairly against the accused .... If, for instance, some admission of some piece of evidence, eg a document, had been obtained from a defendant by a trick, no doubt the judge might properly rule it out."

In *Callis v Gunn*[3] Lord Parker, C. J. said:

> "... in considering whether admissibility would operate unfairly against a defendant, one would certainly consider whether it had been obtained in an oppressive manner, by force or against the wishes of an accused person."

And, he said, the overriding discretion:

> "would certainly be exercised by excluding the evidence if there was any suggestion of it having been obtained oppressively, by false representations, by a trick, by threats, by bribes, anything of that sort."

In *Jeffrey v Black*[4] Lord Widgery C. J. said:

> "If the case is such that not only have the officers entered without authority, but they have been guilty of trickery, or they have misled someone, or they have been oppressive, or they have been unfair, or in other respects they have behaved in a manner which is morally reprehensible, then it is open to the justices to apply their discretion and decline to allow the particular evidence to be let in as part of the trial."

These statements are high authority for saying that the courts should be concerned not only with fairness at the trial but also with the fairness of the police before trial. On this reasoning evidence could be excluded because of the misconduct of the police irrespective of its evidential value, and the judicial discretion to exclude evidence could be used to express disapproval of police behaviour and as a disciplinary measure.

133. But in a recent case this was specifically rejected by the House of Lords. In *R v Sang*[5] Lord Diplock said:

> "It is no part of a judge's function to exercise disciplinary powers over the police or prosecution as respects the way in which evidence to be used at

[1]For a statement of these principles see the judgment of Lord Diplock in *R v Sang* [1979] 2 All E R 1222 at pp 1227–1228.
[2][1955] AC 197 at p 203.
[3][1964] 1 QB 495.
[4][1978] QB 490.
[5][1979] 2 All ER 1222, at p 1230.

> the trial is obtained by them. If it was obtained illegally there will be a remedy in civil law; if it was obtained legally but in breach of the rules of conduct for the police, this is a matter for the appropriate disciplinary authority to deal with. What the judge at the trial is concerned with is not how the evidence sought to be adduced by the prosecution has been obtained, but with how it is used by the prosecution at the trial."

Although their Lordships were not unanimous as to the extent of the judicial discretion to exclude evidence, none disagreed with the principle stated by Lord Diplock above. Furthermore, each of their Lordships agreed with the following propositions:

(1) A trial judge in a criminal trial always has a discretion to refuse to admit evidence if in his opinion its prejudicial effect outweighs its probative value.

(2) Save with regard to admissions and confessions and generally with regard to evidence obtained from the accused after the commission of an offence, he has no discretion to refuse to admit relevant admissible evidence on the ground that it was obtained by improper or unfair means. The court is not concerned with how it was obtained.

CHAPTER 5

The prosecution process

Introduction

134. Prior to the nineteenth century, it was generally the task of the private citizen to bring alleged offenders to the notice of the court; there was no official designated as public prosecutor. Thus it was open to any individual to seek to commence proceedings against any other. During that century, the police came to handle the majority of prosecutions, more as the result of a gradual historical development than of any deliberate decision to give them that duty. But that development did not confer on the police in England and Wales any special power in law as prosecutors. In Scotland, by contrast, the right of private prosecution was already regarded as fallen into disuse by the early nineteenth century, and the special position of the public prosecutor (the procurator fiscal) was clearly established.

135. This historical view of private prosecution in England and Wales does not correspond to present practice for three main reasons. First, there is a public prosecutor in the person of the Director of Public Prosecutions, who is under a duty to "institute, undertake or carry on criminal proceedings in any case which appears to him to be of importance or difficulty or which for any other reason requires his intervention."[1] Second, a variety of statutes restricts the prosecution of offences by requiring the consent of the Director, Attorney General, High Court Judge or other body to the institution or continuance of proceedings.[2] Third, most prosecutions are in practice brought by the police and a large number of the rest by other public agencies.

A. Prosecution by the police

136. Chapter 1 discussed the constitutional position and accountability of the police, dealing briefly with the police discretion to prosecute and its limits. Certain points should be noted. None of the statutes setting up police forces in England and Wales made any mention of their prosecutorial role. The police are under no duty to prosecute except that deriving from their general duty to enforce the law. According to Lord Denning, the chief officer is answerable only to the law for the decision to prosecute (see paragraph 6). This discretion is potentially reviewable by means of prerogative writ if the way the chief

[1]Prosecution of Offences Regulations 1978, Regulation 3; see also s. 2 of the Prosecution of Offences Act 1979.

[2]For a full list of these provisions, see K W Lidstone, Russell Hogg and Frank Sutcliffe: *Prosecutions by Private Individuals and Non-Police Agencies* (Royal Commission on Criminal Procedure, Research Study No 10, London HMSO 1980) (The Sheffield Study).

officer exercises it amounts to failure in his duty to enforce the law. Notwithstanding the lack of any formal duty, the present position is that the great majority of prosecutions in England and Wales are brought by the police. This section is concerned primarily with who prosecutes on behalf of the police and how decisions in relation to prosecution are taken.

a. The formal responsibility for prosecution

137. Informations[1] are usually laid in the name of the officer who, formally at least, has made the decision to prosecute. In some forces they will be in the name of the chief constable; in others, the officer in charge of the force prosecuting department or the head of the division or sub-division. In yet others (the Metropolitan Police for instance) it is usual for informations to be laid in the name of the reporting or arresting officer. This variation has little practical effect, as was illustrated in the recent case of *Hawkins v Bepey*.[2] In that case the Divisional Court held that the death of a chief inspector before the hearing of an appeal against the dismissal of an information which he had laid did not mean that the appeal thereby lapsed. The Court held that the information had been laid on the instruction of the chief constable and, therefore, the prosecutor in the case was either the chief constable or the force of which he had command.

b. Police decisions on prosecution

138. There is a number of decisions involved in bringing a person before a court to face a criminal charge. The way these are taken can vary according to how serious the offence is, the circumstances in which it first comes to light, whether there is a power of arrest, whether the suspect is an adult or a juvenile and the evidential complexity of the case. What follows deals with police decisions and is a somewhat simplified account of them.

139. The first decision is whether to follow up an incident which may amount to a criminal offence. Following up all such incidents would clearly be impossible. The officer on the street therefore takes decisions about what to pursue. The discretion to take no formal action is more likely to be exercised the more minor is the conduct involved. The way in which other early decisions on prosecution are made (assuming some further action is to be taken) depends first on whether the offence is one which carries a power of arrest. If it does not, the officer may report the matter to a senior officer. (He will tell the individual concerned that he is being reported for consideration of prosecution.) The choice then lies between no further proceedings, administering a formal caution (see paragraphs 150–154) or prosecution. This decision is normally ratified at chief inspector level or above, either in the force prosecutions department or by the commander of the division or sub-division (usually a chief superintendent or superintendent). If the decision is that there should be a prosecution, the proceedings will be commenced by way of summons. If the offence carries a power of arrest, the officer concerned may choose either to arrest the person or to report the matter with a view to prosecution. If the

[1]The laying of an information is described at paragraphs 175–177. Procedural aspects of bringing a case to trial are discussed in Chapter 6.
[2][1980] 1 WLR 419.

latter course is adopted, the procedure will then be the same as that described above in respect of a non-arrestable offence. If an arrest is made, the person is taken to the station where after such further investigation as may be necessary, if any, the station officer (usually the station or charge sergeant but occasionally an inspector) decides whether to accept or refuse the charge. The range of outcomes is described at paragraph 64, but essentially the choice lies between no proceedings, a caution or prosecution. Whether or not an arrest has been made, in the more serious or complicated cases or in cases which are likely to attract publicity or where a complaint is likely to be made against the police, senior officers may be involved in the decision whether to prosecute: the divisional commander, or in rare instances an assistant chief constable or even the chief constable.

140. Arrested juveniles are usually released so that the police may consult with the local authority social services department and the probation service (some forces also consult with the school and the educational welfare service) before making the decision on whether the offence will be dealt with by prosecution, caution or by taking no further action. Police forces have a variety of arrangements for dealing with juvenile offenders. About half of them have established specialised juvenile bureaux and, in the majority of the remainder, juvenile liaison officers are assigned to deal with juvenile matters at divisional or sub-divisional level.

c. Obtaining legal advice

141. After the decision to prosecute has been taken, the next stage is preparation for trial. Whether and at what point legal advice is sought will naturally vary with the gravity and complexity of the offence, as well as the practice of the force concerned. For example, no legal advice will be needed in a case of "simple" drunkenness where a guilty plea is expected, and little or no legal advice may be needed in a case of simple theft, but in a fraud case legal advice might well be needed before even the charges can be decided upon. In the latter type of case a lawyer may have been consulted before the police decide to arrest. The arrangements for obtaining legal advice vary from force to force.[1] The basis for the practice in most forces is the recommendation made by the Royal Commission on the Police in 1962 that consideration be given to the appointment of a prosecuting solicitor for every force to give legal advice in deciding upon prosecutions and preparing cases for trial.[2] The position at June 1980 is that thirty-one police forces have prosecuting solicitors' departments of some kind.[3] In addition the Metropolitan force has its own Solicitor and the City of London force is understood to obtain advice from the legal staff of the Common Council. In several of the ten forces without a department of any kind, the chief constable has in the past requested a department. Those forces without a prosecuting solicitor employ private firms *ad hoc*.

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[1]For an account of these various arrangements, see Mollie Weatheritt: *The Prosecution System: Survey of Prosecuting Solicitors' Departments* (Royal Commission on Criminal Procedure Research Study No 11, London HMSO 1980).
[2]London HMSO Cmnd 1728 paragraph 380.
[3]See Appendix 22.

142. There are no nationally prescribed standards for the organisational arrangements of prosecuting solicitors' departments. The prosecuting solicitor and his staff may be employed by the police authority itself, or they may be on the staff of the local auuthority (perhaps with other duties to perform on behalf of that authority). There is little uniformity in their terms and conditions of service and no unified career structure throughout the country. Similarly, there are wide variations in the type and amount of work done by the prosecuting solicitors' departments and the way the work is handled. They range in size from less than half a dozen legally qualified staff to more than 50 in the large metropolitan areas. Some are highly centralised, with solicitors going out from one office to the various courts; others are decentralised, with one or two solicitors permanently attached to one area of the force. In some cases the prosecuting solicitor is employed full time on police work, in others he may also occasionally prosecute on behalf of the local authority or agencies such as the British Transport Police; and the police may also make use of private firms of solicitors. The kind and proportion of cases in which the prosecuting solicitor is asked for advice, the stage at which he is called in, and the proportion of summary cases in which he conducts the prosecution case also vary. But broadly, the functions of prosecuting solicitors may be summarised as the conduct of prosecutions in magistrates' courts, briefing counsel in trials on indictment and advising the police on prosecution matters. They have no responsibility for investigations.

143. The relationship between the solicitor and the police is not precisely defined, and much depends on the cooperation and understanding of the individuals concerned. Basically it is a client/solicitor relationship, whether the solicitor is a member of a prosecuting solicitor's department or a private firm. The solicitor may offer advice but the final decision on who shall be prosecuted and for what offence rests with the police. This is equally true if any question arises whether a prosecution should be withdrawn at any stage, for example if further evidence comes to light. This may be contrasted with the position of the Director of Public Prosecutions who (through his various powers, on which see paragraphs 158 ff) may override police decisions over prosecution.

d. Representation at court

144. Practice varies from force to force over representation of the police in the magistrates' court. The following is an account of general practice.[1] Whether the police are legally represented in cases tried summarily depends on the complexity or importance of the case, as well as on such other factors as whether the defence is also represented and whether a plea of not guilty is expected. The Royal Commission on the Police in 1962 regarded it as "undesirable" that police officers should appear as prosecutors except for minor cases. If the police are legally represented in the magistrates' court, it may be by a member of a prosecuting solicitor's department, by a private solicitor or by a barrister.

145. In cases which go to the Crown Court there is of course no question of police advocacy, nor in general do solicitors have a right of audience there.

[1]For a full account see Weatheritt, *op. cit.*

The choice of barrister in cases heard on indictment rests either with the prosecuting solicitor or with the police or, in cases which he has taken over, with the Director of Public Prosecutions. Since rather more than 25 per cent of serious crime committed in England and Wales each year is committed in London, the requirements of London in respect of criminal prosecutions are very demanding and a permanent group of prosecuting counsel—the only one in the country—has been established there. They are called Treasury Counsel and number at present seven senior and ten junior counsel appointed by the Attorney General at the Central Criminal Court. The Director of Public Prosecutions has first call upon them to conduct his prosecutions. In addition there is a supplementary list of 25 leading and 25 junior counsel who can be instructed at any time making a total of 67 counsel of different seniority immediately available to undertake advisory and trial work for the Director. The Metropolitan Police also maintains a list of approved counsel. In the provinces the Director's cases are dealt with by counsel nominated by the Attorney General from a list of counsel practising on the relevant circuit.

e. Constraints upon police discretion in the decision to prosecute

146. As indicated in paragraphs 139 and 140, the police exercise a discretion at several different points in the prosecution process and at several different levels within the force. But while there is internal supervision over the exercise of this discretion by junior officers, there is little explicit guidance in force orders or elsewhere on how the discretion should be exercised. The extent to which such guidance is known to be available is discussed in the following paragraphs.

147. In the case of traffic offences, forces operate on the basis of written guidance, scheduled to force orders, outlining which offences merit prosecution and which can be disposed of by a written caution. The guidance is drawn up at regional conferences of the Association of Chief Police Officers, following a recommendation by the Royal Commission on the Police in 1962[1] that chief officers should formulate consistent policies in relation to prosecution of traffic offences.

148. Adults suspected of an offence other than a traffic offence are normally prosecuted unless the circumstances suggest an alternative approach. The most obvious reason for not prosecuting is that there is no reasonable prospect of conviction because the evidence is insufficient or of poor quality. But there are many other considerations which may lead the police to decide that despite the existence of a case strong enough to go to trial it would not be in the public interest to prosecute. Although much depends on the circumstances of each case, a number of broad principles can be discerned. If the offence committed was merely a trivial or technical infringement it could be oppressive to enforce the letter of the law. Humanitarian considerations may operate in cases where the offender is either very young or very old, or suffering from serious illness or mental disorder. The "public interest" in the broad political sense may play a part in deciding whether prosecution or non-prosecution will best promote the maintenance of law and order. Finally there are some areas of the law where

[1] *op. cit.*

a degree of discretion is particularly desirable, such as obsolete or archaic offences, or especially controversial or unpopular laws.

149. Where the police decide to prosecute their decision will be subject to the scrutiny of the courts, which may, if the circumstances appear to warrant it, comment adversely upon a prosecution that has been improperly brought. If a conviction is recorded, but the court regards the prosecution as unnecessary or oppressive, it may grant the accused an absolute discharge or impose a nominal penalty, and it may refuse to award costs to the prosecution. If the accused is acquitted the court has power to award costs against the prosecution. Decisions not to prosecute are not subject to the same scrutiny by the courts, although according to Lord Denning a chief officer's policy decision not to prosecute particular types of offence could be challenged before the courts (see paragraph 6).

f. Cautioning

150. Cautioning is used as an alternative to prosecution and reflects the exercise of police discretion not to prosecute detected offenders. There is a distinction to be made between the informal guidance or warning which a person, especially a juvenile or a motorist, may receive from a police officer on the street and a formal caution. The latter should be given only if the police are satisfied that the offence is capable of proof.

151. Although the practice of cautioning has been given recognition in two statutes (the Street Offences Act 1959 and the Children and Young Persons Act 1969[1]), it has never been specifically authorised by statute and no precise date can be assigned to its origin.[2] In addition, it seems to have aroused little judicial comment. This is not entirely surprising, since offences for which cautions are given are, by definition, not prosecuted, and (except in juveniile courts) it is not the practice to cite a caution if the person cautioned is subsequently convicted of some other offence. Where a reference has been made to cautioning it seems to have been regarded as a matter within the discretion of the police. Thus, for example, in *R v Metropolitan Police Commissioner, ex parte Blackburn and another (No 3)*[3] the procedure of cautioning a person and inviting him to sign a disclaimer of any interest in material seized under the Obscene Publications Act was described in the judgment as a convenient and effective procedure because of the courts' unpredictable attitudes to alleged obscenity and the time involved in referring cases to them.

152. In proportionate terms, cautions are most frequently given to juveniles. Formal cautioning has grown considerably in recent years: in 1978, of all juveniles cautioned or found guilty of indictable offences, 49 per cent were cautioned.[4] The practice of cautioning juveniles follows a deliberate policy recommended by the Home Office not to prosecute juveniles if this can be

[1]The relevant subsection (5(2)) of the 1969 Act has, however, not been brought into force.
[2]For information on the history of the practice, see Home Office Evidence to the Royal Commission on Criminal Procedure, Memorandum No VI, paragraphs 7–10 (Home Office 1979).
[3][1973] 1 QB 241.
[4]See Appendix 23, which shows cautioning rates by police force area.

avoided. A juvenile will be cautioned only if he admits the alleged offence and he and his parent or guardian agree to the caution. A caution will not normally be considered suitable if the juvenile has previously been cautioned or prosecuted. Other factors such as the wishes of the complainant (if any) and the views of the local authority social services department may be taken into account. A caution is cited in the same way as a previous conviction if the juvenile is subsequently found guilty of another offence. When a juvenile is cautioned, he and his parents will be required to attend at a police station and the caution will be formally given by a senior police officer.

153. Motoring offenders are commonly cautioned. The caution is given in writing by way of a letter sent through the post. It is not required that the motorist admit the offence, and the fact that he has been cautioned may not be referred to in any way if the motorist is subsequently convicted of a further offence.

154. Adults who have committed offences other than motoring offences are comparatively infrequently cautioned. In 1978 of all adults cautioned or found guilty for indictable offences, 4 per cent were cautioned.[1] Most decisions to caution appear to be taken on humanitarian grounds, for example old age or ill-health. As with juveniles a formal caution will, it is said, be given only if the adult admits the offence. But it does not follow invariably that he will be prosecuted if he denies it. In these cases, as with motoring offenders, the fact that the person has been cautioned may not be referred to in court if he is subsequently convicted of another offence.

B. The Director of Public Prosecutions

a. The Director's office and functions

155. The creation of the Office of Director of Public Prosecutions resulted from pressure throughout the middle years of the nineteenth century for a system of public prosecution. The Prosecution of Offences Act 1879 provided for the establishment of a Director of Public Prosecutions to be appointed by the Home Secretary though the Director's duties were to be exercised under the superintendence of the Attorney General. The Director's powers and duties were defined in very broad terms, the details being left to regulations made under the Act. He was "to institute, undertake, or carry on such criminal proceedings ... and to give such advice and assistance to chief officers of police, clerks to justices and other persons ... as may be for the time being prescribed by regulations under this Act, or may be directed in a special case by the Attorney General". The 1880 Regulations referred, *inter alia*, to cases "which appear to the Director of Public Prosecutions to be of importance or difficulty, or in which special circumstances seem to him to render his action necessary to secure the due prosecution of an offender".

156. The Act also provided for the appointment of Assistant Directors who were to be responsible for particular areas or districts but nothing was done to implement this provision, which was in fact the last vestige of earlier unsuccessful schemes for a network of local prosecutors, and the Director's staff have always been based in London. The department has an authorised

[1]See Appendix 23.

establishment of 57 legally qualified staff. In addition a Deputy Director, two Principal Assistant Directors and nine Assistant Directors are appointed by the Home Secretary.

157. The Director's office was first established as a separate entity by the Prosecution of Offences Act 1908. The present functions of the Director are based on the three Acts of 1879, 1884 and 1908 (which were consolidated in the Prosecution of Offences Act 1979) and the Prosecution of Offences Regulations 1978.

b. The power to take over proceedings

158. The Director is empowered by the 1979 Act to assume responsibility for the further conduct of any prosecution including discontinuing it at any stage if he sees fit. Thus although the right of a member of the public to institute or carry on criminal proceedings is expressly preserved by the 1979 Act (as it had been by the Acts of 1879 and 1908) the Director is given an important supervisory role by this provision. Taken with the power to require cases—or certain classes of case—to be referred to him, it in effect gives him the potential for imposing particular prosecution policies on other prosecutors. But the provisions have not been seen by successive Directors as appropriate to be used in that way. The power to take over prosecutions has been exercised on extremely few occasions, for example where the prosecution is malicious.

c. Consents to prosecution

159. In certain classes of case, however, the Director is required to become involved, particularly in recent years, by Parliament enacting that certain offences can be prosecuted only by or with the consent of the Director or the Attorney General.[1] The theoretical basis to the requirement for consent to be given before prosecution was analysed in the Home Office Memorandum to the Departmental Committee on s. 2 of the Official Secrets Act 1911,[2] which was cited by the Director in his evidence to the Royal Commission as follows:

> "Put at its most general, the basic ground for including in a statute a restriction on the bringing of prosecutions is that otherwise there would be a risk of prosecutions being brought in inappropriate circumstances. There are several kinds of reason which may lead to the conclusion that such a risk exists. These reasons are not wholly distinct from each other, and more than one of them may well be present in any particular case but for purposes of exposition they may conveniently be distinguished as follows:
>
> *(a)* to secure consistency of practice in bringing prosecutions, eg where it is not possible to define the offence very precisely, so that the law goes wider than the mischief aimed at or is open to a variety of interpretations;
>
> *(b)* to prevent abuse, or the bringing of the law into disrepute, eg with the kind of offence which might otherwise result in vexatious private prosecutions or the institution of proceedings in trivial cases;

[1] There are also offences which require the consent of a Government department or some other official body.
[2] London HMSO Cmnd 5104, pp 125–26.

(c) to enable account to be taken of mitigating factors, which may vary so widely from case to case that they are not susceptible of statutory definition;

(d) to provide some central control over the use of the criminal law when it has to intrude into areas which are particularly sensitive or controversial, such as race relations or censorship;

(e) to ensure that decisions on prosecution take account of important considerations of public policy or of a political or international character, such as may arise, for instance, in relation to official secrets or hijacking.

"Subject to what is said above about the absence of a clear and long-established general policy [underlying the requirements for consent], recent practice would suggest that a control over prosecutions introduced on grounds (a), (b) or (c) above would normally be thought appropriate to the Director of Public Prosecutions, a control on ground (e) would normally be thought appropriate to the Attorney General, and a control on ground (d) might be given to either, depending on the particular circumstances. Where important political or international considerations may be involved, the Crown's senior Law Officer who is directly answerable in Parliament for his decisions and who is in a position to consult Ministerial colleagues directly if need be, is regarded as the proper person to carry the responsibility. Official Secrets Act cases apart, the case of Leila Khaled[1] provides a good recent illustration of this kind of situation. Similarly, with sensitive subjects like race relations Parliament may feel that they would like to hold the Attorney directly responsible for a personal decision rather than relying on his general superintendence of the Director."

Appendix 24 is a further memorandum submitted by the Director in response to an invitation from the Royal Commission. It discusses the question of consents to prosecution and gives statistics for 1977 on the number and type of cases submitted to the Director and Attorney General for consent or *fiat* and the number where this was withheld.

d. The Director's prosecution activity and policies

160. There were 17,738 applications to the Director in 1978. Proceedings were brought by the Director against 2,242 persons in 1,178 cases involving a total of 7,353 charges or counts. In the remaining cases he gave advice to the police or other authority, but it was left to the authority to prosecute as necessary. In his evidence to the Royal Commission, the Director described in some detail the factors which he takes into account when deciding whether to prosecute or to give his consent to a prosecution. This part of his evidence is reproduced at Appendix 25. The first criterion is whether there is a reasonable prospect of conviction. This is a higher standard than merely sufficient evidence to constitute a *prima facie* case. It has been described as whether a conviction is more likely than an acquittal. It takes into account such factors as the credibility which the jury is likely to attach to a witness. Even if this criterion

[1]The Palestinian terrorist who was deported instead of being prosecuted.

is met, the Director will not automatically prosecute. He then goes on to consider other factors, for example whether acquittal would have unfortunate consequences, the likely expense and duration of the trial compared with the gravity of the offence, and grounds of public policy. How the Director interprets these grounds is set out in Appendix 25. The Director also has a role to play in encouraging consistency of prosecution policy and practice between police forces in England and Wales. He has described these in a short note supplementary to his evidence to the Royal Commission. This is at Appendix 26.

e. Allegations of criminal offences against police officers

161. An additional responsibility for the Director is dealing with allegations that a criminal offence has been committed by a police officer. Under s. 49 of the Police Act 1964, complaints by the public against the police have to be reported to the Director unless the chief officer is "satisfied that no criminal offence has been committed". The Director comments in his evidence:

> "In practice almost every chief officer is extremely anxious to divest himself of responsibility for deciding whether one of his officers should be prosecuted, however trivial the allegation, so that there can be no suspicion of improper bias.
>
> "Hence they normally report all cases involving an officer even if the evidence is virtually non-existent and regardless of whether the complaint has been made by a member of the public. They will also report cases involving cadets and special constables who do not, strictly speaking, come within s. 49."

C. The functions of the law officers in relation to the prosecution system

162. The Attorney General, assisted by the Solicitor General (both of whom are Members of Parliament and appointed to their offices by the Government of the day), is the chief legal adviser to the Government and is ultimately responsible for all crown litigation. Apart from the occasions on which the Attorney or Solicitor General actually conduct a prosecution in court, the Law Officers have two important powers in respect of particular prosecutions. First, the Attorney General possesses the common law power to enter a *nolle prosequi* in cases tried on indictment, which has the effect of terminating the proceedings. This is analogous to the power of the Director of Public Prosecutions to take over a case and offer no evidence (see paragraph 158). But the Director's power may be exercised in respect of both summary and indictable cases, whereas the *nolle prosequi* is used only in respect of cases to be tried on indictment.

163. The Attorney General's other major power is to give or withhold his *fiat* to prosecution in those offences where his consent is necessary before a prosecution can be brought. By the Law Officers Act 1944, the Solicitor General may exercise this function if the Attorney General is absent or incapacitated or if he specifically authorises him to do so. This provision was discussed in relation to the similar powers of the Director of Public Prosecutions at paragraph 159. Statistical material on its use also is at Appendix 24.

164. Apart from these two special powers, the Attorney General carries Ministerial responsibility (and is thus answerable to Parliament) for his decisions as to the institution and conduct of criminal proceedings. This responsibility extends to the actions and decisions of the Director of Public Prosecutions, since the latter may be directed by the Attorney General to prosecute in a particular case (though this power is rarely used).[1] By tradition, the Attorney General can be asked to account for his decisions only *ex post facto*, and it is for him to decide how much of his reasoning to disclose. Indeed it is a well understood constitutional principle that the Attorney General's decisions on particular cases must be his alone. The position, as stated in 1959 by the then Prime Minister, is that "it is an established principle of government in this country, and a tradition long supported by all political parties, that the decision as to whether any citizen should be prosecuted, or whether any prosecution should be discontinued, should be a matter, where a public as opposed to a private prosecution is concerned, for the prosecuting authorities to decide on the merits of the case without political or other pressure". He went on to say that the Attorney General should "absolutely decline to receive orders from the Prime Minister or Cabinet or anybody else that he should prosecute".[2]

D. Prosecutions by non-police agencies

165. Substantial numbers of prosecutions are brought by government departments, nationalised industries, local authorities and a variety of other public bodies for criminal offences falling within their fields of responsibility.[3] Many of these are offences created by the statute relating specifically to the duties of that organisation, for example the Health and Safety at Work Act 1974 which established the Health and Safety Executive. Some of these statutes name the department or body concerned as the sole prosecutor, or one of a number of alternative prosecutors. For example s. 19 of the Prevention of Oil Pollution Act 1971 provides that proceedings may be brought only by the Attorney General, a harbour authority, the Secretary of State or a person authorised by him.

166. Of the offences commonly prosecuted by central government bodies the majority relate to the collection of various forms of revenue, the expenditure of public money (such as fraudulent claims to rebates or benefits) or contravention of regulatory requirements (such as factories legislation). Many of the departments and public bodies concerned have their own specialist investigation departments as well as their own legal advisers. As an example, in 1976 the Post Office Investigation Division comprised some 300 staff and prosecuted some 3,500 persons, the prosecutions largely being conducted by the Post Office Solicitor's Department. Some bodies handle even larger numbers of prosecutions. In 1975 the Department of the Environment (which was at that time the Vehicle Licensing Authority for England and Wales) and the local authorities which acted as its agents for vehicle licensing purposes

[1]Prosecution of Offences Act 1979, subsection 2(1).
[2]HC Debates Vol 600, col 31, 16 February 1959.
[3]Prosecutions by non-police governmental agencies are fully discussed in Chapter Three, and prosecutions by public utilities and local authorities in Chapter Six, of the Sheffield study, *op. cit.*

considered over one million reports of apparently unlicensed vehicles, which resulted in over 150,000 prosecutions for offences relating to vehicle excise duty.[1] But by no means all the offences charged by these bodies are of such a specialised nature. The Department of Health and Social Security in seeking to minimise benefit fraud will make use of the various offences under the Theft Act 1968. Clearly in many cases there is a degree of overlap with the responsibilities of the police, but there is generally an understanding as to their respective fields of operation. Thus the police are likely to deal with cases of violent robbery from Post Office premises or transport but offences involving savings frauds are more likely to be prosecuted by the Post Office itself.

167. Many of the functions of government which are performed by local authorities include law enforcement responsibilities, often under statutes specifically naming a local authority or one of its officials. For example, s. 51 of the Weights and Measures Act 1963 provides that proceedings under the Act shall not be instituted except by or on behalf of a local weights and measures authority or a chief officer of police. These specific statutory powers are in addition to the general power conferred by s. 222 of the Local Government Act 1972 for any local authority to prosecute in any legal proceedings where it is considered expedient for the promotion or protection of the interests of the inhabitants of the area. Section 223 of the Act enables a member or official of a local authority to exercise the power under the previous section on its behalf. Out of the wide range of duties which local authorities discharge, those which frequently involve prosecutions are public health and environmental duties generally, child welfare and education, consumer protection (for example under the Trade Descriptions Act 1968) and highways and parking matters.[2]

168. It should be noted that securing convictions for breaches of the law may not be the major aim of those public bodies which are also prosecuting authorities. For example, those concerned with the collection of revenue give a higher priority to maximising the amount of revenue collected, and those involved in the welfare or education of children see the child's needs as their major concern. Many of these bodies have a wide range of alternatives to prosecution such as care proceedings, mitigated penalties, warnings, cautions, prohibition notices, seizure of goods, or the cancellation or suspension of licences.

E. Private prosecutions

169. Under this heading are included prosecutions by private agencies, such as the NSPCC and RSPCA,[3] and by private individuals and retail stores.[4] The right of private prosecution is frequently described as an important constitutional principle. Traditionally the courts have been anxious to protect this right and in a number of leading cases have rejected defence submissions that a

[1] For further statistics on prosecutions by these agencies, see Appendices 3.1–3.7 to the Sheffield study, *op. cit.*
[2] See also the tables in Chapter Six of the Sheffield study, *op. cit.*
[3] For a discussion of these, see Chapter Four of the Sheffield study, *op, cit.*
[4] *Ibid*, at Chapter Five.

private person had no title to prosecute. For example, it was established in *Smith v Dear*[1] that it was no bar to prosecution by a third party that the victim of a crime was satisfied with compensation received from the offender. The general principle was stated by Channell, J. in *R v Kennedy*[2] thus:

> " . . . as it is put in the form of a criminal offence, it appears to me that a private individual is entitled to prosecute for it."

As Lord Wilberforce said in *Garret v Union of Post Workers*:[3]

> "The individual, in such situations, who wishes to see the law enforced has a remedy of his own: he can bring a private prosecution. This historical right which goes right back to the earliest days of our legal system, though rarely exercised in relation to indictable offences, and though ultimately liable to be controlled by the Attorney General (by taking over the prosecution and, if he thinks fit, entering a *nolle prosequi*) remains a valuable constitutional safeguard against inertia or partiality on the part of authority."

170. There is in practice, however, a number of constraints upon the individual prosecutor. First, there is the cost. Since legal aid is not available to meet the cost of bringing a prosecution, the private prosecutor has to find the money to obtain legal advice and, where necessary, representation. If the prosecution results in a conviction, the prosecutor may be awarded his own costs at the discretion of the court, but if the accused is acquitted the prosecutor may well have to bear part or the whole of the defence costs as well as his own. If the prosecution was frivolous or vindictive, the prosecutor may be sued by the defendant for malicious prosecution, with the possibility of damages being awarded if the action is successful. Furthermore, as has been noted, there is a large number of statutory offences for whose prosecution the consent of the Director of Public Prosecutions or Attorney General is necessary. Lastly there are the powers of the Director to take over any case at any point, and those of the Attorney to enter a *nolle prosequi* in an indictable case. The courts may also refuse to allow an unsatisfactory prosecution to be initiated (whether by private individuals or by the police). It has been held that "justices may, in the exercise of their discretion, refuse to issue a summons, even if there was evidence of the offence before them, if they considered that the issue of a summons would be a vexatious and improper proceeding".[4]

171. In practice, private prosecutions are nowadays numerically significant in only two categories of cases, shoplifting and common assault. As regards shoplifting, many of the larger stores have their own detective staff, and one or two police forces leave the firm to prosecute if it wishes. Various reasons have been suggested for this policy. For example, where the offence has been detected and the arrest carried out by trained personnel, there may not be the same practical need for police involvement, especially if the store concerned is accustomed to bringing its own prosecutions. While, however, the precise policy of the police on prosecution of shoplifters varies from force to force (as

[1](1903) 20 Cox CC 458.
[2](1902) 20 Cox 230 CC at 242.
[3][1977] 3 All ER 70.
[4]See Lord Alverstone L. C. J. in *R v Bros* (1901) 66 JP at p 55.

a study by a Home Office Working Party[1] has shown) some steps have been taken towards greater uniformity of prosecution practice. The present position is that the Metropolitan Police encourage supermarkets and other large businesses to conduct their own prosecutions where they are willing to do so, while other police forces in England and Wales normally conduct all prosecutions for shoplifting, unless the company concerned wishes to undertake the prosecution itself.[2]

172. The other offence for which private prosecutions are brought is a common assault charged under s. 42 of the Offences Against the Person Act 1861. By the terms of that section the proceedings are to be brought "by or on behalf of the party aggrieved". By virtue of these words it has been held that the police may not prosecute, save in the most exceptional circumstances, for example where the victim is so feeble, old and infirm as to be incapable of instituting proceedings or is not a free agent but under the control of the person committing the assault.[3] Further, by virtue of s. 45 of the 1861 Act a person prosecuted for common assault under s. 42 of the Act is released from all further proceedings, civil or criminal, for the same cause. This applies whether he is convicted or acquitted.

173. The 1861 Act contains a variety of provisions relating to acts of violence. These include assault occasioning actual bodily harm (s. 47) and inflicting grievous bodily harm (s. 20) each punishable on conviction on indictment with five years imprisonment or on summary conviction with six months imprisonment and a fine of £1,000. There is also a common law offence of common assault; this is punishable on conviction on indictment with 12 months imprisonment (s. 47 of the 1861 Act) or on summary conviction with six months imprisonment and a fine of £1,000 (s. 28 of, and paragraph 5(h) of Schedule 3 to, the Criminal Law Act 1977). None of these offences is caught by the restriction on prosecution imposed by s. 42 of the 1861 Act or by the provisions of s. 45 of that Act preventing civil proceedings. Consequently, the police may prosecute for any assault, so long as the proceedings are not brought as a common assault under s. 42 of the 1961 Act. Notwithstanding the possibility of prosecuting under these provisions, it is now a widely adopted practice for the police not to prosecute for common assault. Indeed, it appears to be an accepted, though not necessarily correct, view of the law, that the police should not prosecute for a minor assault, because it is thought to prevent civil proceedings.[4]

174. The situations giving rise to private prosecutions for common assault are not easy to classify.[5] They frequently involve parties known to each other (for example neighbours) and they sometimes form part of a wider dispute. Sometimes violence may be used by both parties. Sometimes violence by one party may have been provoked, for example by abuse or annoyance and

[1] *Shoplifting and thefts by shop staff. Report of the Working Party on Internal Shop Security* (1973).
[2] For a discussion of the prosecution of shoplifting by stores and of the policies of different police forces see the Sheffield study, *op. cit.*
[3] *Nicholson v Booth* (1888) 52 JP 662; *Pickering v Willoughby* [1907] 2 KB 296.
[4] The Sheffield study, *op. cit.*
[5] For a discussion of this offence, see the 14th Report of the Criminal Law Revision Committee: *Offences against the Person*, London HMSO 1980, Cmnd 7844.

disturbance. Sometimes the violence used is trivial, but this is not always the case. The "accepted view of the law" referred to above can lead to the police taking no action, leaving the complainant to institute a private prosecution even where the assault is neither trivial nor provoked.

CHAPTER 6

Procedural aspects of bringing a case to trial

A. The institution of proceedings

a. Laying an information

175. As a matter of strict legal theory all criminal proceedings are begun by the "laying of an information"; yet this is not the actual situation. Where the accused has been arrested and charged there is no step in the proceedings which can be regarded as the laying of an information. Where the proceedings are begun by way of summons, although there is a step which could be so described, what is actually done usually bears no relation to what the law requires.

176. The word "information" is not statutorily defined but it has been described as "nothing more than what the word implies, namely the statement by which the magistrate is informed of the offence for which the summons or warrant is required".[1] An information is not necessarily a document, for it need not be in writing[2] except where a warrant is issued.[3]

177. When it is in writing the form of an information is prescribed[4] and is as follows:

> . . . Magistrates' Court
>
> Date: *[date information laid]*
>
> Accused: *[name of accused]*
>
> Address:
>
> Alleged offence:
>
> The information of: *[name of person laying the information]*
>
> Address:
>
> who [upon oath][5] states that the accused committed the offence of which particulars are given above.
>
> Taken [and sworn][5] before me
>
> J.P. Justice of the Peace
>
> [J.C. Justices' Clerk]

[1] See Huddleston, B in *R v Hughes* (1879) 4 QBD 614 at p 633.
[2] Magistrates' Courts Rules 1968, Rule 1.
[3] When it must also be substantiated on oath, Magistrates' Courts Act 1952, s. 1.
[4] Magistrates' Courts (Forms) Rules 1968, Form 1 in the Schedule.
[5] These words will be deleted unless the information is for a warrant.

An information is, under r. 83 of the Magistrates' Courts Rules, required to do no more than describe the offence in ordinary language; it need not state all the elements of the offence so long as it gives reasonable information of the nature of the charge and, where appropriate, quotes the statutory provision creating the offence. An information which is not on oath (that is, an information for a summons) may be laid either before a magistrate or (by virtue of the Justices' Clerks Rules 1970) before a justices' clerk. An information for a warrant (which must be on oath) may be laid only before a magistrate. It will be noted that although the prescribed form requires the signature of the magistrate or justices' clerk before whom it is laid, it does not require the signature of the informant.

b. Methods of bringing a person before a court

178. There are two main methods by which persons are brought before a court for the purpose of proceedings.

(a) The prosecutor may lay an information as described in the foregoing paragraphs and request the issue of a summons which is then served on the accused and which informs him of the offence(s) with which he is charged and the date on which he is summoned to appear before the magistrates' court.

(b) In the case of an offence for which a power of arrest without warrant exists the police may arrest the person for the offence without first laying an information and applying for a warrant. Following the arrest, the person is normally charged at the police station with the offence. The law requires that if it will not be practicable to bring the person before a magistrates' court within 24 hours he should be released on bail for surrender to a magistrates' court at a later date. If he is retained in custody, he must be brought before a magistrates' court "as soon as practicable".[1]

179. It is also possible (although this procedure seems rarely to be used) for the prosecutor to lay an information in writing and substantiated on oath, and to request the issue of a warrant to arrest the accused and bring him before the magistrates' court. A warrant may not be issued unless the offence is indictable or is punishable by imprisonment or unless the address of the accused is not sufficiently established for a summons to be served on him.[2]

c. Information for summons

180. When a summons is sought, laying an information requires the informant (that is, the prosecutor) to tell the magistrate or justices' clerk that he alleges that the accused has committed a specified offence. The magistrate or justices' clerk is required to go through the judicial exercise of deciding whether a summons ought to be issued or not.[3] He has a (judicial) discretion to refuse to issue a summons if he is of opinion that the prosecution is

[1]See paragraph 65.
[2]Criminal Justice Act 1967, subsection 24(1).
[3]*R v Brentford JJ* [1975] 1 QB 455; *R v West London JJ* [1979] 2 All ER 221.

vexatious[1] or that there will not be enough evidence to prove the allegation.[2] At the very least the magistrate or justices' clerk should ascertain:

(a) whether the allegation is an offence known to the law and if so whether the ingredients of the offence are *prima facie* present;

(b) that the offence alleged is not "out of time";

(c) that the court has jurisdiction;

(d) whether the informant has the necessary authority to prosecute.[3]

181. In practice, however, where a summons is applied for by the police or other recognised prosecution agencies[4] no consideration is given as to whether or not a summons should be issued. It is even common practice for them to prepare their own informations and summonses. If such a prosecutor makes a mistake or error of judgment leading to the case being dismissed then he may be ordered to pay costs and these will normally be paid without delay. The same is not necessarily true of a private prosecutor. Where a private person lays an information a magistrate or justices' clerk will seek to ensure the propriety of the prosecution and the technical correctness of the information and summons.

d. Information when accused arrested and charged

182. Where proceedings follow an arrest without warrant and the accused is charged by the police there is, as a matter of law, an "information" which has been "laid".[5] This, however, is a legal fiction. In such a case, the only relevant document prepared will be the police charge sheet which will contain all the particulars required for an information (see paragraph 177). The charge sheet will be delivered by the police to the court by way of the justices' clerk's office and the justices' clerk's staff will prepare the court register from the charge sheet. At no stage is the allegation put to a magistrate or the justices' clerk so that he may go through the judicial exercise of deciding whether or not there should be a hearing and ensure that the information (that is, the charge) is technically correct.[6] So, even though the charge sheet contains all the particulars required for an information, there is no point at which an information can be said to be "laid". The information is usually regarded as having been laid on the day the accused is bailed to attend court (whether or not he actually attends) or on the day an accused in custody is brought to court.

e. Information for arrest warrant

183. On an application for a warrant the magistrate should be satisfied that a warrant, as distinct from a summons, should be issued. The essential principle is that a warrant ought not to be issued when a summons would be

[1] *R v Bros* (1901) 66 JP 54, quoted with approval in *R v West London JJ* (above).
[2] *R v Mead* (1916) 80 JP 382.
[3] *R v West London JJ* (above).
[4] For example, government departments and local authorities.
[5] This is clear from a variety of statutory provisions including the Magistrates' Courts Act 1952, s. 14, the Magistrates' Courts Rules 1968, r. 10 and the Costs in Criminal Cases Act 1973, s. 12, all of which envisage the existence of an information.
[6] Compare the position prescribed by law on the laying of an information for a summons, paragraph 180.

equally effectual.[1] The information must be in writing and substantiated on oath[2] but it is usually no more than the purely formal document set out in paragraph 177. Nevertheless in a note of long standing to s. 1 of the Magistrates' Courts Act 1952 *Stone's Justices' Manual* states in relation to an information for a warrant:

> "It is customary to take an information in the form of deposition, stating shortly the facts: a formal information in the technical languge of the warrant was disapproved by the House of Lords in *Herniman v Smith* [1938] AC 305."

Despite this editorial opinion and high judicial guidance, it is extremely rare for an information for a warrant to be in the form of a deposition. A deposition is properly defined as a statement made on oath before a magistrate, taken down in writing, and signed by the person making the statement and by the magistrate. However carefully and thoroughly the magistrate may enquire into the matter, there will therefore be no record indicating why he issued a warrant (and not a summons). The application will, by its very nature, be *ex parte*. Historically, informations were laid in open court and the allegations made were liable to be reported in the press.[3] Today it is regarded as the better practice for informations to be laid in private. If the accused is aggrieved and claims that his arrest and detention was unjustified, his remedy will be by way of a civil action. The propriety of the issue of the warrant will be irrelevant in the criminal proceedings it commences. But, in the absence of a written record of what is an *ex parte* private hearing, it will be difficult, if not impossible, for him to commence such an action, for he will not know and will be unable to ascertain why a warrant was issued. The decision of a magistrate to issue a warrant is not subject to review; yet it is a decision which results in the deprivation of a person's liberty.

B. Committal proceedings

a. Historical background

184. Before the establishment of regular police forces it was the duty of magistrates to pursue and arrest offenders and it was the magistrates who could be referred to as "detectives and prosecutors".[4] They had responsibility for the taking of depositions as long ago as the 16th century. These were equivalent to the statements taken from witnesses by the police today. The examination of the witnesses took place in private and the accused had no right to be present. In the early part of the 19th century the responsibility for enquiring into offences began to pass to the police. In 1848 changes were made in the procedure. The Administration of Justice (No 1) Act of that year set out to consolidate the law relating to the duties of magistrates in relation to the functions of investigating and inquiring into offences, with such changes as were deemed necessary. The most important change was a provision whereby the accused was entitled, for the first time, to be present at the examination of the witnesses against him. But the inquiry was not required to be in open

[1] *O'Brien v Brabner* (1885) 49 JPN 227.
[2] Magistrates' Courts Act 1952, s. 1.
[3] *Kimber v Press Association* [1893] 1 QB 65.
[4] For a fuller account see *Report of Departmental Committee on Proceedings before Examining Justices* London HMSO 1958, Cmnd 479 (the Tucker Report).

court, that is in public. The nature of the inquiry by the magistrates was changing before 1848 and continued to do so after that year. During this transitional period, the position of the police as investigators and prosecutors was becoming more clearly established. During the same period, the magistrates' inquiry became a judicial instead of an investigative function. Indeed, by 1848, or soon after, the magistrates' examination (that is committal proceedings) usually took place in open court. As a result of these changes there became grafted onto the system a preliminary judicial hearing.

b. Committal proceedings today

185. This preliminary judicial hearing continues today, with modifications, as committal proceedings.[1] The link with the magistrates' former investigative functions is evidenced by the statutory reference to committal proceedings as an inquiry into an offence by examining justices;[2] and by the procedure which envisages that the charge will not be formulated until after the "examining justices" have heard the evidence of the prosecution and that it is the magistrates who will decide upon what charge the accused will be committed for trial.[3] These terminological and procedural relics have no practical effect today. As the police became the principal investigators of crime, so the magistrates' inquiry became a judicial function with the object of ensuring that there was sufficient evidence for the accused to stand trial. In 1848 when this practice was codified[4] all crimes proper were triable only at assizes or quarter sessions (now the Crown Court);[5] so it may be said that the normal criminal procedure envisaged a preliminary judicial hearing before a person could be put on trial.

186. From 1848 until the present time there has been a continuous tendency to confer jurisdiction on magistrates' courts to try criminal offences. Today, those courts try as many as 80 per cent of all indictable offences.[6] Consequently, a preliminary judicial hearing is held in only the 20 per cent of such cases which are committed for trial at the Crown Court.

c. Purpose of committal proceedings

187. The purpose of committal proceedings now is to ensure that no person shall stand trial at the Crown Court unless there is a *prima facie* case against him. It is not a purpose of committal proceedings that the defence may hear all the prosecution witnesses, or any particular witness or witnesses, give their evidence in chief or that such witnesses shall be made available for cross examination. The prosecution are not required to call all their witnesses at committal proceedings; if they can make out a *prima facie* case without calling any particular witness or witnesses, even an important witness, they are entitled

[1]It is possible to dispense with committal proceedings by preferring a voluntary bill of indictment but this procedure is rarely used.
[2]Magistrates' Courts Act 1952, ss. 4, 6 and 7, which, in this context, are simply repeating the wording of 19th century statutes.
[3]See s. 7 of the 1952 Act and r. 4 of the Magistrates' Courts Rules 1968 (repeating the effect of 19th century legislation).
[4]In the Administration of Justice (No 1) Act 1848.
[5]Only very minor offences could be dealt with by magistrates' courts. No indictable offence could be dealt with by them.
[6]If all offences are included in the calculation, the proportion dealt with by magistrates' courts is as high as 97 per cent.

to do so and neither the defence nor the court can require any witness to be called.[1] It follows that committal proceedings are not necessarily a means whereby the defence may obtain full disclosure of the prosecution case before trial. In most cases, however, the prosecution do present all their evidence at the committal proceedings, and if they do not, they should give notice before the trial of any additional evidence they propose to call.

d. Form of committal proceedings

188. Committal proceedings may take one of two forms, either:

(a) a hearing under s. 7 of the Magistrates' Courts Act 1952, or

(b) a committal for trial without consideration of the evidence by the magistrates under s. 1 of the Criminal Justice Act 1967.

These different types of committal are discussed in the following paragraphs. The general rule is that all stages of committal proceedings, whichever form they take, must take place in the presence and hearing of the accused. There are limited exceptions. These are where the accused is so disorderly as to make it impractical for evidence to be given in his presence or he is absent for reasons of health but is legally represented and has consented to evidence being given in his absence (Criminal Justice Act 1967, s. 45).

189. Since 1967 most committals are made under s. 1 of the Criminal Justice Act 1967. This provides that where all the evidence before the court (whether for the prosecution or the defence) consists of written statements,[2] tendered with or without exhibits, the magistrates may commit the accused for trial at the Crown Court without consideration of the contents of those statements, unless:

(a) the accused or one of them is not legally represented; or

(b) counsel or a solicitor for the accused or one of them has asked the court to consider a submission that the statements disclose insufficient evidence to put that person upon trial by jury for the offence.

190. The other form of committal proceedings, under s. 7 of the Magistrates' Courts Act 1952, requires the magistrates' court[3] to consider the evidence.[4] The procedure is laid down in s. 4 of the Magistrates' Courts Rules 1968 whereby the oral evidence of each witness[5] must be put into writing. It is then read to the witness, signed by him, and authenticated by the magistrate (or one of the magistrates). Evidence so recorded is known as a deposition.

191. The procedure involving the recording of the oral evidence of each witness as a deposition may be modified by allowing a written statement[6] of a

[1] *R v Epping and Harlow JJ ex parte Massaro* [1973] 1 QB 433; *R v Grays JJ ex parte Tetley* (1980) 80 Cr App R 11.

[2] These must comply with the provisions of s. 2 of the Criminal Justice Act 1967 and r. 58 of the Magistrates' Courts Rules 1968, see footnotes 1 and 2 to paragraph 191.

[3] The court may be comprised of a single magistrate for this purpose.

[4] Magistrates sitting for a committal hearing are statutorily (and archaically) referred to as "examining justices".

[5] Including any evidence given by or on behalf of the accused but not any witness of his merely as to character.

[6] This must be in the prescribed form, r. 58 of the Magistrates' Courts Rules 1968 and form 8 of the Magistrates' Courts (Forms) Rules 1968. It will be based on the original statement made to the police but excluding prejudicial and inadmissible matter and where the prosecution has a legal representative should be prepared by him and not a police officer, *Practice Note* [1969] 3 All ER 1033.

witness to be admitted in evidence in accordance with s. 2 of the Criminal Justice Act 1967. Such a statement may be admitted in evidence only if, amongst other conditions,[1] the accused (or each of them) does not object and the court does not require the witness to attend and give evidence. An advantage of this modification of the procedure is that a witness whom the defence do not wish to cross-examine at the committal proceedings need not be called to give evidence at those proceedings. A statement so admitted as evidence must be read out[2] at the committal hearing and forms part of the evidence upon which the court will decide whether or not to commit the accused for trial.

192. At a committal hearing under s. 7 of the Magistrates' Courts Act 1952 the court must, if it is of the opinion that there is sufficient evidence to put the accused on trial by jury, commit him for trial; if it is not so satisfied it must discharge him. The function of magistrates at a committal hearing is to decide whether there is "such evidence that, if it be uncontradicted at the trial, a reasonably minded jury may convict upon it".[3] In no sense are they attempting to determine whether or not the accused is guilty of the offence.

193. There is no information kept nationally of the use made of committals under s. 1 of the Criminal Justice Act 1967 as opposed to those under s. 7 of the Magistrates' Courts Act 1952. It is generally thought that the proportion of the latter to the former is extremely small and the limited research information that is available bears out this impression. In a study of cases committed for trial by Sheffield magistrates' court during 1972, only one case out of a total of 356 had full committal proceedings.[4] And of 2,406 cases sent for trial in the Crown Court at Birmingham during 1975 and 1976, only four had full committals; in 18 others some of the evidence had been given orally.[5]

C. Disclosure of evidence by the prosecution

a. In cases tried on indictment

194. In cases tried at the Crown Court the evidence of the prosecution may be disclosed to the defence in any one or more of three ways. First, (and this is the most common way) where the prosecution propose to adduce evidence at the committal proceedings by way of written statement, a copy of the statement will be given to the defence at or before those proceedings (see paragraph 191). Second, where, at the committal proceedings, oral evidence is recorded as a deposition, the Crown Court is responsible for supplying the defence with a copy of the deposition (see paragraph 190). Third, where the prosecution propose to call evidence in addition to that given at the committal proceedings, they should give notice to the defence of their intention to call such evidence

[1]These other conditions are (*a*) the statement purports to be signed by the person who made it, (*b*) it contains a declaration that it is true to the best of that person's knowledge and belief, and (*c*) that a copy has been served on the accused or each of the accused.

[2]If the court so directs, the contents of the statement may be summarised instead of being read out in full.

[3]*R v Governor of Brixton Prison, ex parte Bidwell* [1937] 1 KB 374.

[4]A E Bottoms and J D McClean: *Defendants in the Criminal Process*, London, Routledge and Kegan Paul, 1976.

[5]We are grateful to Drs John Baldwin and Michael McConville of the Institute of Judicial Administration, University of Birmingham, for allowing us to quote these findings from their study of acquittals at the Crown Court in advance of publication.

and a copy of the evidence they propose to call ought to be served on the defence. It seems there is no procedure whereby the prosecution can be required to serve a copy of such additional evidence, but if the accused is taken by surprise he may apply for an adjournment. The defence is normally given full advance disclosure of the evidence the prosecution propose to call. The duty of the prosecution to disclose to the defence any other material in their possession has elements of uncertainty and is discussed in the following paragraphs.

195. It is clear that where the prosecution have taken a statement from a witness who they know can give material evidence, but whom they do *not* intend to call as a witness, they are obliged to make that witness available to the defence by supplying his name and address.[1] Failure to discharge this obligation may amount to a denial of natural justice and result in the conviction being quashed.[2]

196. Where a prosecution witness gives evidence which conflicts with a previous statement made by him, prosecuting counsel is expected to show defence counsel the statement so that he may cross examine on it.[3] It is doubtful if the prosecution are under any greater duty than that and in *R v Howes*[4] the Lord Chief Justice said, "If the prosecution are putting forward a case in which it is necessary for them to tender a witness . . . whose evidence is vital to the material issue, it would not be right for them if they had a statement from that witness conflicting with the evidence he is afterwards giving in the box, that they should not supply a copy of his previous statement or inform the defence of that fact."

197. Where a prosecution witness is of known bad character it appears to be the rule that the defence should be informed of the fact[5] or, at least, informed of convictions affecting the credibility of the witness.[6]

198. Details of previous convictions of the accused must be supplied by the police to the defence solicitor or, if no solicitor is instructed, to defence counsel on request.[7] The purpose of this requirement is to prevent the defence inadvertently putting the character of the accused at issue without realising that he is vulnerable on this score.

199. There are certain kinds of expert or technical evidence which the prosecution must make available to the defence. For example, the prosecution must supply a copy of any statement or report made by any prison medical officer who can give evidence as to insanity, and must make such a witness available to the defence.[8] More generally, it is a recognised principle that the

[1] *R v Bryant and Dickson* (1946) 31 Cr App R 146. In *Dallison v Caffery* [1965] 1 QB 348, Lord Denning M. R. suggested at p 369 that the prosecution should not only supply the name and address of the witness but also a copy of his statement; in the same case, however, Diplock, L. J. stated at p 376 that the duty on the prosecution was confined to making the witness available.
[2] *R v Leyland JJ ex parte Hawthorne* [1979] 2 WLR 28.
[3] *R v Clarke* (1930) 22 Cr App R 58; *Baksh v R*[1958] AC 167.
[4] March 27 1950 (unreported).
[5] *R v Collister and Warhurst* (1955) 39 Cr App R 100.
[6] See Lord Devlin in *Connelly v DPP* [1964] AC 1254 at p 1348
[7] *Practice Direction* [1966] 1 WLR 1184.
[8] *R v Casey* (1947) 32 Cr App R 91. Nowadays such reports are sent direct to the court, which then supplies copies to both the prosecution and defence.

results of any examination carried out at a Home Office Forensic Science laboratory should be made available to the defence where such results may have a bearing on the case, even if the prosecution has neither tendered such results in evidence nor intends to do so.[1]

200. A recent development which, while not the primary purpose of the scheme, involves an element of reciprocal disclosure between prosecution and defence is the pre-trial review adopted in selected cases at the Central Criminal Court and now at other Crown Court centres. A note provided by the Lord Chancellor's Department about these arrangements is at Appendix 27.

201. Existing practice on pre-trial disclosure in cases tried on indictment also varies considerably between different prosecuting solicitors' departments. Appendix 28 sets out the existing practice in this respect in the office of the Director of Public Prosecutions, in the Metropolitan Police Solicitor's Department and in one of the largest prosecuting solicitors' departments, that of Greater Manchester.

202. The rules set out above leave much to the discretion of the prosecution, both because of uncertainties about their precise requirements and because they depend to some extent on subjective judgment (for example as to what might be "material" to the defence case). In practice, this discretion is frequently left to prosecution counsel, who may be specifically asked to advise what material should be disclosed. Much material is in fact disclosed on a "counsel to counsel" basis, an arrangement which encourages the wide use of the prosecution's discretion because it enables a degree of confidentiality to be maintained. Partly for this reason, current practice on disclosure is often considerably more liberal than the formal rules set out above require. However, disclosure between counsel has the drawback that it often does not take place until, or shortly before, the trial when it becomes known who counsel is, though some kinds of material (for example the results of forensic examinations) are disclosed at an earlier stage.

b. In cases tried summarily

203. With one exception existing procedures for summary trial place no obligation on the prosecution to give the accused advance notice of the evidence on which it intends to rely at the trial. Prosecutors may, however, indicate informally to the defence solicitor the nature of the prosecution case if he asks for it. But there is an obligation on the prosecution to supply to the defence the name and address of any witness who they know can give material evidence but whom they do not intend to call (see the *Leyland Justices* case cited at paragraph 195). Section 48 of the Criminal Law Act 1977 (reproduced in Appendix 29) enables rules of court to be made which could provide for disclosure by the prosecution in summary or either way offences. No rules have been made and a working party convened by the Home Office is studying the relative merits and costs of various possible schemes of disclosure, concentrating initially on either way offences.

204. The exception is in cases where the procedure under the Magistrates' Courts Act 1957 for pleading guilty in absence is adopted. This procedure is

[1]Home Office Circular 158/1947.

limited to summary offences punishable on conviction by not more than three months imprisonment.[1] It allows the prosecutor to serve on the accused with the summons "a concise statement in the prescribed form of such facts relating to the charge as will be placed before the court by or on behalf of the prosecutor if the accused pleads guilty without appearing before the court". A statement of the effect of the 1957 Act is also sent with the summons and this tells the accused that he may, if he wishes, plead guilty in writing and have the case dealt with in his absence. If this procedure is adopted the prosecution may refer only to the facts contained in the statement together with any previous convictions notified.

205. There is at present no statutory provision in force requiring the prosecution to disclose particulars of its case to the defence before the defendant has to choose the mode of trial. Nor will the defence receive such information (except by informal arrangement between defence solicitor and prosecutor) if the offence is tried summarily. On the other hand, if the accused elects trial at the Crown Court, he will obtain disclosure of the prosecution case to the extent outlined in paragraphs 194 ff.

D. Disclosure by the defence

206. The preceding section has set out the various requirements for disclosure of evidence by the prosecution to the defence. In contrast, the defence is under no such obligation, apart from certain very limited exceptions which are set out in the following paragraphs. The defence is not required to disclose any statements or the names of the witnesses who will be called or the evidence they will give; nor does the defendant have to plead until the trial.

207. There are two exceptions to the rule that the defence may reserve the whole of its case until the trial. The first relates to defences of alibi in trials on indictment. The disclosure of the defence of alibi was recommended by the Criminal Law Revision Committee in its *Ninth Report on Evidence* in 1966.[2] That recommendation was implemented in s. 11 of the Criminal Justice Act 1967, which provides that in proceedings on indictment the defendant may not without the leave of the court adduce evidence in support of an alibi unless he has given notice of that evidence within seven days of the conclusion of the committal proceedings.

208. The second exception is a very few statutory offences of a specialised nature, such as breaches of regulatory requirements. An example is s. 2 of the Consumer Safety Act 1978. It is a statutory defence for offences under that Act against safety regulations for the defendant to prove that he took all reasonable steps and exercised all due diligence to avoid the commission of the offence. That section also provides that if in any case the defence involves the allegation that the commission of the offence was owing to the act or default of another, or to reliance on information supplied by another person, the defendant shall not, without the leave of the court, be entitled to rely on this defence unless he has served notice on the prosecution at least seven days

[1]Sentence of imprisonment or disqualification cannot be imposed until the defendant has been given the opportunity to make specific representations to the court (s. 24 Criminal Justice Act 1967).

[2]London HMSO Cmnd 3145.

beforehand, giving such information identifying or assisting in the identification of the other person as was then in his possession.

APPENDIX 1

Statutory police powers to stop and search persons

This list is restricted to stop and search of persons. Where there are linked powers to stop and search vehicles or vessels these have been mentioned, but these references are not a comprehensive list of such powers. It should also be noted that powers to stop persons which are not linked with powers to search them, for example section 4 of the Conservation of Seals Act 1970, are not included.

Table 1.1 Public general legislation

Statutory provision	Person on whom power conferred	Circumstances in which exercisable/person who may be searched
Airports Authority Act 1975, s. 11	Any constable appointed under the Act on any aerodrome owned or managed by the Authority	Any person employed by the Authority, or working on any aerodrome owned or managed by the Authority whom the constable has reasonable grounds to suspect of having in his possession or conveying in any manner anything stolen or unlawfully obtained on any such aerodrome (Note: there is a linked power to search any vehicle or aircraft in similar circumstances)
Badgers Act 1973, s. 10	Any constable	Where there are reasonable grounds for suspecting that a person is committing, or has committed, an offence under the Act, and that evidence of the commission of the offence is to be found on that person or any vehicle or article he may have with him (Note: power of search extends to any such vehicle or article)
Canals (Offences) Act 1840, s. 11	Any constable appointed under the Act in respect of a canal or river	Any person who may be reasonably suspected of having or conveying in any manner anything stolen or unlawfully obtained (Note: there is also a power to search any vessel, boat, cart or carriage in similar circumstances)
Conservation of Wild Creatures and Wild Plants Act 1975, s. 10	Any constable	Any person reasonably suspected of committing, or of having committed, an offence under the Act, if the constable reasonably suspects that he has evidence on his person of the commission of an offence under the Act (Note: there is an attached power to search any vehicle, boat or animal which the person is using at the time)

Appendix 1

Statutory provision	Person on whom power conferred	Circumstances in which exercisable/person who may be searched
Firearms Act 1968, s. 47(3)	Any constable	Where there is reasonable cause to suspect a person of having a firearm with him in a public place, or to be committing, or about to commit, elsewhere than in a public place, one of certain offences under the Act (Note: there is also a power in similar circumstances to search a vehicle)
S. 49 (1) & (2)	Any constable	A police officer may search for and seize any firearms or ammunition which he has reason to believe are being removed or have been removed in contravention of an order under s. 6 of the Act *etc.* Any person having the custody or control of firearms or ammunition in course of transit shall on demand by a constable allow him all reasonable facilities to inspect and examine them, and shall produce any documents relating thereto
Metropolitan Police Act 1839, s. 66	Any constable within the Metropolitan Police District (Note: by virtue of the Special Constables Act 1923 this power extends to constables of the Ministry of Defence Police, and, further, by virtue of the Atomic Energy Authority Act 1954 (Schedule 3) to constables of the Atomic Energy Authority Police, within their respective jurisdictions)	Any person who may be reasonably suspected of having or conveying in any manner anything stolen or unlawfully obtained (Note: there is a linked power to search any vessel, boat, cart or carriage in similar circumstances)
Misuse of Drugs Act 1971, s. 23(2)	Any constable	Any person reasonably suspected of being in unlawful possession of a controlled drug (Note: there is also a power to search any vehicle or vessel in which the constable suspects that the drug may be found)
Pedlars Act 1871, s. 19	Any constable or officer of police	Power to open and inspect any pack, box, bag, trunk or case in which a pedlar carries his goods

Statutory provision	Person on whom power conferred	Circumstances in which exercisable/person who may be searched
Poaching Prevention Act 1862, s. 2, as amended by the Games Laws (Amendment) Act 1960	Any constable	Any person in any public place whom the constable may have good cause to suspect of coming from any land where he shall have been unlawfully in search of or pursuit of game, or any person aiding or abetting such person, and having in his possession any game unlawfully obtained, or any gun or part of a gun or ammunition, nets, traps *etc* (Note: there is also a linked power to stop and search any cart or conveyance)
Policing of Airports Act 1974, s. 3	Any relevant constable (ie a constable for the area in which the airport is situated) within a designated airport	Any airport employee whom the constable has reasonable grounds to suspect of having in his possession or of conveying in any manner anything stolen or unlawfully obtained on the aerodrome (Note: there are also linked powers to search any vehicle or aircraft in similar circumstances, and to stop any person leaving a cargo area and inspect any goods carried by him)
Prevention of Terrorism (Temporary Provisions) Act 1976, s. 14 and Sch. 3, Part II, paragraph 6(1)	Any constable	In any circumstances in which a constable has power under s. 12 of the Act to arrest a person, he may also stop and search him for the purpose of ascertaining whether he has in his possession any document or article which may constitute evidence that he is a person liable to arrest
Protection of Aircraft Act 1973, s. 19(2)	Any constable (or other person specified in a direction by the Secretary of State under s. 10 of the Act)	Any person who is for the time being in any part of an aerodrome in respect of which a direction has been issued under s. 10 of the Act, and where there is reasonable cause to believe that a firearm, explosive *etc* is, or may be brought (Note: the power extends to any person who is in any part of the aerodrome at the relevant time, and is not restricted to persons suspected of carrying such firearm, explosive *etc*. There is also a power to search any part of the aerodrome, or any aircraft, vehicle, goods or other movable property of any description)
Protection of Birds Act 1954, s. 12	Any constable	Any person found committing an offence against the Act (Note: power of search extends to any vehicle, boat or animal which such person may then be using)

Statutory provision	Person on whom power conferred	Circumstances in which exercisable/person who may be searched
Protection of Birds Act 1967 s. 11	Any constable	Where there are reasonable grounds for suspecting that a person has taken or destroyed an egg of a protected bird (as specified in Sch. 1 to the Protection of Birds Act 1954) and that evidence of the commission of the offence is to be found on that person or on any vehicle, boat or animal which that person may be using (Note: power of search extends to any such vehicle, boat or animal)
Public Stores Act 1875, s. 6	Any constable of the Metropolitan Police within the limits for which he is constable, and any constable if deputed by a public department (Note: by virtue of the Special Constables Act 1923 this power extends to constables of the Ministry of Defence Police, and, further, by virtue of the Atomic Energy Authority Act 1954 (Schedule 3) to constables of the Atomic Energy Authority Police)	Any person reasonably suspected of having or conveying in any manner any of Her Majesty's stores, stolen or unlawfully obtained (Note: there is also a power to search any vessel, boat or vehicle in similar circumstances. By virtue of Sch. 3 to the Atomic Energy Authority Act 1954 "Her Majesty's stores" includes any goods or chattels belonging to or in the possession of the Authority)

Table 1. 2 Local legislation

The following provisions confer upon police in the relevant (pre–1974) local authority areas powers which are similar to those conferred on the Metropolitan Police by s. 66 of the Metropolitan Police Act 1839 (see above):

1. Birkenhead Corporation Act 1881, s. 99, as amended by the Birkenhead Corporation Act 1923, s. 104.
2. Birmingham Corporation (Consolidation) Act 1883, s. 137(2).
3. Burnley Borough Improvement Act 1871, s. 342.
4. City [of London] Police Act 1839, s. 48.
5. Hertfordshire County Council Act 1935, s. 130.
6. Liverpool Corporation Act 1921, s. 514.
7. Manchester Police Act 1844, s. 218.
8. Newcastle-upon-Tyne Improvement Act 1841, s. 39.
9. Oldham Borough Improvement Act 1865, s. 204.
10. Rochdale Corporation Act 1948, s. 115.

11. St Helens Borough Improvement Act 1869, s. 257.
12. Salford Improvement Act 1862, s. 242.

In addition, there are also the two following provisions:

13. British Transport Commission Act 1949, s. 54(1). This provision confers on any constable the power to stop and search any person employed by, or on the premises of, the former British Transport Commission—including the premises of the British Railways Board, the London Transport Executive and the British Transport Docks Board—whom there is reasonable cause to suspect of being in possession of anything stolen or unlawfully obtained from such premises.
14. Port of London Act 1968, s. 157. Under this provision a constable within the port police area has power to stop and search any person whom he reasonably suspects to be in possession of anything stolen or unlawfully obtained on or from the port premises, a vessel in dock or at a pier, or other specified premises.

Table 1. 3. Secondary legislation

The Mersey Docks and Harbour (Police) Order 1975 (SI 1975/1224), Article 4. This order, made under s. 14 of the Harbours Act 1964, gives constables a power in respect of the port of Liverpool similar to that conferred in respect of the port of London by the Port of London Act 1968.

APPENDIX 2

Stops and searches for controlled drugs under the Misuse of Drugs Act 1971

Table 2.1 Stops and searches for controlled drugs in England and Wales (excluding Metropolitan Police District)

	1972	1973	1974	1975	1976	1977	1978
Numbers of occasions on which persons were stopped and searched	14046	12340[1]	9144[2]	9158	9912	10446	10023[3]
Numbers of occasions on which illegal possession of drugs was discovered	4481	4123[1]	2799[2]	2521	2515[4]	3135	3116[5]
Percentage of occasions on which illegal possession of drugs was discovered	31.9	33.4	30.6	27.5	25.4	30.0	31.1
Number of persons involved in searches	16953	18067	14831	14099	14859	15850	18107
Numbers of persons found in illegal possession of drugs	5095	5170	4115	3413	3503	4026	4051
Percentage of persons searched who were found in illegal possession of drugs	30.1	28.6	27.8	24.2	23.6	25.4	22.4
Number of formal complaints against police arising from stop-searches	46	41	33	37	38	65	35

[1] Does not include figures for Hertfordshire, Kent or Thames Valley.
[2] Does not include figures for Thames Valley.
[3] Including one pop festival in the course of which 1282 persons were stopped and searched.
[4] Does not include figures for Hertfordshire.
[5] Including one pop festival at which 75 persons were found in illegal possession of drugs.

Stops and searches for controlled drugs in the Metropolitan Police District.

New Scotland Yard have provided the following details in respect of the Metropolitan Police District:

In 1977, 5818 stop-searches were made under the Act and 2001 arrests made as a result. In 1978, 6412 stop-searches led to 2483 arrests. It is not known how many of those arrests were for illegal possession of drugs.

In 1978, 97 official complaints were registered as a result of all types of stop-searches but it is not known what proportion of those resulted from searches under this Act.

APPENDIX 3

Stops of persons and vehicles under the Metropolitan Police Act 1839

Table 3.1 Statistics of stops by District and Division

District and Division	July 1978				January 1979			
	Total number of stops	Number of stops from road checks	Number of arrests from stops	Percentage of arrests from stops	Total number of stops	Number of stops from road checks	Number of arrests from stops	Percentage of arrests from stops
F								
Hammersmith	766	109	69		455	0	77	
Fulham	472	85	75		369	38	39	
Shepherds Bush	380	0	85		372	0	48	
Total	1618	194	229	14	1196	38	164	14
G								
City Road	341	32	59		201	0	21	
Hackney	645	312	80		309	61	42	
Stoke Newington	456	17	48		204	0	29	
Total	1442	361	187	13	714	61	92	13
H								
Leman Street	436	19	81		318	0	42	
Bethnal Green	320	129	60		441	0	46	
Limehouse	226	0	46		135	0	14	
Total	982	148	187	19	894	0	102	11
J								
Chingford	247	0	35		255	0	40	
Leyton	321	0	18		181	0	15	
Ilford	388	29	49		275	0	46	
Barkingside	299	0	46		241	0	45	
Total	1255	29	148	12	952	0	146	15

Table 3.1 (continued)

District and Division	July 1978 Total number of stops	July 1978 Number of stops from road checks	July 1978 Number of arrests from stops	July 1978 Percentage of arrests from stops	January 1979 Total number of stops	January 1979 Number of stops from road checks	January 1979 Number of arrests from stops	January 1979 Percentage of arrests from stops
K								
Romford	620	75	58		716	74	74	
East Ham	484	146	125		460	6	74	
Dagenham	321	0	66		363	0	51	
West Ham	546	0	77		446	0	62	
Total	1971	221	326	16	1985	80	261	13
L								
Brixton	423	0	98		880	0	166	
Kennington	237	0	31		593	0	50	
Clapham	137	0	50		277	0	65	
Streatham	186	0	31		526	0	131	
Total	983	0	210	21	2276	0	412	18
M								
Southwark	586	0	42		803	279	60	
Tower Bridge	396	138	50		388	24	60	
Carter Street	505	0	90		367	0	59	
Peckham	790	121	137		701	116	95	
Total	2277	259	319	14	2259	419	274	12
N								
Kings Cross Rd	317	0	25		217	0	28	
Holloway	636	58	106		364	20	54	
Islington	463	0	52		306	0	39	
Total	1416	58	183	13	887	29	121	14

P								
Catford	340	0	18		257	0	8	
Lewisham	499	22	115		437	0	89	
Bromley	320	27	47		264	47	45	
St Mary Cray	375	0	57		327	0	45	
Total	1534	49	237	15	285	47	187	15
Q								
Wembley	382	0	46		435	0	26	
Harlesden	896	42	127		674	0	81	
Harrow	654	46	92		661	74	76	
Total	1932	88	265	14	1770	74	183	10
R								
Greenwich	417	0	60		876	338	73	
Woolwich	501	44	43		433	65	43	
Bexleyheath	650	85	66		496	50	45	
Total	1568	129	169	11	805	455	161	9
S								
Golders Green	475	130	56		625	310	23	
West Hendon	679	0	56		470	98	42	
Barnet	758	51	84		646	67	48	
Total	1912	181	196	10	1741	475	113	6
T								
Hounslow	440	0	56		534	0	94	
Chiswick	621	0	48		365	0	31	
Twickenham	423	0	22		321	0	22	
Richmond	402	0	41		311	20	30	
Total	1886	0	167	9	1531	20	177	12
V								
Kingston	380	34	72		245	0	37	
Esher	390	0	46		255	0	20	
Wimbledon	615	131	64		512	0	80	
Total	1385	165	182	13	1012	0	137	14

Table 3.1 (continued)

District and Division	July 1978				January 1979			
	Total number of stops	Number of stops from road checks	Number of arrests from stops	Percentage of arrests from stops	Total number of stops	Number of stops from road checks	Number of arrests from stops	Percentage of arrests from stops
W								
Tooting	440	35	60		492	0	59	
Battersea	685	60	62		517	40	28	
Putney	397	0	48		358	0	47	
Total	1522	95	170	11	367	40	134	10
X								
Ealing	740	88	125		664	13	45	
Southall	462	0	47		413	0	52	
Ruislip	367	0	41		352	0	59	
Total	1569	88	213	14	1429	13	156	11
Z								
Croydon	1381	346	126		665	86	91	
Norbury	1043	296	87		621	30	120	
Epsom	258	0	50		210	0	36	
Sutton	722	268	72		355	0	39	
Total	3404	910	335	10	1851	116	286	15
Airport								
Heathrow	1009	311	34		1084	126	30	
West Drayton	459	126	53		307	0	25	
Total	1468	437	87	6	1391	126	55	4
Grand Total	40477	3988	5110	13	35298	2293	4189	12

APPENDIX 4

Powers of entry of public officials

Table 4.1 Entry to private premises

Department[1]	Statutory authority	Person(s) authorised	Form of authority	Place to which there is power of entry	Power and circumstances of use	Points of interest
1. Customs and Excise	Customs and Excise Act 1952 s. 71(3)	Any customs officer, constable, member of HM forces	Commission of appointment	House or place from which there are reasonable grounds to suspect signals or messages being transmitted to smugglers	Enter and take steps to stop sending of message	
	s. 106(6)	Any customs officer	Commission of appointment	Premises in N. Ireland where reason to believe there is anything liable to forfeiture under provisions relating to unlawfully manufactured spirits	Enter, if necessary by force, search and remove anything liable to forfeiture	
	s. 296(1) and (2)	Any customs officer (if at night, only if accompanied by a constable)	1. Writ of Assistance, or 2. Magistrate's warrant	Premises where reasonable grounds to suspect there is anything liable to forfeiture under C & E Acts	Enter, if necessary by force, and search, seize, detain or remove anything liable to forfeiture	

[1]Or local authority or other official body.

Table 4.1 (continued)

Department	Statutory authority	Person(s) authorised	Form of authority	Place to which there is power of entry	Power and circumstances of use	Points of interest
1. Customs and Excise (continued)	Finance Act 1972 s. 37(3)	Any authorised person	Magistrate's warrant	Premises where reasonable grounds to suspect offence in connection with VAT being committed (or has been or is about to be) or that there is evidence of an offence	Enter, if necessary by force, taking with him such other persons as appear to be necessary, search, seize and remove evidence and search any person or premises who with reasonable cause believed to have committed or to be about to commit an offence	Entry must be within 14 days of issue of warrant
	s. 37(2)	Any authorised person	Commissioners' authorisation	Premises where reasonable grounds to suspect goods liable to VAT to be found	Enter at all reasonable times and inspect premises and goods	
	Sch 7 para 21(3)	Any authorised person	Magistrate's warrant	Premises where reasonable grounds to suspect offence in connection with car tax being committed (or has been or is about to be) or that there is evidence of an offence	Enter, if necessary by force, taking with him such other persons as appear to be necessary, seize and remove evidence and search suspected persons	Entry must be within 14 days of issue of warrant

2. Energy	Electric Lighting Act 1882 s. 24 Electric Lighting Act 1909 s. 16	Any officer appointed by the undertakers	Electricity authority's authorisation	Any premises to which electricity is or has been supplied	Enter at all reasonable times to assess quantity of electricity consumed, or to remove fittings, lines etc	All these powers are restricted by the Rights of Entry (Gas and Electricity Boards) Act 1954, which provides that except in an emergency no right of entry is exercisable except with the occupier's consent or under the authority of a magistrate's warrant which may, in certain circumstances, authorise entry by force and which remains in force until the purpose for which it was granted has been satisfied
	Gas Act 1972 s. 31(2)	Any officer authorised by the corporation	Gas Board's authorisation	Any premises in which there is a service pipe connected with the gas mains	Enter to inspect the fittings *etc* and, if necessary for safety, to disconnect gas	
	Sch. 4 para 1(3)(b)	The Corporation	Gas Board's authorisation	Any premises in which there is a service pipe connected with the gas mains	Enter, after giving 7 days notice, to replace or repair the pipe	
	Sch. 4 para 24(1)	Any officer authorised by the Corporation	Gas Board's authorisation	Any premises in which there is a service pipe connected with the gas mains	Enter at all reasonable times to inspect meters, fittings and supply	

Table 4.1 (continued)

Department	Statutory authority	Person(s) authorised	Form of authority	Place to which there is power of entry	Power and circumstances of use	Points of interest
2. Energy (continued)	Sch. 4 para 25(1)	Any officer authorised by the Corporation	Gas Board's authorisation	Any premises in which there is a service pipe connected with the gas mains	Enter, after giving 24 hours notice, where requested or authorised to disconnect supply	All these powers are restricted by the Rights of Entry (Gas and Electricity Boards) Act 1954, which provides that except in an emergency no right of entry is exercisable except with the occupier's consent or under the authority of a magistrate's warrant which may, in certain circumstances, authorise entry by force and which remains in force until the purpose for which it was granted has been satisfied
	Sch. 4 para 25(3)	Any officer authorised by the Corporation	Gas Board's authorisation	Premises where reasonable cause to suspect gas escaping or may escape, or where gas which has escaped has entered	Enter, inspect and take steps to avert danger to life and property	

3. Environment	Housing Act 1957 s. 159, Housing Act 1969 Sch. 3, Housing Act 1974 ss. 48, 54	Any person authorised for a particular purpose by S of S or housing authority	Written departmental or local authority authorisation	Any house, premises or building which local authority entitled to purchase compulsorily or where entry necessary for certain purposes under Acts	Enter at all reasonable times, after giving 24 hours notice, for survey and examination for compulsory purchase, or in relation to repairs, maintenance and sanitary condition of houses, demolition orders, general improvement areas, housing action areas or priority neighbourhoods	
	Housing Act 1964 s. 68	Person employed by or acting under instructions of housing authority	Magistrate's warrant to be issued only after admission requested and refused	Premises to which provisions of Act governing multi-occupation apply	Enter, if necessary by force, taking with him other persons if necessary, for purposes of provisions governing multi-occupation	Warrant continues in force until purpose for which entry required has been satisfied
	Housing Act 1969 s. 61(5)	Any person authorised for a particular purpose by S of S or housing authority	Written authority. Magistrate's warrant authorising entry by force may be issued if admission requested and refused	Any house in respect of which a notice requiring work to be done has been issued	Enter to see whether requirement has been complied with	

Table 4.1 (continued)

Department	Statutory authority	Person(s) authorised	Form of authority	Place to which there is power of entry	Power and circumstances of use	Points of interest
4. Health and Social Security.	Food and Drugs Act 1955 s. 100	Authorised officer of Council	Local authority's authorisation: entry by force may be authorised by magistrate's warrant	Any premises, after 24 hours notice if private dwelling house	Enter at all reasonable times to see whether contravention of provisions of Act or of regulations and bye-laws made under it or for performance by the council of their functions under the Act	Warrant authorising entry by force continues in force for one month
	Public Health Act 1963 s. 287	Any authorised officer of a Council	Local authority's authorisation: entry by force may be authorised by magistrate's warrant	Any premises, with 24 hours' notice except where factory workshop or workplace	Enter to ascertain whether there is any contravention of provisions of Act	Warrant authorising entry by force remains in force until purpose for which entry necessary has been satisfied

	Medicines Act 1968 ss. 111, 112	Any person duly authorised	Departmental authority. Entry by force may be authorised by magistrate's warrant	Any premises, with 24 hours notice if private dwelling	Enter at any reasonable time to ascertain whether any contravention of Act, inspect, seize goods and documents	Credentials must be produced if requested. Warrant authorising entry by force remains in force for one month
	Children and Young Persons Act 1969 ss. 58, 59	Person authorised by S of S	Departmental authorisation	Children's houses, including premises where foster child or child to be adopted being accommodated or maintained	Enter, inspect house and children	Authority must be produced if requested
5. Home Office	Fire Services Act 1947 s. 1(2)	Any member of a fire brigade	Written authorisation from fire authority: entry by force may be authorised by magistrate's warrant	Any premises, after giving 24 hours notice except where factory, shop or workshop	Enter to ascertain whether there is any contravention of Act	Warrant authorising entry by force remains in force until purpose for which entry necessary has been satisfied
	s. 30	Any member of a fire brigade		Premises where fire has broken out or is reasonably believed to have broken out, or which necessary to enter for fire fighting	Enter, without consent of occupier	

Table 4.1(continued)

Department	Statutory authority	Person(s) authorised	Form of authority	Place to which there is power of entry	Power and circumstances of use	Points of interest
5. Home Office (continued)	Wireless Telegraphy Act 1949 s. 15(1)	Persons authorised by S of S	Magistrate's warrant	Premises where reasonable grounds for suspecting offence committed in connection with licensing and use other than in accordance with licence	Enter and search	Entry must be within one month of issue of warrant
	s. 15(2)	Persons authorised by S of S	Magistrate's warrant issued within 7 days of admission being demanded and refused	Premises where reasonable grounds for suspecting offence committed in connection with radio interference regulations	Enter to obtain information	
	Post Office Act 1969 s. 91(1)	Person authorised by S of S	Magistrate's warrant	Premises where reasonable grounds to suspect offence of unlicensed broadcasting committed and evidence of offence to be found there	Enter, search and test any apparatus	Entry must be within one month of date of warrant
	Fire Precautions Act 1971 s. 19	Fire Inspectors	Written authority	Premises in same building as premises requiring certificate	Enter and inspect, giving 24 hours notice to occupier	Evidence of authority must be produced if required
6. Inland Revenue	Finance Act 1894 s. 7(8)	Person authorised by Commissioners	Commissioners' authorisation	Property to be valued for estate duty	Inspect at such reasonable times as the Commissioners consider necessary	

	War Damage Act 1943 s. 35	Person authorised by Commissioners	Commissioners' authorisation	Any premises on which war damage has occurred	Enter, after 24 hours notice if premises occupied	
	General Rate Act 1967 s. 86	Valuation officer and any person authorised by him in writing	Written authority	Any hereditament in valuation officer's area	Enter at all reasonable times, after giving 24 hours notice, survey and value	Person authorised by valuation officer must produce his authority on request
	Taxes Management Act 1970 s. 61	Collection of taxes	General Commissioners' warrant	Any house or premises where distress to be levied for non-payment of tax	Break open, in the daytime, calling to his assistance any constable to levy distress	
7. Trade	Merchant Shipping Act 1894 s. 537	Receiver of Wrecks	Magistrate's warrant	Any house or other place, on suspicion or information that wreck secreted there	Enter, search and seize	
	Merchant Shipping Act 1970 s. 76(3)	Surveyor of Ships, superintendent or person appointed by Board of Trade	Certificate of appointment	Any premises where reasonable grounds for believing there is food and water for supply to a ship not in accordance with regulations	Enter and inspect	
8. Treasury	Exchange Control Act 1947 Sch. 5 para 2	Constable, together with other persons named in warrant	Magistrate's warrant issued on information given by person authorised by Treasury	Premises where reasonable grounds to suspect offence against Act being committed (or has been or is about to be) or where documents held which should have been produced	Enter, search, seize evidence and search persons there and recently there	Entry must be within one month of date of entry of warrant

Table 4.2 Entry to Business Premises

(This table covers powers of entry which relate to business premises only: where there is power to enter both business and private premises, details have been given in Table 4.1.)

Department	Statutory authority	Person(s) authorised	Form of authority	Place to which there is power of entry	Power and circumstances of use	Points of interest
1. Customs and Excise	Customs and Excise Act 1952, s. 120	Any customs officer	Commission of appointment	Premises of person authorised to receive methylated spirits	Enter, in the daytime, and inspect	
	s. 131(5)	Any customs officer	Commission of appointment	Premises used for brewing by holder of a brewing licence	Enter at all reasonable times to examine vessels and utensils and take samples	
	s. 228	Any customs officer (but at night only if accompanied by a constable)	Commission of appointment	Premises of any person licensed to keep a still	Enter and examine any still or retort	
	s. 248(1)	Any customs officer (but at night only if accompanied by a constable)	Commission of appointment	Premises of excise trader	Enter and inspect	
	s. 248(2)	A customs officer and any person acting in his aid (with a constable if at night)	Commission of appointment	Premises of excise trader in glucose or saccharin or maker of sweets	Enter, by force if admission refused, and inspect	
	s. 249(1)	A customs officer (with a constable if at night)	Commission of appointment	Premises of excise trader where an officer has reasonable grounds to suspect there are concealed pipes etc	Enter, by force if necessary to search for pipes, vessels *etc*	

Purchase Tax Act 1963 s. 34(5)	Person authorised by Commissioners	Commissioners' authorisation	Premises which there is reasonable cause to believe are used for a wholesale or manufacturing business	Enter at all reasonable times and inspect goods	
Finance (No. 2) Act 1964 s. 9(4)	Any officer or person authorised by Commissioners	Commissioners' authorisation	Premises used in connection with manufacture *etc* of goods in respect of which export rebates applied for	Enter at all reasonable times and inspect	Authority must be produced if required
Hydrocarbon Oil (Customs and Excise) Act 1971 s. 15(5)	A customs officer	Commission of appointment	Any premises or plant used for production of horticulture produce in which heavy oil is used	Enter and inspect if Commissioners require producer applying for relief under Act to permit this	
Finance Act 1972 s. 37(1)	An authorised person	Departmental authority	Premises used in connection with the carrying on of a business	Enter at all reasonable times to exercise powers under the Act, eg to assess tax, require documents, take samples	
Betting and Gaming Duties Act 1972 Sch. 1, para 6	Any officer authorised by the Commissioners	Commissioners' authorisation	Any premises used for general or pool betting business	Enter and remain when being used or likely to be used	

Table 4.2 (continued)

Department	Statutory authority	Person(s) authorised	Form of authority	Place to which there is power of entry	Power and circumstances of use	Points of interest
1. Customs and Excise (continued)	Sch. 1, para 10(1)	Any officer	Commission of appointment	Track or any other place where reason to believe bookmaking, pool betting or totalisator operation going on in connection with events taking place there	Be admitted without payment and obtain information	
	Sch. 1, para 10(2)	Any officer	Commission of appointment	Place where person not a bookmaker but liable to pay betting duty operating	Be admitted without payment and obtain information	
	Sch. 2, para 9	Any officer	Commission of appointment	Any premises in respect of which a gaming licence is in force	Enter without payment, inspect and require information	
	Sch. 3, para 12	Any officer	Commission of appointment	Premises where bingo played or where reasonable cause to suspect this	Enter without paying, inspect and require information	
	Sch. 3, para 20	Any officer	Magistrate's warrant	Premises where reasonable grounds to suspect offence concerned with evasion of bingo duty taking place	Enter, seize and remove evidence and search any person on premises where reasonable cause to believe connected with promotion or management of premises	Entry must be within 14 days of issue of warrant

	Sch. 4, para 18	Any officer	Magistrate's warrant	Premises not licensed for the purpose where reasonable grounds to suspect there are gaming machines	Enter, seize and remove evidence and search any person on premises if reasonable cause to believe concerned with provision of machines or admission to premises	Entry must be within 14 days of issue of warrant
2. Health and Social Security	National Assistance Act 1948, s. 39	Person authorised by S of S	Departmental authority	Any premises used or reasonably believed to be used as disabled persons or old persons home	Enter at all reasonable times and inspect	
	National Insurance Act 1965, s. 90, Social Security Act 1971, s. 4(1)	Inspectors appointed by S of S	Departmental authority	Any premises where inspector has reasonable grounds for believing persons employed, or that used as employment agency (but not private dwelling house not used by or with consent of occupier for trade or business)	Enter at all reasonable times, make examination and inquiries for enforcement of Acts, and investigating entitlement to supplementary benefit	
	Nursing Homes Act 1975 s. 9	Person authorised by S of S	Departmental authority	Any premises used or with reasonable cause believed to be used as a mental nursing home	Enter, inspect records, interview patients	

Table 4.2 (continued)

Department	Statutory authority	Person(s) authorised	Form of authority	Place to which there is power of entry	Power and circumstances of use	Points of interest
2. Health and Social Security (continued)	Social Security Act 1975 s. 144	Inspector appointed under Act	Departmental authority	Any premises where reasonable grounds for suspecting persons employed or there is employment agency (but not private dwelling house not used by or with consent of occupier for trade or business)	Enter at all reasonable times to make examination and inquiries for enforcement of provisions of Act and for investigation of circumstances of industrial injury or disease	
3. Home Office	Gaming Act 1968 s. 43(2)	Any Gaming Board inspector	Warrant of appointment	Any premises licensed under the Act	Enter, inspect premises, machines, equipment, books, documents	
	Misuse of Drugs Act 1971 s. 23(1)	Person authorised by S of S	Departmental authority	Premises of person carrying on business as producer or supplier of controlled drugs	Enter, inspect books, documents and stocks	
	Fire Precautions Act 1971 s. 19	Fire inspectors	Written authority	Premises requiring fire certificate or where there are restrictions on use till fire risk reduced, or to which there is reasonable cause to believe this applies	Enter and inspect, after giving 24 hours notice	Evidence of authority must be produced if required

4. Prices and Consumer Protection	Counter Inflation Act 1973 Sch. 4(3)	Duly authorised officer of Minister or of local weights and measures authority	Departmental or local authority authorisation	Any premises other than those used only as a dwelling	Enter at all reasonable times to determine whether provisions of order or notice under Act being complied with	
	Fair Trading Act 1973 s. 29	Authorised officer of local weights and measures authority or person authorised in writing by S of S	Written authority. Entry by force may be authorised by magistrate's warrant	Any premises other than those used only as a dwelling	Enter at all reasonable hours to see whether there has been any contravention of an order made under the Act	Warrant authorising entry by force remains in force for one month
	Fair Trading Act 1973 s. 123	Person authorised in writing by S of S	Written authority. Entry by force may be authorised by magistrate's warrant	Any premises other than those used only as a dwelling	At all reasonable hours enter to see whether any contravention of provisions of Act relating to trading agreements	Warrant authorising entry by force remains in force for one month

Table 4.3. Entry to land

Department	Statutory authority	Person(s) authorised	Form of authority	Place to which there is power of entry	Power and circumstances of use	Points of interest
1. Customs and Excise	Customs and Excise Act 1952 s. 69(2)	Any customs officer and any person acting in aid of an officer	Commission of appointment	Any part of coast or shore, or bank of any river or creek, any railway or aerodrome or land adjoining it	Patrol upon and pass freely along, for prevention of smuggling	
	Customs and Excise Act 1952 s. 71(3)	Any customs officer, constable, member of HM forces	Commission of appointment	Any place from which there are reasonable grounds to suspect messages being transmitted to smugglers	Enter and take steps to stop sending of message	
	Customs and Excise Act 1952 s. 106(6)	Any customs officer	Commission of appointment	Land in N. Ireland where reason to suspect there is anything liable to forfeiture under provisions relating to unlawful manufacture of spirits	Enter, if necessary by force, search and remove anything liable to forfeiture	
	Customs and Excise Act 1952 s. 296(1) and (2)	Any customs officer (at night only if accompanied by a constable)	Writ of assistance (Subs. 1) or magistrate's warrant (Subs. 2)	Any place where there is reason to suspect there is anything liable to forfeiture under the Custom and Excise Acts	Enter, if necessary by force, search, seize, detain or remove anything liable to forfeiture	

2. Energy	Electricity (Supply) Act 1919 s. 22	Any authorised undertaker	Authorisation of electricity authority	Any land where electric line runs	Enter to repair or alter the line	
	Gas Act 1965 Sch. 6	Person authorised by gas authority	Written authorisation	Any land subject of Ministerial direction that it should be prospected for an underground storage site	Enter and survey, after giving 24 hours notice if land occupied	
	Gas Act 1972, Sch. 4 para 1(3)(b)	The Gas Corporation	Gas Corporation's authorisation	Any land	Enter, after giving 7 days notice, to repair or replace gas pipe	
3. Environment	Ancient Monuments Act 1931 s. 9	Any person specially authorised by the Commissioners of Ancient Monuments	Commissioners' authorisation	Any land which Commissioners have reason to believe contains an ancient monument. Houses, gardens *etc* not to be entered without consent of occupier	Enter, after giving 14 days notice, and make excavations for purpose of examination	
	National Parks and Access to the Countryside Act 1949 s. 108	Any person authorised by the Minister or other authority having power to do so	Departmental or local authority authorisation	Any land	Enter, after giving 7 days notice, and survey in connection with acquisition of land, either voluntary or compulsorily, making of public path or access order, or claim for compensation	Evidence of authority to be produced if requested

Table 4.3 (continued)

Department	Statutory authority	Person(s) authorised	Form of authority	Place to which there is power of entry	Power and circumstances of use	Points of interest
3. Environment (continued)	Water Resources Act 1963 s. 111	Any person authorised by a river authority, or by the Minister	Written authorisation. Entry by force may be made under magistrate's warrant	Any land	Enter, taking with him such other persons as may be necessary, to perform any functions of river authority (or of Minister) in relation to pollution, land drainage *etc*, whether in relation to that land or not. 7 days notice must be given before entering land used for residential purposes	a. Evidence of authority to be produced if requsted b. Where entry is under warrant, warrant continues in force until purpose for which entry required has been satisfied
	New Towns Act 1965 s. 49	Any official of valuation office or person authorised by authority having power to purchase land compulsorily	Written authorisation	Any land	Enter at any reasonable time (after 24 hours notice if land occupied) and survey and estimate value, in connection with compulsory purchase of land, or development proposals	Evidence of authority to be produced if requested

	Town and Country Planning Act 1971 ss. 280, 281	Any person authorised in writing by S of S or local planning authority	Written authorisation	Any land	Enter at any reasonable time (24 hours notice if land occupied) and survey, in connection with structure or local plan, application for planning permission, unauthorised works, failure to carry out required works, applications for listed building consent, tree preservation orders, claims for compensation	Evidence of authority to be produced if requested
4. Home Office	Civil Defence Act 1948 s. 4(3)	Any person authorised by S of S or local or police authority exercising functions under Act	Departmental or local authority authorisation	Any land	Enter at all reasonable hours (but 24 hours notice must be given before entering as of right), inspect to see whether anything ought to be constructed or done on land or use made of it for civil defence purposes	Evidence of authority to be produced if requested

Table 4.3 (continued)

Department	Statutory authority	Person(s) authorised	Form of authority	Place to which there is power of entry	Power and circumstances of use	Points of interest
5. Inland Revenue	Finance Act 1894 s. 7(8)	Person authorised by Commissioners of Inland Revenue	Commissioners' authority	Property to be valued for estate duty	Inspect at such reasonable times as the Commissioners consider necessary	
	General Rate Act 1967 s. 86	Valuation officer and any person authorised by him in writing	Written authority	Any hereditament in valuation officer's area	Enter at all reasonable times after giving 24 hours notice, survey and value	Person authorised by valuation officer must produce his authority on request
6. Prices and Consumer Protection	Counter-Inflation Act 1973 Sch. 4(3)	Any authorised official of the Minister or of local weights and measures authority	Departmental or local authority authorisation	Any land	Enter at all reasonable times to determine whether provisions of order or notice made under Act are being carried out	

Table 4.4 Entry to vessels, vehicles, aircraft etc

Department	Statutory authority	Person(s) authorised	Form of authority	Place to which there is power of entry	Power and circumstances of use	Points of interest
1. Customs and Excise	Customs and Excise Act 1952, s. 19	Any customs officer and any person engaged in the prevention of smuggling	Commission of appointment or departmental authority	Ship within limits of port, aircraft at a customs airport, vehicle on approved route	Board, rummage and search, to detect and prevent smuggling	
	Customs and Excise Act 1952 s. 71(3)	Any customs officer, constable, member of HM forces or coastguard	Commission of appointment	Any ship, aircraft or vehicle from which there are reasonable grounds to suspect signals or messages are being transmitted to smugglers	Enter and take steps to prevent or stop sending of messages	
	Customs and Excise Act 1952 s. 297	Customs officer, constable, member of HM forces or coastguard	Commission of appointment	Vehicle or vessel which there are reasonable grounds to suspect is carrying goods on which duty has not been paid, or which are being unlawfully removed or are liable to forfeiture	Stop and search	

Table 4.4 (continued)

Department	Statutory authority	Person(s) authorised	Form of authority	Place to which there is power of entry	Power and circumstances of use	Points of interest
2. Environment	Water Resources Act 1963 ss. 111(5), 112	Person duly authorised by Secretary of State	Written authorisation. Entry by force may be made under magistrate's warrant	Any vessel	Enter for purpose of performing functions under Act in connection with river pollution	Evidence of authority must be produced on request. If entry made under warrant, warrant continues in force until purpose for which entry was required is satisfied
3. Health and Social Security	Food and Drugs Act 1955 s. 111(1)(a) s. 111(1)(b)	Authorised officer of council	Written authority. Entry by force under magistrate's warrant	(a) Any ship or aircraft (b) any vehicle, still or home going ship	(a) Enter at all reasonable times to see whether there is any improperly imported food on board (b) Enter to ascertain whether there has been any contravention of the Act	If entry under warrant, warrant continues in force for one month
	Medicines Act 1967 ss. 111, 112	Person authorised by S of S	Departmental authority on entry by force under magistrate's warrant	Ship, aircraft, vehicle, hovercraft	Enter at any reasonable time, inspect, take samples and seize goods and documents, to ascertain whether there is any contravention of the Act's provisions	Credentials must be produced if requested. If entry under warrant, warrant continues in force for one month

4. Home Office	Wireless Telegraphy Act 1949 s. 15(1)	Person authorised by S of S	Magistrate's warrant	Vehicle, vessel or aircraft where reasonable grounds for suspecting offence under Act relating to licence and use other than in accordance with licence	Enter and search	Entry must be within one month of date of issue of warrant
	Wireless Telegraphy Act 1949 s. 15(2)	Person authorised by S of S	Magistrate's warrant, issued within 7 days of admission being demanded and refused	Vehicle, vessel or aircraft where reasonable grounds for suspecting offence committed in connection with radio interference regulations	Enter to obtain information	
5. Trade	Merchant Shipping Act 1894 s. 537	Receiver of wrecks	Magistrates's warrant	Any vessel, on suspicion or information that any wreck is secreted there	Enter, search and seize	
6. Treasury	Exchange Control Act 1947, Sch. 5, para 2	Constable and other persons named in warrant	Magistrate's warrant issued on sworn information given by person authorised by Treasury	Vehicle, vessel or aircraft where reasonable grounds to suspect offence against Act committed or about to be committed, or where there are documents which should have been produced	Enter, search and seize evidence of evasion of exchange controls	Entry must be within one month of date of issue of warrant

APPENDIX 5

Statutory police powers to enter and search premises under warrant or other written authority

The following list gives those powers to enter and search premises under warrant, Table 5.1, and under other written authority, Table 5.2, which are normally exercised by the police. There are other provisions which confer similar powers on officials—see Appendix 4. Some powers of entry and search may be exercised either by the police or by some other person; only those which usually fall to be exercised by the police are included in this list. The list is restricted to provisions in public general legislation. It should be noted that while in most cases the power of entry is connected with the search of premises for evidence relating to a criminal offence, in some cases the entry is to enable the police to search the premises for a person, or for some other purpose. In Table 5.1 the relevant powers to issue warrants are conferred on magistrates, except where otherwise mentioned.

Table 5.1. Powers of entry and search under warrant

Provision	Circumstances in which warrant can be issued	Power (brief details)	Notes
Betting, Gaming & Lotteries Act 1963, s. 51	Where there is reasonable ground for suspecting that an offence under the Act is being, has been or is about to be committed on any premises	To enter the premises, search them, seize and remove anything likely to be evidence of an offence under the Act, and arrest and search any person reasonably believed to be committing or to have committed an offence under the Act	The warrant is valid for 14 days after issue
Biological Weapons Act 1974, s. 4	Where there is reasonable ground for suspecting that an offence under s. 1 of the Act has been, or is about to be committed	To enter the premises, and to search them and any person found there; to inspect and copy or seize and detain any document found there or in possession of any person found there; and to inspect, seize and detain any equipment or substance so found, and to sample such substance	The constable executing the warrant must be named therein. The warrant is valid for one month

Table 5.1. (continued)

Provision	Circumstances in which warrant can be issued	Power (brief details)	Notes
Children Act 1975, s. 30(4)	Where there are reasonable grounds for believing that a child to whom an order under subs. (1) (concerning the removal of a child from the custody of a person in contravention of certain provisions of the Adoption Act 1958) relates is in the premises specified	To search the premises and return the child (if found) to the person from whom he was taken	
s. 42(4)	Where there are reasonable grounds for believing that a child to whom an order under subs. (1) (concerning the removal of a child from the custody of an applicant for a custodianship order) relates is in the premises specified	To search the premises and return the child (if found) to the person from whom he was taken	
Children & Young Persons Act 1933, s. 40 (as amended)	Where there is reasonable cause to suspect that a child or young person has been or is being assaulted, ill-treated or neglected in a manner likely to cause him unnecessary suffering or injury to health, or that one of certain offences has been or is being committed in respect of the child or young person	To enter any place named in the warrant to search for such child or young person and, if it is found that the ill-treatment *etc* is or has been occurring in the manner aforesaid, to remove him to a place of safety	Constable executing the warrant must be named therein. Warrant may include power to arrest any person accused of any offence in respect of the child or young person in question
Children and Young Persons Act 1969, s. 32(2A) (as added by Children Act 1975, s. 68)	Where there are reasonable grounds for believing that a child or young person is absent without proper authority from a place of safety, or a place where he is living in the care of a local authority, or a remand home, special reception centre *etc* and is in specified premises	To search the premises for the said person	

Table 5.1. (continued)

Provision	Circumstances in which warrant can be issued	Power (brief details)	Notes
Children & Young Persons (Harmful Publications) Act 1955, s. 3	Where a summons or warrant of arrest in respect of an offence under s. 2 of the Act has been issued, and there is reasonable ground for believing that a person has in his possession or under his control copies of a harmful publication within the meaning of the Act, or any plate or film prepared for the purpose of printing copies of such a publication	To enter and search premises named in the warrant; to seize any harmful publication within the meaning of the Act, and any plate or film prepared for printing such a publication	Constable executing the warrant must be named therein. Power of search and seizure can extend to any vehicle or stall used by the suspect for trade or business
Coinage Offences Act 1936, s. 11(3)	Where there is reasonable cause to suspect that any person has been concerned in counterfeiting any current coin; or has any counterfeit coin, or counterfeiting machine or material	To search the relevant premises and seize any counterfeit coin or counterfeiting instrument, machine or material	
Companies Act 1967, s. 110	Where there are reasonable grounds for suspecting that there are on any premises any books or papers of which production has been required by virtue of s. 109 of the Act, or s. 36 of the Insurance Companies Act 1974, and which have not been produced.	To enter and search the premises and take possession of any books or papers appearing to be those required; or to take any steps which may appear necessary for preserving them and preventing interference with them	Warrant valid for one month
Criminal Damage Act 1971, s. 6(1)	Where there is reasonable cause to believe that any person has anything which there is reasonable cause to believe has been used or is intended for use unlawfully to destroy or damage property belonging to another, or in such a way as to be likely to endanger the life of another	To enter and search the premises and to seize anything believed to have been so used or to be intended to be so used	
Cruelty to Animals Act 1876, s. 13	Where there is reasonable ground to believe that experiments in contravention of the Act are being performed by an unlicensed person in any place not registered under the Act	To enter and search such place, and to take the names and addresses of the persons found therein	

Table 5.1. (continued)

Provision	Circumstances in which warrant can be issued	Power (brief details)	Notes
Customs & Excise Act 1952, s. 296(3)	Where there are reasonable grounds to suspect that any still, vessel, utensil, spirits or materials for the manufacture of spirits is or are unlawfully kept or deposited in any building or place	To enter and search the building or place, and seize and detain or remove articles *etc*	
Emergency Laws (Re-enactments and Repeals) Act 1964, Sch. 1, para 2	Where there are reasonable grounds for suspecting that there are on any premises any documents of which production has been required by virtue of paragraph 1 of the Schedule, and which have not been produced	To enter and search premises and take possession of any documents appearing to be those required by virtue of paragraph 1 of the Schedule; or to take any steps which may appear necessary for preserving them and preventing interference with them	
Exchange Control Act 1947, Fifth Schedule, Part 1, para 2	Where there is reasonable ground for suspecting that an offence against the Act has been or is being committed, and that evidence of the offence is to be found at the premises specified, or in any vehicle, vessel or aircraft specified; or that documents which ought to have been produced under the previous paragraph of the Schedule and which have not been so produced are to be found in any premises, vehicle, vessel or aircraft as specified	To enter and search the premises, vehicle, vessel or aircraft specified, and to seize any article likely to be evidence of an offence under the Act, or any documents which have not been produced under the preceding paragraph of the Schedule	Warrant valid for one month
Explosives Act 1875, s. 73 (as extended by the Explosive Substances Act 1883, s. 8)	Where there is reasonable cause to believe that an offence has been or is being committed with respect to any explosive in any case, *etc*	To enter and search the relevant premises; and take samples of any explosive, or ingredient of explosive, or of any substance reasonably supposed to be an explosive or an ingredient of an explosive	As to entry in an emergency, see Table 5.2 of this Appendix
Firearms Act 1968, s. 46	Where there is reasonable ground for suspecting that an offence under the Act (with certain exceptions) has been, is being, or is about to be committed	To enter and search the premises or place, and to search every person found therein; to seize and detain any firearm or ammunition; and (if the premises are those of a registered firearms dealer) to examine any books relating to the business	Constable executing the warrant must be named therein

Table 5.1. (continued)

Provision	Circumstances in which warrant can be issued	Power (brief details)	Notes
Forgery Act 1913, s. 16	Where there is reasonable cause to believe that any person has in his custody or possession without lawful authority or excuse any bank note, any implement or material which might be used to forge bank notes, any forged document, seal or die, or any machinery *etc* or material used or intended to be used for the forgery of any document	To search for and seize any such article	
Gaming Act 1968, s. 43(4) & (5)	Where there are reasonable grounds for suspecting that an offence under the Act is being, has been or is about to be committed	To enter and search premises and remove anything which may be required as evidence for the purpose of proceedings under the Act; and to arrest and search any person found on the premises who is reasonably believed to be committing or to have committed an offence under the Act	Warrant valid 14 days
Hop (Prevention of Frauds) Act 1866, s. 10	Where there is good reason to believe that any hops, or bags or pockets in which they are contained are not marked as required in the Act and certain other Acts	To enter any premises where the relevant hops, bags or pockets may be, to search for them and any such article which is reasonably believed not to be marked as required	
Immigration Act 1971, Sch. 2, para 17	Where there is reasonable ground for suspecting that a person liable to be arrested (for the purpose of examination or removal) under a provision of the Act is to be found on any premises	To enter the premises for the purpose of searching for and arresting the person	Warrant may only be executed by a constable for the police area in which the premises are situated. Warrant valid for one month. Entry may be made at any time or times within that period

Table 5.1. (continued)

Provision	Circumstances in which warrant can be issued	Power (brief details)	Notes
Incitement to Disaffection Act 1934, s. 2	Where there is reasonable ground for suspecting an offence under the Act and that evidence of the commission of such an offence is to be found at any premises or place	To enter the premises or place, to search it and every person found therein, and to seize anything which is reasonably believed to be evidence of an offence under the Act	Warrant may only be issued by a judge of the High Court on application by a police officer of rank no lower than inspector. Warrant valid for one month
Licensing Act 1964, s. 54	Where there is reasonable ground for cancelling in whole or in part a registration certificate held by a club, and that evidence of it is to be obtained at the club premises; or that intoxicating liquor is sold, supplied or kept by a club in contravention of the provisions of the Act	To enter and search the club premises and to seize any documents relating to the business of the club	Warrant valid for one month. Entry may be made at any time or times within that period
s. 85	Where there is reasonable ground for believing that any premises are kept or habitually used for the holding of parties at which the provisions of s. 84(1) of the Act (relating to parties organised for gain through the sale of liquor) are contravened	To enter and search the premises and to seize and remove any intoxicting liquor reasonably believed to be connected with a contravention of s. 84(1) of the Act	As for s. 54
s. 187	Where there is reasonable ground to believe that any intoxicating liquor is sold by retail, or exposed or kept for sale by retail at any place	To enter and search the place for intoxicating liquor; and to seize and remove any liquor reasonably supposed to be there for the purpose of unlawful sale, and any vessels containing such liquor	As for s. 54
Lotteries & Amusements Act 1976, s. 19	Where there is reasonable ground for suspecting that an offence under the Act is being, has been or is about to be committed	To enter and search the premises and seize and remove any documents *etc* which may be required as evidence for the purpose of proceedings under the Act; and to arrest and search any person found on the premises who is reasonably believed to be committing or to have committed an offence under the Act	Warrant valid for 14 days

Table 5.1. (continued)

Provision	Circumstances in which warrant can be issued	Power (brief details)	Notes
Mental Health Act 1959, s. 135(1)	Where there is reasonable cause to suspect that a person believed to be suffering from mental disorder has been or is being ill-treated, neglected or kept otherwise than under proper control, or, being unable to care for himself, is living alone	To enter the premises specified and, if thought fit, to remove the person to a place of safety	Information must be laid by a mental welfare officer. The warrant may only be executed by a constable named therein, and he must be accompanied by a mental welfare officer and a medical practitioner
Mental Health Act 1959, s. 135(2)	Where there is reasonable cause to believe that a patient in respect of whom there is authority to take to any place, or to take or re-take into custody, is to be found on premises, and that admission to such premises has been refused, or such refusal is apprehended	To enter the premises and remove the patient	Information must be laid by a constable or other person authorised under the Act. The warrant may only be executed by a constable named therein, who may be accompanied by a medical practitioner and/or an authorised person within the meaning of the Act
Misuse of Drugs Act 1971, s. 23(3)	Where there is reasonable ground for suspecting that any controlled drugs are unlawfully in the possession of a person on any premises, or that a document relating to a transaction which is or would be an offence under the Act is unlawfully in the possession of a person on any premises	To enter the premises, and search them and any persons found therein, and to seize and detain drugs or documents in respect of which or in connection with which there is reasonable ground for suspecting that an offence under the Act has been committed	Warrant valid for one month

Table 5.1. (continued)

Provision	Circumstances in which warrant can be issued	Power (brief details)	Notes
Obscene Publications Act 1959, s. 3	Where there is reasonable ground for suspecting that in any premises, stall or vehicle obscene articles are, or are from time to time, kept for publication for gain	To enter and search the premises, or to search the stall or vehicle and to seize and remove any articles which there is reason to believe are obscene and to be kept for publication for gain. If such articles are seized other trade or business documents may be seized too	Warrant valid for 14 days
Offences Against the Person Act 1861, s. 65	Where any gunpowder, other explosive, dangerous or noxious substance or thing or any machine, engine, instrument or thing is suspected to be made, kept, or carried for the purpose of being used for certain offences under the Act	To search any house, mill, magazine, storehouse, warehouse, shop, cellar, yard, wharf or other place, or any carriage, waggon, cart, ship, boat or vessel in which the gunpowder *etc* is suspected to be made, kept or carried and to seize and remove to a proper place the gunpowder *etc* and any receptacle in which it is contained	Warrant may only be executed in the daytime
Official Secrets Act 1911, s. 9(1)	Where there is reasonable ground for suspecting that an offence under the Act has been or is about to be committed	To enter the premises specified and to search them and any person found therein, and to seize any sketch, plan, model, article, note, document *etc*, which is evidence of an offence under the Act having been or being about to be committed and with regard to which there is reasonable ground for suspecting that such an offence has been or is about to be committed	Warrant may only be executed by a constable named therein. As to entry in an emergency, see Table 5.2 of this Appendix

Table 5.1. (continued)

Provision	Circumstances in which warrant can be issued	Power (brief details)	Notes
Pawnbrokers Act 1872, s. 36	Where linen or apparel or unfinished goods or materials have been entrusted to another person, and such goods have been unlawfully pawned, and there is good cause to suspect that a pawnbroker has taken in pawn the relevant goods without the privity or authority of the owner	To enter and search the pawnbroker's shop for the relevant article	Information may only be laid by the owner of the apparel *etc.* If the pawnbroker refuses to open his shop and permit it to be searched a constable authorised by the warrant may enter by force, but only in business hours. The whole of the 1872 Act is liable to repeal under the Consumer Credit Act 1974
Prevention of Fraud (Investments) Act 1958, s. 14(8)	Where there is reasonable ground for suspecting that a person has any documents in his possession in contravention of the section, at any premises	To enter the premises, and to search for, seize and remove any documents found there which he has reasonable ground for believing to be in the possession of a person in contravention of the section	Warrant valid for one month
Prevention of Terrorism (Temporary Provisions) Act 1976, Sch. 3, Part II para 4	Where there is reasonable ground for suspecting that evidence of an offence under certain sections of the Act, or evidence to justify an exclusion order or the proscription of any organisation is to be found at any premises or place	To enter the premises or place and search them and any person found therein, and to seize anything found on any such premises place or person which is reasonably suspected to be evidence of an offence under certain sections of the Act	Application for such warrant may only be made by a police officer of rank not lower than inspector. Warrant may be executed by the applicant and any other police officer. As to entry in an emergency, see Table 5.2 of this Appendix

Table 5.1. (continued)

Provision	Circumstances in which warrant can be issued	Power (brief details)	Notes
Protection of Birds Act 1954, s. 6	Where there is reasonable ground to suspect that an offence has been committed under the section, and that evidence thereof may be found on any premises	To enter and search the premises for the purpose of obtaining the evidence	
Protection of Depositors Act 1963, s. 19	Where there is reasonable ground for suspecting that there are on any premises any books or papers of which production has been required by virtue of s. 18 of the Act, and which have not been produced.	To enter and search the premises, and to take possession of any books or papers appearing to be those required, or to take such steps as may appear necessary for preserving them and preventing interference with them	Warrant valid for one month
Public Order Act 1936, s. 2(5)	Where there is reasonable ground for suspecting that an offence under the section (relating to the prohibition of quasi-military organisations) has been committed, and that evidence thereof is to be found at any place or premises	To enter and search the premises or place, and to search every person found there, and to seize anything which is reasonably suspected to be evidence of the commission of such an offence	Warrant may only be issued by a judge of the High Court on the application of a police officer of rank not lower than inspector. Warrant valid one month
Public Stores Act 1875, s. 12, as substituted by the Theft Act 1968, Sch. 2, Part III	Where there is reasonable cause to believe that any person has any stores in respect of which an offence under s. 5 of the Act has been committed	To search for and seize the stores	
Scrap Metal Dealers Act 1964, s. 6(3)	Where admission to the place specified is reasonably required in order to secure compliance with the provisions of the Act, or to ascertain whether those provisions are being complied with	To enter the place	Warrant valid for one month
Sexual Offences Act 1956, s. 42	Where there is reasonable cause to suspect that any house or part of a house is used by a woman for prostitution and that a man residing in or frequenting the house is living wholly or partly on her earnings	To enter and search the house, and to arrest the man	

Table 5.1. (continued)

Provision	Circumstances in which warrant can be issued	Power (brief details)	Notes
Sexual Offences Act 1956, s. 43	Where there is reasonable cause to suspect that a woman is detained in any place in order that she may have unlawful sexual intercourse, and that she is detained against her will, or is a defective, or is under 16, or if under 18 is detained against the will of her parent or guardian	To enter and search the premises specified and to remove the woman to a place of safety, and detain her there until she can be brought before a magistrate	Warrant may only be executed by a constable named therein
Theatres Act 1968, s. 15(1)	Where there are reasonable grounds for suspecting that a performance of a play is to be given at the specified premises and that an offence under ss. 2, 5 or 6 of the Act is likely to be committed in respect of that performance, or that an offence under s. 13 of the Act is being or will be committed in respect of the premises	If an offence under ss. 2, 5 or 6 is reasonably suspected, to enter and attend any relevant performance; if an offence under s. 13 is reasonably suspected, to inspect the premises	Warrant valid for 14 days
Theft Act 1968 s. 26(1) & (3)	Where there is reasonable cause to believe that any person has in his custody or possession or on his premises any stolen goods	To enter and search the specified premises, and seize any goods believed to be stolen goods	
Vagrancy Act 1824 s. 13	Where a person described in the Act to be an idle and disorderly person, or a rogue and vagabond, or an incorrigible rogue, is, or is reasonably suspected to be, harboured or concealed in any house kept for the lodging of travellers	To enter the house and apprehend such person	

Table 5.2 Powers of entry and search under other forms of written authority

Provision	Form of authority	Circumstances in which authority can be issued	Power
Children & Young Persons Act 1933, s. 28(1) (as extended by s. 59 of the Education Act 1944)	Magistrate's order	Where there is reasonable cause to believe that certain provisions of the Act (in regard to the employment of children, or their performance in entertainments) are being contravened with respect to any person	To enter any place where the person is, or is believed to be, employed, taking part in a performance, or being trained, and to make enquiries with respect to that person. (Order valid only at reasonable times within 48 hours of its making)
Criminal Libel Act 1819, s. 1	Order of a judge	Where a person is convicted of composing, printing or publishing a blasphemous or seditious libel	To enter and search any house, building or any place whatsoever belonging to the person convicted, and of any person named as keeping copies of the libel for the use of the convicted person; and to carry away and detain any copies of the libel which are found
Explosives Act 1875, s. 73 (as extended by the Explosive Substances Act 1883, s. 8)	Written order by a police officer of at least superintendent rank	Where there is reasonable cause to believe that an offence has been or is being committed with respect to any explosive in any case *etc* and the delay in obtaining a magistrate's warrant (as to which see Table 5.1 of this Appendix) would be likely to endanger life	To enter and search the relevant premises; and take samples of any explosive or ingredient of explosive, or of any substance reasonably supposed to be an explosive or an ingredient of an explosive
Licensing Act 1964, s. 45	Written authority of chief officer of police, or his designee	Where a club applies for the issue of a registration certificate in respect of any premises, and in the opinion of the chief officer of police there are special reasons making it necessary for the premises to be inspected for the proper discharge of his functions in relation to the registration of clubs	To enter and inspect the premises
Metropolitan Police Act 1839, s. 47	Written order of Commissioner to superintendent of Metropolitan Police, with such constables as he shall think necessary		To enter any place in the Metropolitan Police District kept or used for bear-baiting, cock-fighting *etc*, and take into custody all persons found therein without lawful excuse

Table 5.2 (continued)

Provision	Form of authority	Circumstances in which authority can be issued	Power
Official Secrets Act 1911, s. 9(2)	Written order of a superintendent of police	Where there is reasonable ground for suspecting that an offence under the Act has been or is about to be committed and the case is one of great emergency, and immediate action is necessary in the interests of the State. (As to entry under warrant, where the case is not one of great emergency, see Table 5.1 of this Appendix)	To enter the premises specified and to search them and any person found therein, and to seize any sketch, plan, model, article, note, document *etc*, which is evidence of an offence under the Act having been or being about to be committed and with regard to which there is reasonable ground for suspecting that such an offence has been or is about to be committed
Prevention of Terrorism (Temporary Provisions) Act 1976, Sch. 3, Part II para (4)	Written order by a police officer of at least superintendent rank	Where there is reasonable ground for suspecting that evidence of an offence under certain sections of the Act, or evidence to justify an exclusion order or the proscription of any organisation is to be found at any premises or place and the case is one of great emergency and immediate action is necessary in the interests of the State. (As to entry under warrant, where the case is not one of great emergency, see Table 5.1 of this Appendix)	To enter the premises or place and search them and any person found therein, and to seize anything found on any such premises, place or person which is reasonably suspected to be evidence of an offence under certain sections of the Act
Safety of Sports Grounds Act 1975, s. 11	Authority of a chief officer of police, the local authority, the building authority or the Secretary of State		On production, if required, of his authority, to enter a sports ground at any reasonable time, and make such inspection of it and such enquiries relating to it as he considers necessary for the purposes of this Act, and in particular to examine records of attendance and records relating to the maintenance of safety, and to copy such documents

Table 5.2 (continued)

Provision	Form of authority	Circumstances in which authority can be issued	Power
Theft Act 1968, s. 26(2)	Written authority of a police officer of at least superintendent rank	If the person in occupation of premises has been convicted within the preceding five years of handling stolen goods or of any offence involving dishonesty and punishable with imprisonment; or, where the premises have been occupied within the preceding twelve months by a person convicted within the preceding five years of handling stolen goods	To search the relevant premises for stolen goods

Statutory police powers to enter premises without warrant

The following list of provisions in public general legislation is in addition to those mentioned in Table 5.2 of Appendix 5. The list refers to premises and does not extend to powers to enter and search vehicles, ships *etc*, except where these are referred to in the same provision

Table 6.1 Police powers of entry without warrant

Provision	Power (brief details)	Restrictions on the power
Betting, Gaming and Lotteries Act 1963, s. 10(4)	To enter any licensed betting office for the purpose of ascertaining whether the provisions of subs. (1) of the section (relating to the conduct of licensed betting offices) are being complied with	
s. 23	To enter any race track for the purpose of ascertaining whether the provisions of the relevant part of the Act (relating to betting) are being complied with	Entry may be made only "at all reasonable times"
Children and Young Persons Act 1933, s. 12(4)	To enter any building in which the constable has reason to believe that an entertainment for children is being, or is about to be, provided, with a view to seeing whether the provisions of the section (relating to the safety of children at entertainments) are carried into effect	
s. 28(2)	To enter any place where a person (to whom a licence under ss. 22 or 24 of the Act relates) is authorised by the licence to take part in an entertainment, or to be trained, and to make enquiries therein with respect to that person	
Cinematograph Act 1909, s. 4	To enter any premises, whether licensed or not, in which the constable has reason to believe that a cinematograph exhibition is being or is about to be given, with a view to seeing whether the provisons of the Act, or any regulations made thereunder, and the conditions or restrictions attached to any licence have been complied with	Entry may be made only "at all reasonable times"

Table 6.1 (continued)

Provision	Power (brief details)	Restrictions on the power
Criminal Law Act 1967, s. 2(6)	For the purpose of arresting a person for an "arrestable offence" (ie one carrying a maximum penalty of five years imprisonment or more on first conviction), power to enter (if need be, by force) and search any place where the person is or the constable reasonably suspects him to be	
Criminal Law Act 1977, s. 11	To enter and search any premises where a person liable to arrest under certain powers conferred by that part of the Act (concerning offences relating to entering and remaining on property) is, or is reasonably suspected to be, for the purpose of arresting him	Power conferred only on constables in uniform. Entry may not be made to premises enjoying diplomatic immunity
Explosives Act 1875, s. 75	To enter, inspect and examine any wharf, ship *etc* of any carrier *etc* (where there is reasonable cause to suppose an explosive to be for the purpose of or in the course of conveyance) for the purpose of ascertaining whether the provisions of the Act relating to the conveyance of explosives are being complied with	Power exercisable by chief officer of police only; the work or business of the carrier *etc* should not be obstructed unnecessarily
Fire Services Act 1947, s. 30(1)	To enter any premises or place in which a fire has or is reasonably believed to have broken out, or any premises or place which it is necessary to enter in order to extinguish a fire, or to protect the premises from acts done for fire fighting purposes, and to do all such things as may be deemed necessary for extinguishing the fire, or protecting the premises or for rescuing any person or property found therein	
Game Laws (Amendment) Act 1960, s. 2	Where there are reasonable grounds for suspecting that a person is committing an offence on any land under s. 1 or s. 9 of the Night Poaching Act 1828 or under s. 30 or s. 33 of the Game Act 1831 to enter on the land for the purpose of exercising the powers conferred on the constable (ie the power of arrest under ss. 1 and 9 of the 1828 Act and the power under s. 31 of the 1831 Act to require the person to quit the land and give his name and address and, in the event of failure to do so, to apprehend him)	Power does not extend to land occupied by the Ministry of Defence *etc*
Gaming Act 1845, s. 14	To enter any house room or place where any public table or board is kept for playing at billiards, bagatelle, or any game of the like kind	

Table 6.1 (continued)

Provision	Power (brief details)	Restrictions on the power
Gaming Act 1968, s. 43(2)	To enter any premises in respect of which a licence under the Act is for the time being in force and to inspect the premises and any machine or other equipment and any book or document which the constable reasonably requires to inspect for the purpose of ascertaining whether a contravention of the Act, or the regulations made thereunder, is being, or has been committed. (Note: see also power of entry under warrant shown in Table 5.1 of Appendix 5)	Entry may be made only "at any reasonable times"
Hypnotism Act 1952, s. 4	To enter any premises where any entertainment is held if he has reasonable cause to believe that any act is being or may be done in contravention of the Act	
Late Night Refreshment Houses Act 1969, s. 10(1)	To enter a late night refreshment house licensed under the Act, and any premises belonging thereto	
Licensing Act 1964, s. 186 (as substituted by the Licensing (Amendment) Act 1977, s. 1)	To enter any licensed premises, a licensed canteen or premises for which a special hours certificate is in force, for the purpose of preventing or detecting the commission of an offence under the Act of 1964	The power may only be exercised within certain times as set out in the section
Misuse of Drugs Act 1971, s. 23(1)	For the purpose of the execution of the Act, to enter the premises of a person carrying on business as a producer or supplier of any controlled drugs, and to demand the production of, and to inspect, any books or documents relating to dealings in such drugs and to inspect stocks of such drugs	
Performing Animals (Regulation) Act 1925, s. 3	To enter and inspect any premises in which any performing animals are being trained or exhibited or kept for training or exhibition and any animals found thereon; and to require any person whom there is reason to believe to be a trainer or exhibitor of perfoming animals to produce his certificate	A constable exercising the power may not go on or behind the stage during a public performance. Entry may only be made "at all reasonable times"
Protection of Aircraft Act 1973, s. 19(2)	To enter and search any building, works or land in an aerodrome in respect of which a direction under s. 10 of the Act is in force, and where there is reasonable cause to suspect that a firearm, explosive *etc* is in, or may be brought into, any part of the aerodrome. (Note: power also extends to aircraft, vehicles, goods or movable property of any description)	

Table 6.1 (continued)

Provision	Power (brief details)	Restrictions on the power
Protection of Animals Act 1911, s. 5(2)	To enter any knackers yard for the purpose of examining whether there is or has been any contravention of or non-compliance with the Act	Entry may only be made "at any hour by day, or at any hour when business is or apparently is in progress or is usually carried on therein"
Scrap Metal Dealers Act 1964, s. 6(1)	To enter and inspect any place registered as a scrap metal store, or in connection with scrap metal dealings, and to require production of, and to inspect, any scrap metal kept there, and any book or receipt which the dealer is required to keep, and to take copies or extracts from any such book or receipt	Entry may only be made "at all reasonable times"
Theatres Act 1968, s. 15(3)	To enter any premises in respect of which a licence under the Act is in force at which he has reason to believe that a performance of a play is being or is about to be given and to inspect them with a view to seeing whether the terms or conditions of the licence are being complied with	Entry may only be made "at all reasonable times". (Officers shall not, if wearing uniform, be required to produce any authority)

APPENDIX 7

Search of premises: a survey

Ten police forces agreed at the Royal Commission's request to take part in a survey of searches of premises in selected divisions and sub-divisions within their force areas. The survey ran for a four week period from 1 September 1979 and was aimed at documenting the number, type and results of all the searches carried out by divisional officers and officers from specialist squads in the areas concerned. Officers were asked to complete a form on each occasion that they searched an address either on warrant, with consent before arrest, after arrest without a warrant or in order to effect an arrest under the power conferred by section 2(6) of the Criminal Law Act 1967.

2. The forces which took part in the survey were chosen to give a reasonable geographical spread, and the division or sub-divisions within them because they were thought to be busy ones. This was in order to collect a reasonably large sample within the shortest possible time. Officers recorded a total of 341 searches during the survey period. The Metropolitan Police District (MPD) contributed nearly one-third of these, with most of the other forces contributing between 20 and 30 searches. The participating forces (and divisions and sub-divisions) were:

Avon and Somerset:	Broadbury Road; Bishopsworth
Cleveland:	Middlesborough
Hampshire:	Southampton Central; Shirley; Portswood
Leicestershire:	Charles Street
Metropolitan Police District:	Bethnal Green; Catford; Dagenham; Hammersmith; Hounslow; Rochester Row; Stoke Newington; West Hendon
Staffordshire:	Hanley
Surrey:	Guildford
Thames Valley:	Reading; Woodley
West Yorkshire:	Chapeltown
Wiltshire:	Swindon

3. It must be stressed that the survey was not a random one and does not give a generalised picture of the numbers, type and success rate of searches of premises. First, it is heavily weighted towards the MPD. Second, only a small number of stations was involved in the survey. Third, several stations have

specialist squads based at them which has probably biased the survey towards certain kinds of activity, most notably drug searches. Six stations—Portswood (Hampshire), Charles Street (Leicestershire), Hanley (Staffordshire), Guildford (Surrey), Reading (Thames Valley) and Swindon (Wiltshire)—house a Drugs Squad and searches in connection with drugs were over represented in these areas. Other specialist squads contributed relatively little to the survey although Regional Crime Squads carried out several searches in one or two areas.

4. Most searches were carried out in connection with offences of theft and handling (44 per cent) or burglary (28 per cent). Twelve per cent were in relation to drugs offences. The remainder were for violent offences including robbery (6 per cent), sex offences (3 per cent), fraud or forgery (2 per cent), or miscellaneous other offences—pornography, firearms or criminal damage (4 per cent). The range of offences involved was considerable, from conspiracy to rob and murder, to low value theft.

5. Details of the authority for searches are shown in Table 7.1.

Table 7.1 The authority for searches

Force	Authority for search											
	Magistrate's warrant		Superintendent's warrant		With consent before arrest		After arrest without warrant		To effect arrest		Total	
	No	%	No	%	No	%	No	%	No	%	No	%
MPD	63	61	0	—	5	5	29	28	6	6	103	100
Provincial forces	56	24	7	3	38	16	117	49	20	8	238	100
All forces	119	35	7	2	43	13	146	43	26	8	341	100

6. Over half the searches in the sample were conducted before arrest with the consent (whether explicitly or otherwise) of the suspect or householder[1] or after arrest and without a warrant; in most of these cases the suspect was in fact already under arrest. About a third of the searches were backed by a warrant issued by a magistrate. This figure is considerably inflated by the survey's bias towards the MPD where the majority (61 per cent) of searches were backed by warrant. Although the numbers of returns made by the provincial forces are too small to provide reliable comparisons, they furnish some evidence that the practice over obtaining search warrants varies between forces; in Cleveland none of the 26 searches was on a warrant issued by a magistrate.

7. Superintendents' warrants were rarely used. Of the seven issued during the survey period, five were in Avon and Somerset.

8. Table 7.2 shows how the authority that was obtained for searches was related to the type of offence under investigation. As can be seen, magistrates'

[1]The two were usually synonymous. One or two searches were of houses where the police expected to find stolen property but did not suspect the householder of stealing or dishonestly obtaining it.

warrants were most frequently used in connection with drugs offences; over two-thirds of drugs searches were conducted on warrant. Forty per cent of searches in connection with burglary were conducted on warrant, as were a quarter of those in relation to theft, handling and fraud.

Table 7.2. Authority for search and principal offence suspected at the time the search was made

Authority for search	Offence											
	Violence /sex		Burglary		Theft/ handling/ fraud/ forgery		Drugs		Other/not specified		Total	
	No	%	No	%	No	%	No	%	No	%	No	%
Magistrate's warrant	9	31	39	40	40	25	27	68	4	24	119	35
Superintendent's warrant	0	—	3	3	4	3	0	—	0	—	7	2
With consent before arrest	3	10	10	10	22	14	4	10	4	24	43	13
After arrest, without warrant	11	38	42	43	81	51	8	20	4	24	146	43
To effect arrest	6	21	3	3	11	7	1	3	5	29	26	8
Total	29	100	97	100	158	100	40	100	17	100	341	100

9. Thirty nine per cent of searches uncovered evidence linking the suspect with the offences which were under investigation at the time the search was made. In most cases it was stolen property (in 60 per cent of successful searches) or drugs (in 20 per cent of them) that were found. Other incriminating articles included pornographic pictures, firearms and forged documents. In one in every ten searches, material evidence implicating the suspect in offences which were not suspected when the search was made came to light. This was mainly stolen property, or, occasionally, drugs. A small number of searches—31—provided material linking other persons with the offence under investigation or with other offences. Typical examples were the recovery of stolen property which the suspect was charged with receiving but which could then be traced to the person who had stolen it, or the recovery of drugs which were then traced to a supplier. In all, 43 per cent of the searches were successful on at least one of the above criteria.

10. Whether or not a search was carried out under warrant made very little difference to its success. Forty five per cent of the searches backed by either a magistrate's or a superintendent's warrant resulted in the discovery of evidence linking the suspect with the offence of which he was suspected; 40 per cent of the searches carried out with consent before arrest or after arrest without a warrant did so. (Searches carried out to effect an arrest very rarely led to the

discovery of material evidence but they were not usually aimed at doing so.) Details are shown in Table 7.3.

Table 7.3. Authority for search and whether evidence of suspected offence was recovered

Authority for search	Evidence of suspected offence recovered					
	Yes		No		Total	
	No	%	No	%	No	%
Magistrate's warrant	55	46	64	54	119	100
Superintendent's warrant	2	(29)[1]	5	(71)[1]	7	100
With consent before arrest	18	42	25	58	43	100
After arrest, without warrant	58	40	88	60	146	100
To effect arrest	1	4	25	96	26	100
Total	134	39	207	61	341	100

[1]Bracketed percentages indicate a base number of less than 16.

11. One-third (114) of the suspects were not charged after a search had been carried out. In a further four cases, the question of whether or not to charge remained at issue while further enquiries were made. It is clear that the police did not always require evidence from a search in order to charge suspects. There were 192 cases where a search failed to turn up any evidence; nonetheless, charges were preferred in 64 (exactly a third) of them and in a further 20 cases the decision whether or not to charge was still to be made.

13. In all, there were 108 cases where a search failed to produce any evidence and where the suspect was not charged (nor were charges pending). Forty two of these searches had the backing of a magistrate's warrant and five had the backing of a superintendent's warrant.

APPENDIX 8

Statistics of summons and arrest and charge

Table 8. Persons proceeded against at magistrates' courts by offence group and how dealt with prior to first scheduled court appearance, 1978

Offence group	Percentage of total number proceeded against		Percentage of those arrested and charged	
	Summonsed	Arrested and charged	Released on bail	Held in custody
Indictable offences				
Violence against the person	23	77	80	20
Sexual offences	21	79	73	27
Burglary	25	75	70	30
Robbery	8	92	39	61
Theft and handling stolen goods	23	77	87	13
Fraud and forgery	18	82	79	21
Criminal damage	30	70	83	17
Other indictable offences	16	84	75	25
Total indictable offences	24	76	82	18
Non-indictable offences				
Assault on constable	13	87	86	14
Drunkenness	3	97	78	22
Motor vehicle licencing offences	100	–[1]	91	9
Wireless Telegraphy Act	100	–[1]	100	–[1]
Drug offences	7	93	83	17
Other non-indictable offences (excluding motoring)	68	32	90	10
Driving or in charge of motor vehicle while unfit through drink or drugs	87	13	86	14
Other motoring offences	100	–[1]	83	17
Total non-indictable offences	87	13	83	17

[1]less than 0.5 per cent.

APPENDIX 9

Statutory police powers of arrest without warrant

This is a list of police powers of arrest without warrant in public general legislation. It is probably comprehensive though there may be a few omissions. The powers listed are in addition to section 2 of the Criminal Law Act 1967 (see paragraph 44 of text) which confers a power of arrest without a warrant in respect of all offences which carry a maximum penalty of 5 years' imprisonment on first conviction. For ease of reference the list has been divided into four groups, as follows:

Table 9.1 Powers of arrest exercisable only where a person is found, or seen, committing the offence specified.

Table 9.2 Powers exercisable where there is reasonable suspicion that a person has committed or is committing the offence specified.

Table 9.3 Powers exercisable only where the name and address of the person cannot be ascertained and/or he is likely to abscond etc. (These powers have been excluded from Tables 9.1 and 9.2.)

Table 9.4 Other miscellaneous powers.

Table 9.1 Powers of arrest exercisable only where a person is found, or seen, committing the offence specified

Provision	Offence (brief details)	Power of arrest (brief details)
Airports Authority Act 1975, s. 9(6)(b) and Policing of Airports Act 1974, s. 4(3)(b)	Person, in contravention of byelaw, does not leave aerodrome or a particular part of it after being requested to do so by a constable appointed under the 1975 Act (in the case of an offence under that Act) or by the relevant constable under the 1974 Act (in the case of an offence under that Act)	Upon such failure to leave
Betting, Gaming & Lotteries Act 1963, s. 8(2)	Street betting	Found committing
Coinage Offences Act 1936, s. 11	Any offence against the Act (eg import and export of counterfeit coin) except an offence against s. 8 (making, possessing and selling medals resembling gold or silver coins)	Found committing

Table 9.1 (continued)

Provision	Offence (brief details)	Power of arrest (brief details)
Criminal Justice Act 1967, s. 91	Being guilty, while drunk, of disorderly behaviour	Found committing
Diseases of Animals Act 1950, s. 71(3)	Obstructing or impeding a constable or other officer in the execution of the Act *etc*	Constable may arrest that person (see Table 9.3 of this Appendix for the power of arrest under s. 71(2))
Ecclesiastical Courts Jurisdiction Act 1860, s. 3	Riotous, violent or indecent behaviour or other misconduct in any church *etc*	Immediately after commission
Explosives Act 1875, s. 78	Any act which is an offence under the Act, and which tends to cause explosion or fire in or about any factory, magazine, store, railway, canal, ship *etc*	Found committing
Highways Act 1959, s. 121(2),	Wilful obstruction of highway	Seen committing
Indecent Advertisements Act 1889, s. 6	Any offence under the Act	Found committing
Licensing Act 1872, s. 12	Drunk in charge of any carriage, horse, cattle or steam engine in a public place, or drunk (anywhere) in possession of a loaded firearm	Found committing
Licensing Act 1902, s. 1	Drunk in a public place or licensed premises (offence under s. 12 of the Licensing Act 1872)	Any such person who is incapable of taking care of himself
Licensing Act 1902, s. 2(1)	Drunk in a public place or licensed premises in charge of a child under seven years old	Any person found drunk in a public place or licensed premises in charge of a child apparently under seven years old
London Hackney Carriages Act 1843, s. 27	Person acting as a taxi driver in the London area without a cab proprietor's consent	Any constable may take into custody any person unlawfully so acting
Metropolitan Police Act 1839, s. 47	Every person found in premises within the Metropolitan Police District kept or used for bear-baiting, cock-fighting *etc* without lawful excuse	Found when premises entered under the authority of an order in writing issued by the Commissioner of Police of the Metropolis (as to which see Table 5.2 of Appendix 5)
Metropolitan Police Act 1839, s. 54	Various street nuisances, including threatening behaviour, indecent language, and suffering to be at large an unmuzzled ferocious dog	Any person committing such an offence within view of a Metropolitan Police constable

Table 9.1 (continued)

Provision	Offence (brief details)	Power of arrest (brief details)
Metropolitan Police Act 1839, s. 66	Any offence under the Act	Found committing
Night Poaching Act 1828, s. 2	Poaching by night	Found committing. (Any such person may be apprehended by the owner or occupier of the land *etc* and delivered by him to a "peace officer" who is to convey the person before two justices of the peace)
Pedlars Act 1871, s. 18	Refusal to show certificate, or having none, or resisting inspection of his pack	When committing
Prevention of Offences Act 1851, s. 11	Any indictable offence at night	Found committing
Public Health Act 1925, s. 74(2)	Driving dangerously (outside the Metropolitan Police District)	Any constable "who witnesses"
Railway Clauses Consolidation Act 1845, s. 104	Refusal to leave carriage	Discovered "either in or after committing or attempting to commit"
Railway Regulation Act 1840, s. 16	Obstructing railway staff, trespassing on railway *etc*, and refusing to quit	Every person so offending may be detained by an officer of the railway, or his agent, or any person whom he may call to his assistance (which would usually be a constable)
Railway Regulation Act 1842, s. 17	Any engine-driver, guard, porter *etc* who is drunk while on duty, or commits an offence against railway byelaws *etc*, or does, or omits to do, any act by which the life or limb of passengers is or might be endangered *etc*	Every person so offending may be detained by an officer of the railway or his agent, or any special constable duly appointed, or any person whom he may call to his assistance (which would usually be a constable)
Representation of the People Act 1949, Sch. 2; para 34 of the Parliamentary Elections Rules and para 29 of the Local Elections Rules	Misconduct at polling stations	To remove the person by order of the presiding officer or other authorised person and, if the person is charged with the commission of an offence in the polling station, take him into custody
Road Traffic Act 1972, ss. 5(5) and 19(3)	Driving or attempting to drive, or being in charge of, a motor vehicle, or riding a cycle, while unfit through drink or drugs	When apparently committing
Sexual Offences Act 1956, s. 41	Solicitation by men	Found committing
Sexual Offences Act 1967, s. 5	Living on the earnings of male prostitution	Found committing

Table 9.1 (continued)

Provision	Offence (brief details)	Power of arrest (brief details)
Town Gardens Protection Act 1863, s. 5	Injuring public gardens (by trespass, depositing rubbish, stealing or damaging flowers *etc*)	Any constable who shall see
Town Police Clauses Act 1847, s. 15	Any offence under the Act or an offence under s. 52 of the Police Act 1964 (impersonating a police officer *etc*)	Found committing
Town Police Clauses Act 1847, s. 28	Various street nuisances	Any constable within whose view
Unlawful Drilling Act 1819, s. 2	Unlawful military training and exercise	Any person present at, or aiding, assisting or abetting any assembly or meeting for the purpose
Vagrancy Act 1824, s. 6	Any offence under the Act (begging, loitering with intent *etc*) other than the fortune-telling offence in s. 4 (as to which see Table 9.3 of this Appendix)	Found offending

Table 9.2 Powers exercisable where there is reasonable suspicion that a person has committed or is committing the offence specified

Provision	Offence (brief details)	Power of arrest (brief details)
Army Act 1955, s. 186, Air Forces Act 1955, s. 186 and Naval Discipline Act 1957, s. 105 (as amended by the Armed Forces Act 1971, s. 56)	Desertion or absence without leave	Reasonable cause to suspect. (Power to issue warrants also exists under all three sections. There are similar powers of arrest under s. 27 of the Auxiliary Forces Act 1953 in the event of embodiment, and under s. 13 of the Visiting Forces Act 1952 in the event of a request from the appropriate authority of the country to which the person belongs)
Army Act 1955, s. 195 and Air Force Act 1955, s. 195	Unlawful purchase of military or air force stores	Reasonable grounds to suspect of having committed the offence
Betting, Gaming & Lotteries Act 1963, s. 51(1)(b)	Any offence under the Act	Reasonable cause to believe to be committing or to have committed any such offence. (Power may only be used in respect of persons found on premises being searched under the authority of a search warrant issued under the section)
Children and Young Persons Act 1933, s. 10(2)	Vagrants preventing children from receiving education	Any constable who finds person wandering from place to place with a child, and has reasonable ground to believe that the person is guilty of the offence. (There is also a power to detain the child—see Table 9.4 below)
Criminal Law Act 1977, ss. 6(6), 7(11), 8(4), 9(7), 10(5)	Offences relating to entering and remaining on property	Anyone who is, or who there is reasonable cause to suspect to be, guilty of one of the relevant offences. (The power may only be exercised by a constable in uniform)
Customs & Excise Act 1952, s. 274(1) & (2)	Smuggling *etc*	Anyone who has committed or whom there are reasonable grounds to suspect of having committed an offence. (In certain circumstances power may only be exercised within three years of the offence)
Deer Act 1963, s. 5	Any offence against the Act	Suspects with reasonable cause of committing an offence
Firearms Act 1968, s. 50(1)	All offences under the Act except an offence under s. 22(3) or an offence relating specifically to air weapons	When searching premises under the authority of a warrant issued under s. 46 of the Act, and there is reason to believe that the person is guilty of a relevant offence

Table 9.2 (continued)

Provision	Offence (brief details)	Power of arrest (brief details)
Firearms Act 1968, (contd) s. 50(2)	Carrying firearms in a public place; trespassing with; possession by a previously convicted person or refusal to hand over firearm after stop and search	Reasonable cause to suspect to be committing an offence
Gaming Act 1968, s. 5(2)	Gaming in street *etc*	Suspects with reasonable cause to be taking part in gaming
s. 43(5)	Any offence under the Act	Constable entering the premises under authority of a search warrant issued under s. 43(4) may arrest any person found on the premises whom he has reasonable cause to believe to be committing or to have committed an offence under the Act
Immigration Act 1971, s. 24(2)	Illegal entry and similar offences	Reasonable cause to suspect to have committed or attempted to commit
s. 25(3)	Knowingly concerned in making or carrying out arrangements for securing or facilitating entry of illegal immigrant	Reasonable cause to suspect of committing an offence
Metropolitan Police Act 1839, s. 34	Any arrestable offence in or on board a ship *etc* lying in the River Thames *etc*	Where there is just cause to suspect that an offence has been or is about to be committed, power, on entry to the vessel, to take into custody all persons suspected of being concerned. (The power is restricted to superintendents, inspectors and sergeants of the Metropolitan Police)
Metropolitan Police Act 1839, s. 65	Any aggravated assault within the Metropolitan Police District	Where a person is charged by another person with such an assault, and the constable has good reason to believe that such assault has been committed, though not within his view, and that by reason of the recent commission of the offence, a warrant could not have been obtained. (The power is restricted to constables belonging to the Metropolitan Police)
Naval Discipline Act 1957, s. 106(1)	Unlawful purchase of naval stores and other offences under Part 3 of the Act punishable on summary conviction	Reasonable grounds for suspecting of having committed the offence

Table 9.2 (continued)

Provision	Offence (brief details)	Power ot arrest (brief details)
Official Secrets Act 1911, s. 6	Wrongful communication of information	Found committing or reasonably suspected of having committed, or having attempted to commit, or being about to commit
Prevention of Terrorism (Temporary Provisions) Act 1976, ss. 2(2) & 12(1)(a)	Offences under ss. 1 & 2 (proscribed organisations), 9 (exclusion orders), 10 (contribution towards terrorism) and 11 (information about terrorism) of the Act	Reasonably suspects to be guilty of a relevant offence
Protection of Animals Act 1911, s. 12	Offences under the Act punishable by imprisonment without the option of a fine	Reason to believe person is guilty, whether upon the constable's own view or acting on the word of another if that other gives his name and address
Public Order Act 1936, s. 7(3)	Wearing uniform signifying association with any political organisation, carrying an offensive weapon at public meeting or procession, and offensive conduct in a public place	Reasonably suspected to be committing an offence
Public Stores Act 1875, s. 12 (as substituted by the Theft Act 1968, Sch. 2, Part II)	Offences against ss. 5 of the 1875 Act (obliterating marks denoting that property in stores is HM property) and 8 thereof (sweeping, dredging *etc* near docks, artillery ranges *etc*)	Reasonable cause to suspect to be in the act of committing, or attempting to commit, an offence
Rabies Act 1974, s. 5A (as inserted by the Criminal Law Act 1977, s. 55)	Contravention of the anti-rabies controls	Reasonable cause to suspect to be in the act of committing, or to have committed, an offence
Representation of the People Act 1949, Sch. 2; para 37 of the Parliamentary Elections Rules and para 32 of the Local Elections Rules	Personation by applicant for a ballot paper	If at time person applies for ballot paper, or after that but before he leaves polling station, candidate or agent tells presiding officer that he has reasonable cause to suspect personation, and undertakes to substantiate this in court, presiding officer may order constable to arrest applicant
Road Traffic Act 1972, s. 100	Driving while disqualified	Constable in uniform may arrest any person driving or attempting to drive a motor vehicle on a road whom he has reasonable cause to suspect of being disqualified
Road Traffic (Foreign Vehicles) Act 1972, s. 3(2)	Driving a foreign goods or public service vehicle after prohibition by examiner or other authorised person, and related offences under the Act	Constable in uniform may arrest on reasonable cause to suspect of having committed such offence

Table 9.2 (continued)

Provision	Offence (brief details)	Power of arrest (brief details)
Sexual Offences Act 1956, s. 40	Causing prostitution of women and procuration of girls under 21	Reasonable cause to suspect of having committed, or of attempting to commit
Street Offences Act 1959, s. 1(3)	Soliciting in a street *etc* for the purposes of prostitution	Suspects with reasonable cause to be committing an offence
Theft Act 1968, s. 12(3)	Taking motor vehicle or other conveyance other than a pedal cycle without authority	Deemed an arrestable offence for the purposes of s. 2 of the Criminal Law Act 1967 (and therefore attracts the power of arrest under that section)
s. 25(4)	Going equipped for theft, burglary or cheating	Reasonable cause to suspect to be committing an offence
Sch. 1, paras 1(2) and 2(4)	Unlawfully taking or killing deer and unlawfully taking or destroying fish	Reasonable cause to suspect to be committing an offence

Table 9.3 Powers exercisable only where the name and address of the person cannot be ascertained and/or he is likely to abscond

Provision	Offence (brief details)	Power exercisable (brief details)	Condition attached to power before arrest can be made
Airports Authority Act 1975, s. 9(6)(a) and the Policing of Airports Act 1974, s. 4(3)(a)	Offences under airport byelaws	Reasonable cause to believe that person has contravened byelaw. (Power conferred only on constables appointed under the 1975 Act in the case of offences against that Act, and on "relevant" constables—ie constables for the area in which the airport is situated—in the case of offences against the 1974 Act)	If the constable does not know and cannot ascertain the person's name and address
Badgers Act 1973, s. 10	Any offence under the Act (unlawfully taking badgers *etc*)	Reasonable grounds for suspecting that an offence is being committed, or that an offence has been committed and that evidence of that commission is on the suspect or his property	If he fails to give his full name and address to the constable's satisfaction
Children and Young Persons Act 1933, s. 13(1)(a)	Offences set out in first schedule to the Act being offences against children and young persons (including murder, manslaughter, various sexual offences *etc*)	Any person who commits a relevant offence within the constable's view	If the constable does not know and cannot ascertain his name and residence
s. 13(1)(b)	Offences set out in the first schedule to the Act (see above)	Any person who has committed, or whom there is reason to believe has committed, a relevant offence	If there is reasonable ground for believing that the person will abscond or the constable does not know and cannot ascertain his name and address
Conservation of Seals Act 1970, s. 4	Any offence under the Act (use of unlawful methods for killing seals *etc*)	Suspects with reasonable cause of committing an offence	If he fails to give his name and address to the constable's satisfaction
Conservation of Wild Creatures and Wild Plants Act 1975, s. 10	Any offence under the Act (restrictions on killing *etc* protected wild creatures and wild plants)	Suspects with reasonable cause of committing or of having committed an offence	If he fails to give his name and address to the constable's satisfaction

Table 9.3 (continued)

Provision	Offence (brief details)	Power exercisable (brief details)	Condition attached to power before arrest can be made
Diseases of Animals Act 1950, s. 71(2)	Any offence under the Act	Any person seen or found committing or reasonably suspected of being engaged in committing an offence. (For the further power of arrest under s. 71(3), see Table 9.1 of this Appendix)	If his name and address are not known to the constable and he fails to give them to the satisfaction of the constable
Firearms Act 1968, s. 50(3)	Refusal or failure to give name and address, when asked to do so in consequence of failure to produce a firearms certificate	Any person who refuses to give name and address, or who is suspected of giving a false name and address or of intending to abscond	See preceding column
Game Act 1831, s. 31 (as amended by Game Laws (Amendment) Act 1960, s. 1(2))	Trespassing in search or pursuit of game *etc* in the daytime	Committing. (To be conveyed before a justice within 12 hours, otherwise released and proceeded against by summons or warrant)	If the person does not give real name and address, or continues or returns on land when required to quit and give his name and address
Licensing Act 1964, s. 187(5)	Failure or refusal to give name and address or answer questions to verify these when liquor is seized under the authority of a justice's warrant	Any person suspected of having committed the offence	
Metropolitan Police Act 1839, s. 63	Any offence under the Act or s. 52 of the Police Act 1964 (impersonating a police officer *etc*)	Any person who, within view of a Metropolitan Police constable, so offends	If the person's name and address are unknown to, and cannot be ascertained by, the constable
Misuse of Drugs Act 1971, s. 24	Any offences under the Act	Any person who has committed or who is suspected with reasonable cause to have committed an offence. (This power is declared by s. 24(2) to be without prejudice to any other power of arrest)	If there is reasonable cause to believe that the person will abscond unless arrested, or his name and address are unknown to the constable and cannot be ascertained by him, or the constable is not satisfied that the name and address given are true
Parks Regulation Act 1872, ss. 5 and 8	Offences against regulations concerning conduct in Royal Parks	Offence committed within view of park constable or constable for the area in which the park is situated	If name or residence of the offender is unknown to, and cannot be ascertained by, such constable

Table 9.3 (continued)

Provision	Offence (brief details)	Power exercisable (brief details)	Condition attached to power before arrest can be made
Prevention of Crime Act 1953, s. 1(3)	Having an offensive weapon in a public place without lawful authority or excuse	Any person believed with reasonable cause to be committing an offence	If the constable is not satisfied as to the person's identity or place of residence or has reasonable cause to believe that it is necessary to arrest him in order to prevent an offence in the course of which an offensive weapon might be used
Protection of Birds Act 1954, s. 12(1)	Any offence against the Act	Any person found committing an offence	If the person fails to give his name and address to the constable's satisfaction
Protection of Birds Act 1967, s. 11	Taking or destroying an egg of a protected bird	Any person suspected with reasonable grounds of having committed an offence	If the person fails to give his name and address to the constable's satisfaction
Public Meeting Act 1908, s. 1(3) (as added by Public Order Act 1936, s. 6)	Acting in a disorderly manner in order to break up a meeting	Reasonably suspects of committing an offence	If on being required to give his name and address by a constable (if so requested by the chairman of the meeting) the person refuses or fails to give his name and address, or the constable reasonably suspects him of giving a false name and address
Public Service Vehicles (Arrest of Offenders) Act 1975, s. 1	Misconduct on a public service vehicle	Suspects with reasonable cause that an offence has been committed	If the person refuses to give his name and address, or does not answer to the satisfaction of the constable questions put to him for the purpose of ascertaining whether the name and address are correct
Regulation of Railways Act 1889, s. 5(2)	Failure to pay or show ticket	Committing	If the person refuses or fails to give his name and address when requested to do so (by an officer or servant of the railway company)

Table 9.3 (continued)

Provision	Offence (brief details)	Power exercisable (brief details)	Condition attached to power before arrest can be made
Representation of the People Act 1949, s. 84(3)	Disturbance at election meetings	Reasonably suspects of committing an offence	If on being required to give his name and address by a constable (if so requested by the chairman of the meeting) the person refuses or fails to give his name and address, or the constable reasonably suspects him of giving a false name and address
Road Traffic Act 1972, s. 164(2)(a)	Driving a motor vehicle recklessly, or carelessly, or without reasonable consideration	Any person who within the constable's view commits an offence	If the person neither gives his name and address, nor produces his driving licence
s. 164(2)(b)	Riding a cycle recklessly, or carelessly, or without reasonable consideration	Any person who within the constable's view commits an offence	If the person does not give his name and address
Vagrancy Act 1824, s. 6 as restricted by Criminal Justice Act 1948, s. 68	Telling fortunes contrary to s. 4 of the 1824 Act	Any person found committing an offence	If the constable has reason to believe that the person will abscond unless arrested, or is not satisfied as to the identity or place of residence of the person

Table 9.4 Other miscellaneous powers

Provision	Power (brief details)
Airports Authority Act 1975, s. 11(2)(a)	To arrest without warrant any person employed by or on one of the Authority's airports whom the constable has reasonable grounds to suspect of having in his possession or conveying in any manner anything stolen or unlawfully obtained on the aerodrome. (Power conferred only on constables appointed under the Act. For the power of stop and search under the same subsection see Appendix 1)
Army Act 1955, s. 190B and Air Force Act 1955, s.190B (as added by the Armed Forces Act 1971)	To arrest without warrant any person who, having been sentenced by the service authorities to imprisonment or detention, is unlawfully at large during the currency of the sentence. (There are similar powers under s. 27 of the Auxiliary Forces Act 1953 in the event of embodiment and under s. 13 of the Visiting Forces Act 1952 in the event of a request from the appropriate authority of the country to which the person belongs)
Bail Act 1976, s. 7(3)	To arrest without warrant a person released on bail and under a duty to surrender into the custody of a court if the constable has reasonable grounds for believing that the person is not likely so to surrender, or that the conditions attached to bail have been or are likely to be broken, or where a surety notifies a constable in writing that the person is unlikely to surrender to custody and that therefore the surety wishes to be relieved of his obligations
Canals (Offences) Act 1840, s. 10	To take into custody without a warrant any loose, idle or disorderly person whom the constable shall find disturbing the public peace, or whom he shall have good reason to suspect of having committed or being about to commit any offence or breach of the peace or other offence contrary to the Act, and any person found at nighttime loitering or lying in or on the tow-path, wharfs *etc* of a canal, and not giving a satisfactory account of himself. (Power conferred only on constables appointed under the Act)
Children and Young Persons Act 1969, s. 28(2)	To detain a child or young person whom the constable has reasonable cause to believe to be neglected or ill-treated, or exposed to moral danger, or beyond his parents' control, or whom the constable has reasonable cause to believe that an appropriate court would take the view that it is probable that the child will be ill-treated or neglected, and also to detain any child or young person whom the constable has reasonable cause to believe to be a child or young person in respect of whom an offence is being committed under s. 10 of the Children and Young Persons Act 1933 (which penalises a vagrant who takes a juvenile from place to place)
Children and Young Persons Act 1969 s. 32(1) (as amended by the Children Act 1975, s. 68)	To arrest without warrant any child or young person absent without proper authority from a place of safety, or a place where he is living in the care of the local authority, or a remand home, special reception centre *etc*, and to take him back there at the expense of the appropriate person or authority
Criminal Justice Act 1972, s. 34	To take to a treatment centre any person whom the constable has power to arrest for certain offences of drunkenness
Domestic Violence and Matrimonial Proceedings Act 1976, s. 2	To arrest without warrant any person whom the constable reasonably suspects of being in breach of an injunction (restraining a spouse from using violence or from entering or coming within a certain area of the matrimonial home) to which the judge has attached a power of arrest, and to bring that person before a judge within 24 hours

Table 9.4 (continued)

Provision	Power (brief details)
Immigration Act 1971, Sch. 2, para 17	To arrest without warrant a person liable to be detained under the Act for examination or removal from the United Kingdom
Immigration Act 1971, Sch. 2, paras 24 and 33	To arrest without warrant a person bailed under the Act if the constable has reasonable cause to believe that the person is not likely to appear at the time and place required or that any other condition of bail has been, is being, or is likely to be broken; or where a surety provides written notification that the person is unlikely to surrender to custody, and that therefore the surety wishes to be relieved of his obligations
Mental Health Act 1959, s. 40	Where a patient is compulsorily admitted to hospital or subject to guardianship *etc* constables are among those empowered to take him into custody and return him to the proper place. (There are time limits—six months or 28 days according to the circumstances—within which this power must be exercised)
s. 136(1)	To remove to a place of safety any person whom the constable finds in a place to which the public has access and who appears to him to be suffering from mental disorder, and to be in immediate need of care or control, where the constable considers such removal to be in the interests of that person or for the protection of other persons. (Person arrested may be detained for up to 72 hours while treatment, care *etc* are arranged)
s. 140	To retake any mentally disordered person who has escaped from legal custody
Metropolitan Police Act 1839, ss. 38 and 39, and Metropolitan Fairs Act 1868, s. 2	Fairs in the Metropolitan Police District may not operate between 11 pm and 6 am. If any booth, caravan *etc* be open for business or amusement at the fair within those hours a constable may take into custody the person having its care or management and any person who does not quit when so told (s. 38). Section 39 provides that the Commissioner has power to inquire into the lawfulness of a fair. If a fair is declared unlawful by a magistrate then, subject to certain formalities, the Commissioner may direct officers to remove certain fairground equipment and arrest persons who are trying to pitch the fair, run a booth *etc*. There are similar procedures and powers under s. 2 of the 1868 Act if the fair at a particular site was not held there for each of the last seven years
s. 62	To apprehend with or without warrant any person who, within the Metropolitan Police District, by committing any offence "herein forbidden" has caused hurt or damage to any person or property. (The person is to be taken before a magistrate if he does not make amends to the satisfaction of the person aggrieved)
s. 64	To take into custody without a warrant any loose, idle or disorderly person whom the constable shall find disturbing the public peace, or whom he shall have good cause to suspect of having committed or being about to commit any offence or breach of the peace, and any person found at night-time lying or loitering in any highway, yard or other place and not giving a satisfactory account of himself. (Power conferred only on Metropolitan Police constables)
Municipal Corporations Act 1882, s. 193	To apprehend any idle and disorderly person whom a borough constable finds disturbing the public peace

Table 9.4 (continued)

Provision	Power (brief details)
Naval Discipline Act 1957, s. 104(1)	To arrest without warrant any person who having been sentenced by the service authorities to imprisonment or detention is unlawfully at large during the currency of the sentence
Pawnbrokers Act 1872, ss. 34 and 49	In certain events (eg, person offering article for pawn cannot say where he got it from; trying to redeem piedge when not entitled; uttering pawn ticket which the pawnbroker reasonably suspects to be forged) the pawnbroker may seize and detain the person and/or the article and deliver him/it into the custody of a constable who shall convey the person, if detained, before a justice. (Note: the whole of the 1872 Act is liable to repeal under the Consumer Credit Act 1974, s. 192(3) and Sch. 5)
Policing of Airports Act 1974, s. 3(1)(a)	To arrest without warrant in any designated airport any airport employee whom the constable has reasonable grounds to suspect of having in his possession or conveying in any manner anything stolen or unlawfully obtained on the aerodrome. (Power conferred only on "relevant" constables—ie, constables of the force within whose area the airport is situated. For the power of stop and search under the same subsection see Appendix 1)
Prevention of Terrorism (Temporary Provisions) Act 1976, s. 12(1)(b) and (c)	To arrest without warrant any person whom the constable reasonably suspects to be a person who is or has been concerned in the commission, preparation or instigation of acts of terrorism, or a person subject to an exclusion order. (For the power of arrest under s. 12(1)(a) see Table 9.2 of this Appendix)
Prison Act 1952, s. 49(1)	To arrest without warrant any person who, having been sentenced to imprisonment or detention, is unlawfully at large, and return him to the place of detention
Protection of Aircraft Act 1973, s. 19(1)	Where a constable has reasonable cause to suspect that a person about to embark on an aircraft in the United Kingdom intends to commit in relation to the aircraft one of certain offences (relating to hijacking *etc*) he may prohibit him from travelling on the aircraft, and for that purpose may prevent him or remove him, and arrest him without warrant and detain him for so long as is necessary for the purpose
Road Traffic Act 1972, s. 8(4)	To arrest without warrant any person (except a hospital patient) in respect of whom a breath test indicates that the proportion of alcohol in the blood exceeds the prescribed limit. (Breath tests may only be required by a constable in uniform)
s. 8(5)	To arrest without warrant any person (except a hospital patient) who fails to provide a specimen of breath for a breath test, and who the constable has reasonable cause to suspect of having alcohol in his body. (Breath tests may only be required by a constable in uniform)

APPENDIX 10

The use of equipment in police surveillance operations: extract from the general orders of one force.

1. *The use of equipment in police surveillance operations*

The use of certain equipment in police surveillance operations may involve encroachment on privacy. As a general principle, the primary purpose of using such equipment for aural or visual surveillance should be to help confirm or dispel a suspicion of serious crime, and not to collect evidence (except where, as in blackmail, the spoken word is the kernel of the offence). In each case officers should satisfy themselves that use of the particular equipment is:

(a) operationally necessary;

(b) operationally feasible; and

(c) justified in all the circumstances.

2. *Aural and visual surveillance*

The covert use in operations of listening, recording and transmitting equipment, and the covert use of visual surveillance equipment, including cameras and closed circuit television, but excluding, for this purpose, ordinary binoculars, requires the permission of the chief constable. In certain circumstances, as listed at Appendix A,[1] this authority has been delegated.

3. *Binoculars*

The covert use of ordinary binoculars will be at the discretion of chief inspectors.

4. *Administration*

In normal circumstances equipment will be held within the Technical Support Unit at force headquarters. Where time permits, written applications for the supply and use of the equipment will be submitted through chief superintendents to the chief constable under confidential cover.

In cases of urgency, where time does not allow this procedure to be followed, a personal approach to the appropriate authorising officer should be made by an officer not below the rank of superintendent and a confirmatory report submitted as soon as possible.

When approval has been given for the use of equipment, the Technical Support Unit Liaison Inspector will be informed and he will make the necessary

[1]Not appended

arrangements. A record will be kept of each authority given for the use of equipment, as in paragraph 1.1 to 1.6 in Appendix A,[1] indicating the nature of the case and broadly how the criteria in paragraph 1(a), (b) and (c) were met.

[1]Not appended

APPENDIX 11

Telephone calls (interception): Text of announcement in Parliament by the Home Secretary, House of Commons Official Report 1 April 1980, cols. 205–208.

Mr William Whitelaw: With permission, Mr Speaker, I shall make a statement on the interception of communications.

The House will recall that, following the Vice-Chancellor's judgment in *Malone v Commissioner of Police of the Metropolis*, my predecessor the right hon. Member for Leeds South (Mr Rees) informed the House on 8 March 1979 that he proposed to put in hand a study of the implications of that judgment. On 13 June 1979 I told the House that I had directed that this study should be continued to its completion, and would inform the House of my conclusions in due course.

Since that study began, a number of questions have been raised about the practice and extent of interception. The study has been completed. The Government have also made a thorough review of the procedures and conditions which, since the report of the Committee of Privy Councillors under the chairmanship of Lord Birkett in 1957, have been the basis of our arrangements in these matters. Over the years there have been minor changes of practice; but in all essentials the principles and procedures laid down by Birkett continue to be observed, including the fact that interception takes place only on the personal warrant of the Secretary of State. I have today published a Command Paper which sets out the Birkett principles and procedures as they operate today. It covers, as the Birkett report did, interception on behalf of the police, Her Majesty's Customs and Excise and the security service.

Information about interception in Northern Ireland is excluded from the command paper because the need to be able to combat terrorism there makes it undesirable to disclose any details. However, I can assure the House that the procedures, conditions and safeguards set out in the command paper are observed in Northern Ireland, subject only to the overriding requirements for dealing with terrorism. In particular, the personal authorisation of the Secretary of State for Northern Ireland has to be obtained for each individual interception.

The interception of communications, whether by the opening and reading of letters, or by recording and listening to telephone communications, is an interference with the freedom of the individual in a democratic society. None the less, when carried out by the properly constituted authorities it is justified if its aims and consequences help to protect the law abiding citizen from the

threats of crime and violence and the fabric of democracy from the menaces of espionage, terrorism and subversion.

Allegations have been made that interception is now practised on a vastly wider scale than at the time of the Birkett inquiry. I hope that the figures quoted in the Command Paper, which bring up to date those in the Birkett report, will provide reassurance on this score. There has been a modest overall increase in the total number of warrants signed and a change in the balance between telephone and letter interception which reflects the greatly increased use of the telephone since 1957. But, given the very considerable growth in serious crime and in particular the development of the terrorist threat during the intervening years, I believe that the figures demonstrate that the use of interception continues to be tightly controlled.

In his judgment in *Malone v Commissioner of Police of the Metropolis*, the Vice-Chancellor, Sir Robert Megarry, found that interception undertaken on behalf of the police under the warrant of the Secretary of State was not illegal. There is, therefore, no need for legislation to make duly authorised interception lawful. He drew attention to the fact that the restrictions and safeguards under which interception is conducted are, in this country, matters of administrative practice and not, as in some other countries, of statute. He went on to suggest that it was for consideration whether the procedures and conditions governing the use of interception should be embodied in legislation.

In their review, the Government have considered this suggestion with great care. The interception of communications is, by definition, a practice that depends for its effectiveness and value upon being carried out in secret, and cannot therefore be subject to the normal processes of parliamentary control. Its acceptability in a democratic society depends on its being subject to ministerial control, and on the readiness of the public and their representatives in Parliament to repose their trust in the Ministers concerned to exercise that control responsibly and with a right sense of balance between the value of interception as a means of protecting order and security and the threat which it may present to the liberty of the subject.

Within the necessary limits of secrecy, I and my right hon. Friends who are concerned are responsible to Parliament for our stewardship in this sphere. There would be no more sense in making such secret matters justiciable than there would be in my being obliged to reveal them in the House. If the power to intercept were to be regulated by statute, then the courts would have power to inquire into the matter and to do so, if not publicly, then at least in the presence of the complainant. This must surely limit the use of interception as a tool of investigation. The Government have come to the clear conclusion that the procedures, conditions and safeguards described in the Command Paper ensure strict control of interception by Ministers, are a good and sufficient protection for the liberty of the subject, and would not be made significantly more effective for that purpose by being embodied in legislation. The Government have accordingly decided not to introduce legislation on these matters.

The Government have, however, decided that it would be desirable if there were a continuous independent check that interception was being carried out in

accordance with the established purposes and procedures. We propose to invite a senior member of the judiciary to carry out this task. His terms of reference will be

> "To review on a continuing basis the purposes, procedures, conditions and safeguards governing the interception of communications on behalf of the police, HM Customs and Excise and the security service as set out in Cmnd Paper 7873; and to report to the Prime Minister".

He will have the right of access to papers, and the right to request additional information from the Departments and organisations concerned. For the purpose of his first report, which will be published, he will examine all the arrangements set out in Cmnd Paper 7873. His subsequent reports on the detailed operation of the arrangements will not be published, but Parliament will be informed of any findings of a general nature and of any changes that are made in the arrangements.

The Government believe that these standing arrangements for monitoring the operation and control of interception will be a valuable, additional assurance to Parliament and the public that the powers of interception are exercised strictly, sparingly and responsibly.

Judges' Rules and Administrative Directions to the Police

HOME OFFICE CIRCULAR NO. 89/1978:

Judges' Rules and Administrative Directions to the Police

The Chief Officer of Police

Sir,

I am directed by the Secretary of State to say that he is anxious to ensure that the Judges' Rules and the related Administrative Directions to the police are known by all police officers and readily available to all members of the legal profession and others who may be concerned with them. He has accordingly decided, with the agreement of the Lord Chief Justice, to re-issue the Rules and Directions taking account of related Home Office circulars issued since new Rules were made in 1964.

2. The Rules which are reproduced in Appendix A to this circular are identical to those issued under cover of Home Office circular No. 31/1964. The Judges have made it clear that the Rules are concerned with the admissibility in evidence against a person of answers, oral or written, given by that person to questions asked by police officers and of statements made by that person. In giving evidence as to the circumstances in which any statement was made or taken down in writing, officers must be absolutely frank in describing to the court exactly what occurred, and it will then be for the Judge to decide whether or not the statement tendered should be admitted in evidence. The Rules should constantly be borne in mind, as should the general principles which the Judges have set out before the Rules. But in addition to complying with the Rules, interrogating officers should always try to be fair to the person who is being questioned, and scrupulously avoid any method which could be regarded as in any way unfair or oppressive.

3. Appendix B contains the Administrative Directions to the Police, which have been revised to take account of relevant Home Office circulars issued since 1964. Attention is drawn to the following points at which the Directions differ from those issued in 1964:

(i) Home Office letter of May 31, 1968 on interviewing, fingerprinting and photographing children and young persons made it clear that the advice contained in the first sentence of paragraph 4 of the Directions should

be taken as relating to all persons under 17 years of age. Paragraph 4 of the Directions has been amended accordingly.

(ii) Home Office circular No. 66/1976 clarified the second paragraph of Administrative Direction 7(*a*), by pointing out, for the avoidance of doubt, that the sending of telegrams and letters by persons in police custody should be subject to the same proviso as telephone communications with the person's solicitors and friends (covered by the first paragraph of Direction 7 (*a*)). Administrative Direction 7 (*a*) has now been recast accordingly.

(iii) Home Office circular No. 109/1976 gave guidance on the need for special care in the interrogation of mentally handicapped persons. A new paragraph, 4A, now incorporates that guidance. The reference to a "social worker" as an example of the sort of person who might be asked to be present should not be narrowly interpreted—any person with a professional interest in the mentally handicapped would be suitable. Chief officers of police may find that if the Director of Social Services is approached locally it may be possible to make suitable arrangements in advance.

In addition, the heading but not the sense of Administrative Direction 5 has been altered.

4. Home Office circular No. 148/1977 set out arrangements for obtaining the services of competent interpreters in cases where police enquiries involve the questioning of a deaf person. For convenience, the substance of this circular is set out in Appendix C attached.

5. Section 62 of the Criminal Law Act provides that where any person has been arrested and is being held in custody in a police station or other premises, he shall be entitled to have intimation of his arrest and of the place where he is being held sent to one person reasonably named by him without delay or, where some delay is necessary in the interest of the investigation or prevention of crime or the apprehension of offenders, with no more delay than is so necessary. Guidance to the police on section 62 is contained in Home Office circular No. 74/1978. Paragraph 1 of that circular makes it clear that the provision in section 62 in no way detracts from the Judges' Rules and Administrative Directions.

I am, Sir,

Your obedient Servant,

R. T. ARMSTRONG.

Appendix A

JUDGES' RULES

Note

The origin of the Judges' Rules is probably to be found in a letter dated October 26, 1906, which the then Lord Chief Justice, Lord Alverstone, wrote to the Chief Constable of Birmingham in answer to a request for advice in consequence of the fact that on the same Circuit one Judge had censured a member of his force for having cautioned a prisoner, whilst another Judge had censured a constable for having omitted to do so. The first four of the pre-1964 Rules were formulated and approved by the Judges of the King's Bench Division in 1912; the remaining five in 1918. They were much criticised, *inter alia* for lack of clarity and of efficacy for the protection of persons who were questioned by police officers; on the other hand it was maintained that their application unduly hampered the detection and punishment of crime. A Committee of Judges devoted considerable time and attention to producing, after consideration of representative views, a new set of Rules which was approved by a meeting of all the Queen's Bench Judges and issued in 1964.

The Judges control the conduct of trials and the admission of evidence against persons on trial before them; they do not control or in any way initiate or supervise police activities or conduct. As stated in paragraph (*e*) of the introduction to the present Rules, it is the law that answers and statements made are only admissible in evidence if they have been voluntary in the sense that they have not been obtained by fear of prejudice or hope of advantage, exercised or held out by a person in authority, or by oppression. The Rules do not purport to envisage or deal with the many varieties of conduct which might render answers and statements involuntary and therefore inadmissible. The Rules merely deal with particular aspects of the matter. Other matters such as affording reasonably comfortable conditions, adequate breaks for rest and refreshment, special procedures in the case of persons unfamiliar with the English language or of immature age or feeble understanding, are proper subjects for administrative directions to the police.

JUDGES' RULES

These Rules do not affect the principles

(a) That citizens have a duty to help a police officer to discover and apprehend offenders;

(b) That police officers, otherwise than by arrest, cannot compel any person against his will to come to or remain in any police station;

(c) That every person at any stage of an investigation should be able to communicate and to consult privately with a solicitor. This is so even if he is in custody provided that in such a case no unreasonable delay or hindrance is caused to the processes of investigation or the administration of justice by his doing so;

(d) That when a police officer who is making enquiries of any person about an offence has enough evidence to prefer a charge against that

person for the offence, he should without delay cause that person to be charged or informed that he may be prosecuted for the offence;

(e) That it is a fundamental condition of the admissibility in evidence against any person, equally of any oral answer given by that person to a question put by a police officer and of any statement made by that person, that it shall have been voluntary, in the sense that it has not been obtained from him by fear of prejudice or hope of advantage, exercised or held out by a person in authority, or by oppression.

The principle set out in paragraph (*e*) above is overriding and applicable in all cases. Within that principle the following Rules are put forward as a guide to police officers conducting investigations. Non-conformity with these Rules may render answers and statements liable to be excluded from evidence in subsequent criminal proceedings.

RULES

I. When a police officer is trying to discover whether, or by whom, an offence has been committed he is entitled to question any person, whether suspected or not, from whom he thinks that useful information may be obtained. This is so whether or not the person in question has been taken into custody so long as he has not been charged with the offence or informed that he may be prosecuted for it.

II. As soon as a police officer has evidence which would afford reasonable grounds for suspecting that a person has committed an offence, he shall caution that person or cause him to be cautioned before putting to him any questions, or further questions, relating to that offence.

The caution shall be in the following terms:

"You are not obliged to say anything unless you wish to do so but what you say may be put into writing and given in evidence."

When after being cautioned a person is being questioned, or elects to make a statement, a record shall be kept of the time and place at which any such questioning or statement began and ended and of the persons present.

III.*(a)* Where a person is charged with or informed that he may be prosecuted for an offence he shall be cautioned in the following terms:

"Do you wish to say anything? You are not obliged to say anything unless you wish to do so but whatever you say will be taken down in writing and may be given in evidence."

(b) It is only in exceptional cases that questions relating to the offence should be put to the accused person after he has been charged or informed that he may be prosecuted. Such questions may be put where they are necessary for the purpose of preventing or minimising harm or loss to some other person or the public or for clearing up an ambiguity in a previous answer or statement.

Before any such questions are put the accused should be cautioned in these terms:

"I wish to put some questions to you about the offence with which you have been charged (*or* about the offence for which you may be

prosecuted). You are not obliged to answer any of these questions, but if you do the questions and answers will be taken down in writing and may be given in evidence."

Any questions put and answers given relating to the offence must be contemporaneously recorded in full and the record signed by that person or if he refuses by the interrogating officer.

(c) When such a person is being questioned, or elects to make a statement, a record shall be kept of the time and place at which any questioning or statement began and ended and of the persons present.

IV. All written statements made after caution shall be taken in the following manner:

(a) If a person says that he wants to make a statement he shall be told that it is intended to make a written record of what he said. He shall always be asked whether he wishes to write down himself what he wants to say; if he says that he cannot write or that he would like someone to write it for him, a police officer may offer to write the statement for him. If he accepts the offer the police officer shall, before starting, ask the person making the statement to sign, or make his mark to, the following:

"I,....., wish to make a statement. I want someone to write down what I say. I have been told that I need not say anything unless I wish to do so and that whatever I say may be given in evidence."

(b) Any person writing his own statement shall be allowed to do so without any prompting as distinct from indicating to him what matters are material.

(c) The person making the statement, if he is going to write it himself, shall be asked to write out and sign before writing what he wants to say, the following:

"I make this statement of my own free will. I have been told that I need not say anything unless I wish to do so and that whatever I say may be given in evidence."

(d) Whenever a police officer writes the statement, he shall take down the exact words spoken by the person making the statement, without putting any questions other than such as may be needed to make the statement coherent, intelligible and relevant to the material matters; he shall not prompt him.

(e) When the writing of a statement by a police officer is finished the person making it shall be asked to read it and to make any corrections, alterations or additions he wishes. When he has finished reading it he shall be asked to write and sign or make his mark on the following Certificate at the end of the statement:

"I have read the above statement and I have been told that I can correct, alter or add anything I wish. This statement is true. I have made it of my own free will."

(f) If the person who has made a statement refuses to read it or to write

the above mentioned Certificate at the end of it or to sign it, the senior police officer present shall record on the statement itself and in the presence of the person making it, what has happened. If the person making the statement cannot read, or refuses to read it, the officer who has taken it down shall read it over to him and ask him whether he would like to correct, alter or add anything and to put his signature or make his mark at the end. The police officer shall then certify on the statement itself what he has done.

V. If at any time after a person has been charged with, or has been informed that he may be prosecuted for an offence a police officer wishes to bring to the notice of that person any written statement made by another person who in respect of the same offence has also been charged or informed that he may be prosecuted, he shall hand to that person a true copy of such written statement, but nothing shall be said or done to invite any reply or comment. If that person says that he would like to make a statement in reply, or starts to say something, he shall at once be cautioned or further cautioned as prescribed by Rule III(*a*).

VI. Persons other than police officers charged with the duty of investigating offences or charging offenders shall, so far as may be practicable, comply with these Rules.

Appendix B

ADMINISTRATIVE DIRECTIONS ON INTERROGATION AND THE TAKING OF STATEMENTS

1. *Procedure generally*

(a) When possible statements of persons under caution should be written on the forms provided for the purpose. Police officers' notebooks should be used for taking statements only when no forms are available.

(b) When a person is being questioned or elects to make a statement, a record should be kept of the time or times at which during the questioning or making of a statement there were intervals or refreshment was taken. The nature of the refreshment should be noted. In no circumstances should alcoholic drink be given.

(c) In writing down a statement, the words used should not be translated into "official" vocabulary; this may give a misleading impression of the genuineness of the statement.

(d) Care should be taken to avoid any suggestion that the person's answers can only be used in evidence against him, as this may prevent an innocent person making a statement which might help clear him of the charge.

2. *Record of interrogation*

Rule II and Rule III(*c*) demand that a record should be kept of the following matters:

(a) when, after being cautioned in accordance with Rule II, the person is being questioned or elects to make a statement—of the time and place at which any such questioning began and ended and of the persons present;

(b) when, after being cautioned in accordance with Rule III(*a*) or (*b*) a person is being questioned or elects to make a statement—of the time and place at which any questioning and statement began and ended and of the persons present.

In addition to the records required by these Rules full records of the following matters should additionally be kept:

(a) of the time or times at which cautions were taken, and

(b) of the time when a charge was made and/or the person was arrested, and

(c) of the matters referred to in paragraph 1(*b*) above.

If two or more police officers are present when the questions are being put or the statement made, the records made should be countersigned by the other officers present.

3. *Comfort and refreshment*

Reasonable arrangements should be made for the comfort and refreshment of persons being questioned. Whenever practicable both the person being ques-

tioned or making a statement and the officers asking the questions or taking the statement should be seated.

4. *Interrogation of children and young persons*

As far as practicable children and young persons under the age of 17 years (whether suspected of crime or not) should only be interviewed in the presence of a parent or guardian, or in their absence, some person who is not a police officer and is of the same sex as the child. A child or young person should not be arrested, nor even interviewed, at school if such action can possibly be avoided. Where it is found essential to conduct the interview at school, this should be done only with the consent, and in the presence, of the head teacher, or his nominee.

4A. *Interrogation of mentally handicapped persons*

(a) If it appears to a police officer that a person (whether a witness or a suspect) whom he intends to interview has a mental handicap which raises a doubt as to whether the person can understand the questions put to him, or which makes the person likely to be especially open to suggestion, the officer should take particular care in putting questions and accepting the reliability of answers. As far as practicable, and where recognised as such by the police, a mentally handicapped adult (whether suspected of crime or not) should be interviewed only in the presence of a parent or other person in whose care, custody or control he is, or of some person who is not a police officer (for example a social worker).

(b) So far as mentally handicapped children and young persons are concerned, the conditions of interview and arrest by the police are governed by Administrative Direction 4 above.

(c) Any document arising from an interview with a mentally handicapped person of any age should be signed not only by the person who made the statement, but also by the parent or other person who was present during the interview. Since the reliability of any admission by a mentally handicapped person may even then be challenged, care will still be necessary to verify the facts admitted and to obtain corroboration where possible.

5. *Statements in languages other than English*

In the case of a person making a statement in a language other than English:

(a) The interpreter should take down the statement in the language in which it is made.

(b) An official English translation should be made in due course and be proved as an exhibit with the original statement.

(c) The person making the statement should sign that at (*a*).

Apart from the question of apparent unfairness, to obtain the signature of a suspect to an English translation of what he said in another language can have little or no value as evidence if the suspect disputes the accuracy of this record of this statement.

6. *Supply to accused persons of written statement of charges*

(a) The following procedure should be adopted whenever a charge is preferred against a person arrested without warrant for any offence:

As soon as a charge has been accepted by the appropriate police officer the accused person should be given a written notice containing a copy of the entry in the charge sheet or book giving particulars of the offence with which he is charged. So far as possible the particulars of the charge should be stated in simple language so that the accused person may understand it, but they should also show clearly the precise offence in law with which he is charged. Where the offence charged is a statutory one, it should be sufficient for the latter purpose to quote the section of the statute which created the offence.

The written notice should include some statement on the lines of the caution given orally to the accused person in accordance with the Judges' Rules after a charge has been preferred. It is suggested that the form of notice should begin with the following words:

"You are charged with the offence(s) shown below. You are not obliged to say anything unless you wish to do so, but whatever you say will be taken down in writing and may be given in evidence."

(b) Once the accused person has appeared before the court it is not necessary to serve him with a written notice of any further charges which may be preferred. If, however, the police decide, before he has appeared before a court, to modify the charge or to prefer further charges, it is desirable that the person concerned should be formally charged with the further offence and given a written copy of the charge as soon as it is possible to do so having regard to the particular circumstances of the case. If the accused person has then been released on bail, it may not always be practicable or reasonable to prefer the new charge at once, and in cases where he is due to surrender to his bail within forty-eight hours or in other cases of difficulty it will be sufficient for him to be formally charged with the further offence and served with a written notice of the charge after he has surrendered to his bail and before he appears before the court.

7. *Facilities for defence*

(a) A person in custody should be supplied on request with writing materials.

Provided that no hindrance is reasonably likely to be caused to the processes of investigation or the administration of justice:

(i) he should be allowed to speak on the telephone to his solicitor or to his friends;

(ii) his letters should be sent by post or otherwise with the least possible delay;

(iii) telegrams should be sent at once, at his own expense.

(b) Persons in custody should not only be informed orally of the rights and facilities available to them, but in addition notices describing them should be displayed at convenient and conspicuous places at police stations and the attention of persons in custody should be drawn to these notices.

Appendix C

POLICE ENQUIRIES INVOLVING DEAF PERSONS

When, in the course of police inquiries, it becomes necessary to ask questions of a deaf person, there is sometimes difficulty in arranging for the proceedings to be interpreted with sufficient clarity, especially when such persons have no useful hearing and can only communicate manually by means of finger-spelling and signing. In these circumstances the services of competent interpreters for the deaf may be required. It has been agreed with the Association of Directors of Social Services and the Royal National Institute for the Deaf that Directors of Social Services will, on request, designate points of contact (which may, depending on local circumstances, be an office of the local authority or of a voluntary organisation) through which arrangements for securing the services of interpreters can be made. Chief officers of police are therefore requested to get in touch with Directors of Social Services locally so that arrangements for designating a point of contact can be made.

In cases of difficulty The Royal National Institute for the Deaf, 105 Gower Street, London WC1E 6AH (telephone number 01-387 8033) will be glad to advise.

APPENDIX 13

Origin and history of the Judges' Rules

The implications of the law of evidence and its application by the courts for the investigation of crime were first defined for the police in an authoritative way by Lord Brampton (formerly Mr Justice Hawkins) in a Preface to Vincent's Police Code (1882), where he said of questioning:

> "Much discussion has on various occasions arisen touching the conduct of the police in listening to, and repeating, statements of accused persons. I will try, therefore, to point out what I think is the proper course for a constable to take with regard to such statements.
>
> *Questioning; when Permissible:* When a crime has been committed, and you are engaged in endeavouring to discover the author of it, there is no objection to you making enquiries of, or putting questions to, any person from whom you think you can obtain useful information. It is your duty to discover the criminal if you can, and to do this you must make such enquiries; and if in the course of them you should chance to interrogate and to receive answers from a man who turns out to be the criminal himself, and who inculpates himself by these answers, they are nevertheless admissible in evidence, and may be used against him.
>
> *When not Permissible:* When, however, a constable has a warrant to arrest, or is about to arrest a person on his own authority, or has a person in custody for a crime, it is wrong to question such person touching the crime of which he is accused. Neither judge, magistrate, nor juryman, can interrogate an accused person—unless he tenders himself as a witness—or require him to answer questions tending to incriminate himself. Much less, then, ought a constable to do so, whose duty as regards that person is simply to arrest and detain him in safe custody. On arresting a man a constable ought simply to read his warrant, or tell the accused the nature of the charge upon which he is arrested, leaving it to the person so arrested to say anything or nothing as he pleases. For a constable to press any accused person to say anything with reference to the crime of which he is accused is very wrong. It is well also that it should be generally known that if a statement made by an accused person is made under, or in consequence of, any promise or threat, even though it amounts to an absolute confession, it cannot be used against the person making it. There is, however, no objection to a constable listening to any mere voluntary statement which a prisoner desires to make, and repeating such statement in evidence; nor is there any objection to his repeating in evidence any

conversation he may have heard between the prisoner and any other person. But he ought not, by anything he says or does, to invite or encourage an accused person to make any statement without first cautioning him that he is not bound to say anything tending to incriminate himself, and that anything he says may be used against him. Perhaps the best maxim for a constable to bear in mind with respect to an accused person is, 'Keep your eyes and your ears open, and your mouth shut'. By silent watchfulness you will hear all you ought to hear. Never act unfairly to a prisoner by coaxing him by word or conduct to divulge anything. If you do, you will assuredly be severely handled at the trial, and it is not unlikely your evidence will be disbelieved."

2. This clear and authoritative guidance issued by a judge in a police guide marks an important departure, and may be considered the forerunner of the present Judges' Rules. The origin of those rules as such however lies in a letter which the Chief Constable of Birmingham sent to the Lord Chief Justice in 1906 asking for advice following one case in which a judge disapproved of a caution and another in which a judge criticised its omission. In reply the Lord Chief Justice advised that the approved practice was that whenever a constable determined to made a charge against a man he should caution him before taking a statement from him. The Lord Chief Justice went on to suggest that the words "against you" should be omitted from the usual caution ("You are not obliged to say anything unless you wish to, but anything you say will be written down and may be used in evidence against you,") on the ground that the man might just as well say something in his favour as against him.

3. From this modest beginning the Judges' Rules have grown. Four rules were in existence by 1912. In 1918 there were nine. These rules remained in force until 1964. They were as follows:

"1. When a police officer is endeavouring to discover the author of a crime, there is no objection to his putting questions in respect thereof to any person or persons, whether suspected or not, from whom he thinks that useful information can be obtained.

2. Whenever a police officer has made up his mind to charge a person with a crime, he should first caution such person before asking any questions, or any further questions, as the case may be.

3. Persons in custody should not be questioned without the usual caution being first administered,

4. If the prisoner wishes to volunteer any statement the usual caution should be administered.

It is desirable that the last two words of the usual caution should be omitted, and that the caution should end with the words 'be given in evidence'.

5. The caution to be administered to a prisoner, when he is formally charged, should therefore be in the following words: 'Do you wish to say anything in answer to the charge? You are not obliged to say anything unless you wish to do so, but whatever you say will be taken down in writing and may be given in evidence.'

Care should be taken to avoid any suggestions that his answers can only be used in evidence against him, as they may prevent an innocent person making a statement which might assist to clear him of the charge.

6. A statement made by a prisoner before there is time to caution him is not rendered inadmissible in evidence merely by reason of no caution having been given, but in such a case he should be cautioned as soon as possible.

7. A prisoner making a voluntary statement must not be cross-examined, and no questions should be put to him about it except for the purpose of removing ambiguity in what he has actually said. For instance, if he has mentioned an hour without saying whether it was morning or evening, or has given a day of the week and day of the month which do not agree, or has not made it clear to what individual or what place he intended to refer in some part of his statement, he may be questioned sufficiently to clear up the point.

8. When two or more persons are charged with the same offence, and statements are taken separately from the persons charged, the police should not read these statements to the other persons charged, but each of such persons should be furnished by the police with a copy of such statements and nothing should be said or done by the police to invite a reply. If the person charged desires to make a statement in reply, the usual caution should be administered.

9. Any statement made in accordance with the above rules should, whenever possible, be taken down in writing and signed by the person making it after it has been read to him and he has been invited to make any corrections he may wish."

4. These rules were confirmed in 1930 when the Home Office issued a circular of guidance to the police (following consultations with the Judges) to deal with some points raised by the Royal Commission on Police Powers and Procedure, which had reported the previous year (Cmd 3297). Subsequently further guidance was issued by the Home Office on the use of interpreters, taking written statements, and administrative matters of that kind.

5. Matters remained in this form until the early 1960s when the Rules and attendant circulars were reviewed. In 1964 the revision was issued to the police under cover of Home Office Circular 31/1964, which was subsequently published.

6. The published document falls into a number of parts. First there is the Home Office circular, which explains the main changes made, and sets out the underlying basis of the rules. Secondly, there is a note which sets out briefly the origin of the Rules, and explains the nature of the rules. In the second part of this preamble there is a statement of certain fundamental principles which are not affected by the rules. Thirdly, there are the Rules proper. These had been revised by a Committee of Judges and approved by a meeting of all the Queen's Bench Judges. And, fourthly, there are some administrative directions drawn up by the Home Office and approved by the judges.

7. These Rules remain in force today. They were supplemented, so far as the police are concerned, by the issue of two Home Office circulars in 1968 and 1976 giving further guidance on particular points of doubt which had arisen in connection with the administrative directions, and in 1976 a circular was also issued on the interrogation of mentally handicapped persons. In June 1978 a revised edition of the Judges' Rules and Administrative Directions incorporating the guidance given in these circulars was published.

APPENDIX 14

Text of Home Office circular No 74/1978 to chief officers of police concerning section 62 of the Criminal Law Act 1977, dated 28 April 1978.

The Criminal Law Act 1977 (Commencement No 5) Order 1977 will bring section 62 of the Criminal Law Act 1977 into force on 19 June 1978. Section 62 provides that—

> "Where any person has been arrested and is being held in custody in a police station or other premises, he shall be entitled to have intimation of his arrest and of the place where he is being held sent to one person reasonably named by him, without delay or, where some delay is necessary in the interest of the investigation or prevention of crime or the apprehension of offenders, with no more delay than is so necessary."

This circular, which contains guidance on the implementation of the section, has been drawn up in consultation with the Association of Chief Police Officers and others concerned. There has also been consultation with the Lord Chief Justice. Section 62 in no way detracts from the provisions of the Judges' Rules and the Administrative Directions to the Police. It is recognised that much of what follows already takes place as a standard procedure within police forces.

Information to the arrested person

2. When a person is arrested (with or without warrant) after the section has come into force, and is taken into custody, the terms of the section should be drawn to his attention. This should be done on arrival at the police station by the station officer and/or duty officer receiving the arrested person into custody. It will be for chief officers to decide the precise way in which this should be done. One possibility is for a notice outlining the provisions of section 62 to be displayed in conspicuous places at police stations to which the attention of arrested persons can be drawn. Alternatively, chief officers may wish to arrange to have leaflets available explaining the provisions of section 62 which can be handed to arrested persons. Where, exceptionally, an arrested person is held in custody in premises other than a police station, or it is clear that there will be some delay before he is taken to a police station, he should be told of the terms of the section by the senior police officer present. (See also paragraph 22 below.)

Initial steps on receiving a request

3. In some cases it is the responsibility of the police to initiate action to notify a parent, relative or other person of an arrest, even if the arrested

person does not himself make a request for this to be done. This is especially important in the case of mentally handicapped persons, children and young persons (see also paragraph 16 below) and nationals of certain foreign or Commonwealth states (see also paragraph 19 below). In these cases, and wherever there may be some doubt as to the capacity of the arrested person to understand his entitlement under section 62, the police should follow their normal practice of automatically seeking to notify a responsible person or the appropriate authorities of the arrest of the person concerned. In the majority of cases, however, it will be for the arrested person to decide whether he wishes to make use of the entitlement given to him by section 62. In most cases where he wishes to do so he will no doubt inform the officer who draws his attention to the terms of the section. However, if he makes no immediate request, it will nonetheless remain open to him to do so at any time while he is in custody. Similarly a request within the terms of section 62 which is made *before* the arrested person has been informed formally of his entitlement (for example one made in the police car on the way to the police station) will be a valid request for the purposes of section 62, and should be treated accordingly.

4. If a person in custody asks for a person to be informed of his arrest and of the place where he is being held, the effect of the Act is to require intimation to be sent to the person named without delay unless:

(i) the choice of person is not reasonable, or

(ii) some delay is necessary in the interest of the investigation or prevention of crime or the apprehension of offenders (in which case there is to be no more delay in sending the intimation than is necessary).

Reasonably named person

5. When a request is made the police should therefore first consider whether the person to be notified is a "reasonably named" person. In most cases a person in custody will name a member of his family or a solicitor as the person whom he wishes to be informed of his detention, and such a person should normally be considered "reasonably named". Where some other individual is named, and it is clear that he is known personally to the person in custody (eg a flat-mate or neighbour) he should normally be considered a reasonably named person. So should an individual not personally known to the arrested person if he is likely to take an interest in his welfare (eg a community worker or an official of an organisation likely to take such an interest). If the person names an organisation, but does not know the name of an official within it, the police should take account both of the likelihood of that organisation being concerned with the welfare of the arrested person, and also of the readiness with which they may be able to contact an official at the relevant time. If, however, the person in custody names someone who is not personally acquainted with him and cannot be expected to take an immediate interest in his welfare (eg famous pop star, football player or Government Minister not being the person's own Member of Parliament) then the arrested person should be informed that that person is not "reasonably named". If the person in custody then names a "reasonably named" person his request should be met without delay, provided that it is otherwise within the terms of the section. If the arrested person nominates a person who is not in the United Kingdom, the

Channel Islands or the Isle of Man he should be informed that that person is not "reasonably named".

Use of the proviso

6. When a request is made consideration will also need to be given to the possible application of that part of section 62 which provides that intimation may be delayed in the interest of the investigation or prevention of crime or the apprehension of offenders for so long as this is so necessary (but no longer). It will be for the station officer and/or duty officer, in consultation with the officer in charge of the case, to decide when this qualification applies (see also paragraph 21 below). The qualification will no doubt be particularly relevant where the arrested person is, or may be, associated with others involved in crime, or where the family of the arrested person, or a person living at the same address, may be aware of his criminal activities and there is a risk, for example, that stolen property will be disposed of, or evidence destroyed. In such cases immediate intimation may lead to the escape of other offenders, the destruction of evidence or the commission of other offences. It will therefore be appropriate to delay the intimation until such considerations have ceased to apply. Where the police decide that the qualification is to apply the arrested person should be informed that his request for an intimation to be conveyed is being delayed.

7. The following are some examples of situations when it may be considered necessary to delay an intimation—

(i) The police have arrested one member of a terrorist gang, and consider that immediate intimation of his arrest carries the risk that other members will escape and be able to continue their activities.

(ii) They have arrested a man in the act of conveying stolen goods to a receiver, and wish to conduct a search of the area for the receiver; immediate notification may lead to his escape.

(iii) A person suspected of being a persistent shoplifter is arrested and there is reason to believe that the family, if notified, will move or destroy the proceeds of previous thefts.

(iv) The police have arrested a member of a bank robbery gang and immediate intimation may lead to the destruction of evidence or threats to witnesses.

The Secretary of State recognises however that no list of possible situations in which the qualification may be appropriately exercised can be comprehensive. Equally, however serious the offence under investigation, the qualification set out in the latter part of section 62 should never be applied as a matter of routine, but only after a careful review of the considerations which apply in that particular case.

Conveying an intimation

8. Section 62 entitles the arrested person only to have intimation *sent* to a reasonably named person. Nevertheless the Secretary of State is sure that chief officers will take such steps as are reasonably practicable to ensure that an intimation is received by the person to whom it is addressed within a reasonable

period. He recognises however that there will be some cases where there can be no absolute assurance that the intimation has reached the person named.

9. Where the named person can be reached by telephone the intimation should be so conveyed. Alternatively, the arrested person may wish to name someone else with whom a telephone message can be left. In some cases it may be necessary to send a police officer to notify the named person personally; if so, it may be possible to combine this task with the perfomance of other duties in connection with the same, or some other enquiry. In cases where a person is arrested at his home in the presence of his relatives or of someone who is likely to be named as the person to whom intimation is to be conveyed, it is suggested that the arresting officer should wherever practicable inform the latter person of the police station to which the arrested person is being taken. It will then be clear, when the arrested person is informed of his entitlement on arrival at the police station, that the provisions of the section have already been complied with and that no further action by the police is required.

10. The Secretary of State fully recognises the burdens that the police are already carrying in dealing with crime, and in the course of their other duties. He is concerned therefore to ensure that the additional duties placed on the police by section 62 of the Criminal Law Act 1977 are kept to a minimum, commensurate with the proper observance of the section. It is for that reason among others that he suggests that the intimation should wherever possible be conveyed by telephone rather than by a police officer in person. Nevertheless he recognises that in some circumstances the duty of informing a named person will impose considerable extra duties on the police, and that the question of priorities will arise, particularly in busy urban police stations at peak periods.

He recognises that there may be periods when officers engaged on other urgent duties (for example, dealing with a large number of youths arrested during an outbreak of football hooliganism) cannot justifiably be spared to undertake a series of telephone calls or to pay a personal visit to the named person. In such cases, the police will no doubt follow their normal practice of giving priority to those cases where intimation is particularly pressing on humanitarian grounds (eg where the intimation affects the welfare of children). It is, however, important in all cases that a request for intimation should not be lost sight of, and that it should be attended to as soon as the other urgent duties permit. Chief officers will no doubt take steps to ensure that this is clearly understood, and that the importance of conveying an early intimation is appreciated, within their forces.

Persons about to be released

11. Another set of considerations arises where the arrested person is likely to be released on bail after only a short period in custody. Where such a person wishes to exercise his entitlement under section 62 it is open to the police to inform him that he will soon be released, and he may then decide to withdraw his request. If it becomes clear in the course of attempting to fulfil a request that this will materially add to the time before the person in custody can be released (by reason of preoccupying the time of the officers who would otherwise be dealing with him) the arrested person should be informed of this.

However, if, in either event, the person in custody persists with his request, his wishes should be observed.

12. If it has not proved possible to convey an intimation to the named person by the time the person in custody is released by either the police or a magistrates' court the request should be regarded as having lapsed. It may occasionally happen that a person appears in court and is remanded in custody before it has proved possible to convey an intimation to the named person. In these circumstances, the request should not be regarded as having lapsed and the police should try to ensure that an intimation is conveyed, even though the arrested person is no longer detained at a police station.

Intimation in other police areas

13. In some cases the arrested person will name a person in the area of another force as the person to whom the intimation is to be conveyed. If so the force carrying out the arrest should itself attempt to convey the intimation to the person named by telephone. In some cases it may be necessary however to ask the force for the area where the named person is to convey the intimation, but it is hoped that such cases will be few.

14. It is open to the person in custody to name a person living in Scotland, Northern Ireland, the Channel Islands or Isle of Man as the person to be notified. In such a case the procedure set out in the preceding paragraphs should be adopted. Police forces in other parts of the United Kingdom and in the Channel Islands and Isle of Man have agreed to assist in the implementation of section 62 by conveying the intimation, if this should be necessary. (The procedure for getting in touch with the Royal Ulster Constabulary is set out in the Annex to the circular.) Police forces in England and Wales are asked to reciprocate by conveying a similar intimation received from those police forces.

15. No charge should be made for telephone calls, *etc* in the course of meeting a request to police under section 62.

Children and young persons

16. Section 62 applies to juveniles, ie, children and young persons under 17 years of age, as well as to adults. Juveniles who have been arrested and are being held in custody should therefore be informed of the terms of section 62 in accordance with paragraph 2 of this circular. Where a juvenile is living with one or both of his parents, the existing legal requirement[1] that the person who arrests a juvenile shall take such steps as may be practicable to inform at least one of his parents or guardians will also satisfy the entitlement under section 62. This is because a child or young person, when informed of the terms of section 62, will almost invariably ask for his parents to be informed. But there may be occasions when a juvenile (eg a 16 year old living away from home) will nominate someone other than a parent, perhaps an employer, youth leader,

[1]See section 34(2) of the Children and Young Persons Act 1933 (as substituted by section 25(1) of the Children and Young Persons Act 1963 and amended by para. 3 of schedule 5 to the Children and Young Persons Act 1969). See also para. 9.14 of the Consolidated Circular on Crime and Kindred Matters, 1977 Edition.

probation officer or another relative or person living at the same address. The fact that the police have a statutory duty to inform the parent or guardian under section 34(2) of the 1933 Act should not prevent the juvenile's request from being considered within the terms of section 62. In some cases the police may wish to consult the parent or guardian; if the latter object to such a person being informed, the police should take this into account in considering whether or not that person is reasonably named for the purpose of section 62.

17. Since many juveniles who are arrested are held for only short periods, normally until their parents collect them, the advice in paragraphs 11 and 12 above is particularly relevant to juveniles. Normally, for instance, it would be unreasonable to spend police time on a personal visit to a named person other than a parent or guardian, when the juvenile is shortly to be released from custody.

18. The provisions of paragraph 4 of the Administrative Directions appended to the Judges' Rules will continue to apply to the interviewing of children and young persons.

Commonwealth citizens or foreign nationals in custody

19. Chief officers are reminded of the importance attached to the arrangements for notifying High Commissions, Embassies or consulates when citizens of other Commonwealth countries or foreign nationals are held in custody. In particular there is a requirement to notify the appropriate consular officer automatically in cases involving the arrest of a national of a foreign state with which the United Kingdom has entered into a bilateral Consular Convention. The entitlement under section 62 should be regarded as being additional to the need to notify the appropriate authorities in cases of this kind. The relevant guidance is being included in amendments to the Consolidated Circular on Crime and Kindred Matters.

Prevention of terrorism legislation

20. The provisions of the section apply to persons arrested under the Prevention of Terrorism (Temporary Provisions) Act 1976, in the same way as to persons arrested under other statutory and common law powers.

Arrest by persons other than police officers[1]

21. There will be occasions when a person is arrested by someone other than an officer from a "regular" police force (for example, by an officer of the British Transport Police or other "private" police force or of a Government Department such as Customs and Excise or by a store detective); and in the majority of such cases, the arrested person is likely to be taken to the police station of a regular police force. The section imposes a duty on those who for the time being have the custody of the arrested person unless those who had custody of him earlier have already sent the intimation required by the section. It will accordingly be for the station officer and/or duty officer to ensure that the arrested person is made aware of his entitlement under section 62, and that

[1]In this and the following para. a "regular" police force means one maintained under the Police Act 1964.

appropriate action is taken with regard to a request made in consequence. If the arresting officer (being an officer from a private police force or of a Government Department) objects to the person named or considers it right to apply the proviso that the intimation should be delayed in the interest of investigation or prevention of crime or the apprehension of offenders, the station officer and/or duty officer should give due regard to the views of the arresting officer and request a recommendation in writing to this effect.

22. Where an arrested person is held in custody at premises other than the police station of a regular police force or it is clear that there will be some delay before he is taken to such a police station, it is the responsibility of the senior officer present to inform him of the terms of section 62.

APPENDIX 15

Notifications under s. 62: extract from Home Office Statistical Bulletin Issue 5/80 (mimeo)

Table 15.1 Persons arrested in England and Wales by time before action taken to notify person nominated under section 62 of the Criminal Law Act 1977

Period	Number of persons not dealt with within 4 hours		Number of persons not dealt with within 24 hours (included also in previous column)		Number of persons arrested
	Number	Per 10000 arrests	Number	Per 10000 arrests	Thousands
1978					
June 19–30	156	31	9	1.8	50.3
July	200	19	26	2.4	106.7
August	132	12	16	1.5	107.3
September	138	13	15	1.4	107.6
October	117	10	13	1.2	111.7
November	107	10	11	1.0	110.0
December	109	11	12	1.2	98.3
1979					
January	91	9	12	1.2	96.7
February	107	11	12	1.2	100.0
March	99	9	8	1.0	116.1
April	89	8	12	1.0	115.4
May	90	8	15	1.3	119.9
June	70	6	8	1.0	119.3
July	96	8	14	1.2	121.1
August	112	10	28	2.4	117.7
September	88	8	17	1.5	114.6
October	96	8	18	1.5	119.7
November	107	9	26	2.2	116.9
December	72	7	9	0.8	108.6
Total 19 June 1978–31 December 1979	2076	10	281	1.4	2058.0

Table 15.2 Persons arrested by time before action taken to notify person nominated under section 62 of the Criminal Law Act 1977 by police force area

Police force area	Number of persons not dealt with within 4 hours		Number of persons not dealt with within 24 hours (included also in previous column)		Number of persons arrested	
	Number	Per 10000 arrests	Number	Per 10000 arrests	Thousands	Per 1000[1] population
Avon and Somerset	11	4	—	—	29.5	22
Bedfordshire	10	7	1	0.7	14.5	29
Cambridgeshire	15	10	2	1.3	14.9	26
Cheshire	9	5	—	—	17.4	19
Cleveland	13	6	—	—	22.7	40
Cumbria	6	6	—	—	10.7	23
Derbyshire	4	2	—	—	16.4	18
Devon and Cornwall	16	8	4	2.1	19.4	14
Dorset	18	17	—	—	10.8	18
Durham	4	3	—	—	13.6	22
Essex	42	16	6	2.3	26.5	19
Gloucestershire	1	1	—	—	9.7	20
Greater Manchester	8	1	—	—	88.3	33
Hampshire	42	10	11	2.7	40.9	26
Hertfordshire	7	4	1	0.6	16.1	20
Humberside	14	5	2	0.7	27.2	32
Kent	23	7	4	1.2	33.7	23
Lancashire	—	—	—	—	33.9	25
Leicestershire	20	10	2	1.0	19.8	24
Lincolnshire	22	19	2	1.7	11.5	22
London, City of	47	134	2	5.7	3.5	628
Merseyside	2	—	1	0.2	59.4	38
Metropolitan Police District	486	15	116	3.5	330.4	45
Norfolk	17	21	—	—	8.1	12
Northamptonshire	7	5	—	—	12.9	25
Northumbria	20	3	3	0.5	59.1	41
North Yorkshire	9	9	2	2.0	10.0	15
Nottinghamshire	—	—	—	—	27.7	28
South Yorkshire	—	—	—	—	38.5	30
Staffordshire	14	6	1	0.4	24.0	24
Suffolk	11	10	1	0.9	11.5	19
Surrey	12	7	—	—	16.7	23
Sussex	39	12	1	0.3	32.1	25
Thames Valley	50	13	5	1.3	37.3	21
Warwickshire	6	11	4	7.4	5.4	12
West Mercia	40	20	5	2.5	19.9	20
West Midlands	2	—	—	—	73.4	27
West Yorkshire	4	1	—	—	52.7	25
Wiltshire	4	6	—	—	7.0	14
Total England	1055	8	176	1.3	1307.1	28

[1]Persons arrested may not reside in the area in which they were arrested. This particularly applies to city areas.

Table 15.2 (continued)

Police force area	Number of persons not dealt with within 4 hours		Number of persons not dealt with within 24 hours (included also in previous column)		Number of persons arrested	
	Number	Per 10000 arrests	Number	Per 10000 arrests	Thousands	Per 1000[1] population
Dyfed-Powys	6	9	1	1.5	6.5	15
Gwent	43	30	2	1.4	14.2	32
North Wales	8	9	—	—	9.4	15
South Wales	5	2	—	—	28.9	22
Total Wales	62	11	3	0.5	59.0	21
Total England and Wales	1117	8	179	1.3	1336.1	28

[1]Persons arrested may not reside in the area in which they were arrested. This particularly applies to city areas.

APPENDIX 16

Extract from the Home Office consolidated circular to the police on crime and kindred matters (1977 edition) dealing with medical examinations

Medical Examinations

Prisoner arrested on a charge of a sexual offence

4.22 When a prisoner has been arrested on a charge of rape, indecent assault or some other sexual offence, it is often desirable in the interest of justice that he should submit to a medical examination: and it is important that the examination should be so conducted as to protect the doctor from risk of an action being subsequently brought against him by the prisoner. If an examination is carefully made an innocent man is not likely to suffer, but cogent evidence may be obtained against the guilty.

4.23 The examination can be made only with the prisoner's consent; in the absence of consent any examination would be an assault. The police officer in charge of the station should inform the prisoner that it is proposed to examine him, and that he has the right to object if he desires. He should be told that if he desires the attendance of a qualified medical practitioner on his behalf, in addition to the police surgeon, an opportunity for this will be given. The officer should record (a) the fact of the prisoner's consent or refusal, and (b) the offer made to allow a doctor to attend on his behalf and the acceptance or refusal or the offer. The record should be read to the prisoner, and the officer should attend the trial in the event of a committal in order to prove the consent if necessary.

4.24 When consent is given, the examination should be made as soon as practicable after the prisoner is in custody and has been removed to the police station, and before he is taken before a magistrate. The police surgeon should record in writing the result of any examination, and he should be informed of the time and place where his attendance will be required to give evidence before the magistrate.

Prisoners who ask for medical examination

4.25 When a prisoner is in custody on any other charge and desires a medical examination, the examination should be made either by the police surgeon or by a doctor attending on behalf of the prisoner. The officer in charge of the station should record the prisoner's request and the compliance with it. It is important that medical examination of the prisoner should not be delayed owing to the non-arrival either of the police surgeon or of the private

doctor, and the examination by either doctor should therefore take place as soon as possible after his arrival at the station. An examination by a private doctor will usually be conducted in the presence of the police surgeon, but if he is not in attendance at the time it should be conducted in the presence of the station officer. A police surgeon who completes his examination before the arrival of the private doctor should be requested to await the examination by the latter. A private doctor who completes his examination before the arrival of the police surgeon should be informed of the impending examination by the latter, in order that he may, if he so desires, be present.

Persons in police custody who appear to be ill or drunk

4.26 There is often difficulty in deciding whether a defendant's condition at the time of arrest can properly be ascribed to alcohol; and so the police should not bring a charge involving drunkenness if there is any probability of the fact being disputed, without first getting the best evidence they can obtain on the subject. This applies with special force when a defendant's character and antecedents are generally good, and he is therefore likely to use every means open to him to escape a conviction involving drunkenness. The evidence of a doctor called in to a police station immediately after the arrest of the alleged offender may often be desirable. The examination must be subject to the precautions mentioned in paragraph 4.13 above. If drunkenness is denied by a defendant and is proved by the prosecution, the court may properly be asked to order the defendant to pay the costs involved in calling evidence on the point, in addition to any penalty that may be imposed.

4.27 Special care should be taken over the treatment of persons suffering from illness, the arrangements for their care at the police station and during proceedings in court, and the manner in which they are taken from the police station to the court. A person who appears to be drunk may be suffering from illness (eg multiple sclerosis, or a diabetic's hypoglycaemia); or may have sustained an injury which is not apparent. A doctor should be called if there is the slightest suspicion that a person detained may be ill, particularly if there appear to be symptoms of drunkenness without the smell of alcohol. If a doctor has attended and certified that the prisoner is fit to be detained, the station officer should seek his advice on how frequently to visit the prisoner and should not hesitate to recall the doctor if that seems necessary or if the prisoner's condition does not appear to be improving. The following measures are suggested for dealing with persons thought to be drunk—

(1) A person who is found unconscious should be taken to hospital even if he smells of drink or there are other grounds for suspecting that he is in a drunken stupor.

(ii) If a person arrested for an offence involving drunkenness is unconscious on arrival at the police station, a doctor should be summoned. If a doctor cannot attend quickly, the patient should be transferred to hospital by ambulance.

(iii) If a prisoner, although not unconscious, is incapable of understanding the meaning of the charge, charging him should be delayed until he has sufficiently recovered to appreciate the nature of the proceedings.

If he has not recovered to that extent within four hours, a doctor should be summoned.

(iv) A prisoner who is drunk should be visited every half-hour, and aroused and spoken to on each visit. If he fails to respond, or if there is any noticeable evidence of deterioration in his condition, a doctor should be summoned.

(v) A prisoner who is drunk and drowsy should be placed flat in a three-quarters prone position with his head turned to one side so that he will not inhale his vomit.

4.28 Care should also be taken to prevent the unnecessary committal to prison of persons physically unfit for prison treatment (eg pregnant women and persons suffering from illness likely soon to end fatally); and for this purpose a prisoner's examination by the police surgeon or other doctor may be desirable. If the prisoner is found to be suffering from serious illness, a full report on his state of health should be submitted to the court before which he is brought.

4.29 A person coming into the hands of the police may carry documentary evidence of his medical condition. In particular—

(a) an identification card (coloured blue) is issued to patients receiving steroid therapy. A patient undergoing treatment with steroids may be endangered if the treatment is interrupted; and if any person coming into the hands of the police has such an identification card in his possession medical advice should be sought as soon as possible;

(b) identification cards are issued by the British Diabetic Association and by the Multiple Sclerosis Society to sufferers from those diseases;

(c) the Medic-Alert Foundation, 9 Hanover Street, London W1R 9HF supplies, on payment, a metal wrist bracelet indicating a medical condition or allergy. The bracelet is a stainless steel chain with a stainless disc bearing on one side in red a medical emblem incorporated a rod and a serpent flanked by the words "MEDIC-ALERT". On the reverse of the disc is engraved the appropriate medical warning (eg "Allergic to penicillin" or "Epilepsy"), the serial number allotted by the Foundation to the person, and the emergency telephone enquiry number of the Foundation (01-407 2818). Additional information about the medical condition of the wearer can be obtained by telephoning that number and quoting the serial number engraved on the disc.

When a person who is ill or injured comes to the notice of the police and is found to be carrying one of these (or any other) evidence of a medical condition, this should be brought to the attention of any member of the medical services (including the ambulance service) who comes into contact with him, so that the appropriate treatment may be given.

APPENDIX 17

The use of complaints, disciplinary and criminal proceedings

1. This Appendix presents statistics on the use of complaints procedures, the type and results of complaints and the number of disciplinary and criminal proceedings brought against police officers.

2. Table 17.1 shows the number of complaints completed and the outcome of those complaints for the first two full years since the Police Complaints Board began its work in June 1977.

Table 17.1. Complaints completed in 1978 and 1979 and their outcome

Year	Result of complaint: substantiated		unsubstantiated[1]		withdrawn or not proceeded with		Total
	No.	%	No.	%	No.	%	No.
1978	1559	5.5	13720	48.6	12955	45.9	28234
1979	1338	4.6	14104	48.0	13941	47.5	29383

[1]Includes complaints in respect of which the Police Complaints Board granted dispensation from the normal requirements, under the Police (Withdrawn, Anonymous etc Complaints) Regulations 1977. A complaint is defined as unsubstantiated if there turns out to be no substance in it or if for some other reason disciplinary action is not possible or is inappropriate.

3. In both years, slightly fewer than 30,000 individual matters of complaint were completed. A little under half of these were withdrawn or not proceeded with. In 1979 48 per cent of complaints were found to be unsubstantiated (48.6 per cent in 1978) and 4.6 per cent were substantiated (5.5 per cent in 1978).

4. Table 17.2 shows, for complaints completed in 1979, the kinds of incidents which were alleged to have occurred in relation to complaints that were proceeded with. The table also shows whether or not these complaints were substantiated.

Table 17.2. Type of complaints and outcome in relation to complaints that were proceeded with in 1979

Type of complaint	Outcome				Total
	unsubstantiated		substantiated		
	No.	%	No.	%	No.
Incivility	1816	92.0	158	8.0	1974
Assault	2887	96.7	98	3.3	2985
Irregularity in procedure	2722	90.7	279	9.3	3001
Traffic irregularity	476	86.4	75	13.6	551
Neglect of duty	1114	75.8	356	24.2	1470
Corrupt practice	116	95.9	5	4.1	121
Mishandling of property	201	78.5	55	21.5	256
Irregularity in relation to evidence/perjury	688	97.3	19	2.7	707
Oppressive conduct or harassment	1170	84.7	65	5.3	1235
Other crime	599	94.2	37	5.8	636
Other	1537	88.9	191	11.1	1728
Total	13326	90.9	1338	9.1	14664

5. As can be seen, the three most frequently cited allegations involved incivility, assault and irregularity in procedure. Incivility, irregularity in procedure and neglect of duty featured most prominently amongst substantiated complaints, accounting for six out of ten of them.

6. Table 17.3 shows the type of proceedings that followed from substantiated complaints. Formal disciplinary proceedings were not thought to be necessary in respect of most substantiated complaints and 82.2 per cent of them were dealt with without recourse either to disciplinary or criminal proceedings, for example by a word of warning or advice from a senior officer. Formal disciplinary action was taken in 10.9 per cent of substantiated complaints, and criminal proceedings other than for traffic offences in respect of 4.4 per cent of them.

Table 17.3. Substantiated complaints by type of proceedings that resulted

Type of proceedings	number of complaints
Disciplinary proceedings	146
Criminal proceedings (other than for traffic offences)	59
Proceedings for traffic offences	45
Dealt with by other means	1096
Total substantiated complaints[1]	1338

[1]As a complaint may result in proceedings of more than one type, the figures do not add up to the total number of substantiated complaints.

Cases referred to the DPP

7. Section 49 of the Police Act 1964 provides that, unless the chief constable is satisfied from the report of the investigation into a complaint that no criminal offence has been committed, he must send the report to the Director

of Public Prosecutions for his independent scrutiny and advice on whether criminal proceedings should be instituted. In 1979, 3,992 criminal (other than traffic) cases were so referred and the Director recommended proceedings in respect of 63 (1.6 per cent) of them. In addition, 469 cases relating to traffic offences were referred to the Director, who recommended proceedings in 59 (12.6 per cent) of them. (It should be noted that these figures relate to *cases* which may contain more than one individual matter of complaint.)

Police officers convicted of criminal offences

8. The number of officers in England and Wales convicted of criminal offences (including traffic offences) in 1979 was 908. The majority of these, 781, were convicted of traffic offences and 42 were disqualified from driving. Of the 127 officers convicted of offences other than traffic offences, 38 were sentenced to imprisonment. The number of officers dismissed or required to resign as a result of disciplinary action following conviction was 59. In addition, 57 officers resigned after criminal charges had been preferred against them but before such proceedings were completed.

Discipline

9. Tables 17.4 and 17.5 give information about disciplinary proceedings and their outcome. Charges were brought and completed against 736 officers and one or more charges were proved against 691 (94 per cent) of them. It will be seen that only 157 (21 per cent) of the 736 proceedings arose directly out of complaints by members of the public.

Table 17.4. Police officers against whom disciplinary charges were brought and completed

Result of disciplinary proceedings	Reasons for investigation		
	Complaint	Other circumstances	Total
One or more charges were found proved	139	552	691
No charges were proved	18	27	45
Total number of officers	157	549	736

Details of punishments awarded as a result of disciplinary proceedings are given in Table 17.5. Where an officer received more than one punishment only the most serious is shown. In most cases officers were fined; 22 were dismissed and 46 were required to resign. In addition, during the year 28 officers resigned after disciplinary charges had been preferred against them but before the proceedings were completed.

Table 17.5. Police officers punished as a result of disciplinary proceedings

Most serious punishment awarded by the chief officer	number of officers
Dismissal	22
Requirement to resign	46
Reduction in rank	27
Reduction in pay	33
Fine	339
Reprimand	169
Caution	55
Total	691

The police discipline code (extracted from the Police (Discipline) Regulations 1977—SI 1977 No 580)

Disciplinary offences

5. A member of a police force commits an offence against discipline if he commits an offence set out in the discipline code contained in Schedule 2.

SCHEDULE 2 Regulation 5

Discipline Code

1. *Discreditable conduct,* which offence is committed where a member of a police force acts in a disorderly manner or any manner prejudicial to discipline or reasonably likely to bring discredit on the reputation of the force or of the police service.

2. *Misconduct towards a member of a police force,* which offence is committed where—

(a) the conduct of a member of a police force towards another such member is oppressive or abusive, or

(b) a member of a police force assaults another such member.

3. *Disobedience to orders,* which offence is committed where a member of a police force, without good and sufficient cause, disobeys or omits or neglects to carry out any lawful order, written or otherwise, or contravenes any provision of the Police Regulations containing restrictions on the private lives of members of police forces, or requiring him to notify the chief officer of police that he, or a relation included in his family, has a business interest, within the meaning of those Regulations.

4. *Neglect of duty,* which offence is committed where a member of a police force, without good and sufficient cause—

(a) neglects or omits to attend to or carry out with due promptitude and diligence anything which it is his duty as a member of a police force to attend to or carry out, or

(b) fails to work his beat in accordance with orders, or leaves the place of duty to which he has been ordered, or having left his place of duty for an authorised purpose fails to return thereto without undue delay, or

(c) is absent without leave from, or is late for, any duty, or

(d) fails properly to account for, or to make a prompt and true return of, any money or property received by him in the course of his duty.

5. *Falsehood or prevarication,* which offence is committed where a member of a police force—

(a) knowingly or through neglect makes any false, misleading or inaccurate oral or written statement or entry in any record or document made, kept or required for police purposes, or

(b) either wilfully and without proper authority or through lack of due care destroys or mutilates any record or document made, kept or required for police purposes, or

(c) without good and sufficient cause alters or erases or adds to any entry in such a record or document, or

(d) has knowingly or through neglect made any false, misleading or inaccurate statement in connection with his appointment to the police force.

6. *Improper disclosure of information,* which offence is committed where a member of a police force—

(a) without proper authority communicates to any person, any information which he has in his possession as a member of a police force, or

(b) makes any anonymous communication to any police authority, or any member of a police force, or

(c) without proper authority, makes representations to the police authority or the council of any county comprised in the police area with regard to any matter concerning the force, or

(d) canvasses any member of that authority or of such a council with regard to any such matter.

For the purposes of this paragraph the Isles of Scilly shall be treated as if they were a county.

7. *Corrupt or improper practice,* which offence is committed where a member of a police force—

(a) in his capacity as a member of the force and without the consent of the chief officer of police or the police authority, directly or indirectly solicits or accepts any gratuity, present or subscription, or

(b) places himself under a pecuniary obligation to any person in such a manner as might affect his properly carrying out his duties as a member of the force, or

(c) improperly uses, or attempts to use, his position as a member of the force for his private advantage, or

(d) in his capacity as a member of the force and without the consent of the chief officer of police, writes, signs or gives a testimonial of character or other recommendation with the object of obtaining employment for any person or of supporting an application for the grant of a licence of any kind.

8. *Abuse of authority,* which offence is committed where a member of a police force—

(a) without good and sufficient cause makes an arrest, or

(b) uses any unnecessary violence towards any prisoner or other person with whom he may be brought into contact in the execution of his duty, or

(c) is uncivil to any member of the public.

9. *Neglect of health,* which offence is committed where a member of a police force, without good and sufficient cause, neglects to carry out any instructions of a medical officer appointed by the police authority or, while absent from duty on account of sickness, commits any act or adopts any conduct calculated to retard his return to duty.

10. *Improper dress or untidiness,* which offence is committed where without good and sufficient cause a member of a police force while on duty, or while off duty but wearing uniform in a public place, is improperly dressed or is untidy in his appearance.

11. *Damage to police property,* which offence is committed where a member of a police force—

(a) wilfully or through lack of due care causes any waste, loss or damage to any police property, or

(b) fails to report as soon as is reasonably practicable any loss of or damage to any such property issued to, or used by him, or entrusted to his care.

12. *Drunkenness,* which offence is committed where a member of a police force renders himself unfit through drink for duties which he is or will be required to perform or which he may reasonably foresee having to perform.

13. *Drinking on duty or soliciting drink,* which offence is committed where a member of a police force, while on duty—

(a) without proper authority, drinks, or receives from any other person, any intoxicating liquor, or

(b) demands, or endeavours to persuade any other person to give him, or to purchase or obtain for him, any intoxicating liquor.

14. *Entering licensed premises,* which offence is committed where a member of a police force—

(a) while on duty, or

(b) while off duty but wearing uniform,

without good and sufficient cause, enters any premises in respect of which a licence or permit has been granted in pursuance of the law relating to liquor licensing or betting and gaming or regulating places of entertainment.

15. *Criminal conduct,* which offence is committed where a member of a police force has been found guilty by a court of law of a criminal offence.

16. *Being an accessory to a disciplinary offence,* which offence is committed where a member of a police force connives at or is knowingly an accessory to any offence against discipline.

APPENDIX 19

Extracts from Home Office circular 63/1977: police complaints and discipline procedures

B. Recording and counting of complaints

Definition of a complaint

5. The requirement to record a complaint under section 49 of the Police Act 1964 does not extend to complaints about the general administration, efficiency or procedures of the force which do not amount to a complaint about the conduct of an individual officer. If, after initial inquiries, a complaint recorded as a section 49 complaint is found not to be a section 49 complaint, the record should be marked accordingly.

6. All section 49 complaints must be referred in due course to the Complaints Board unless they fall within one of the exclusions set out in section 2(2) of the 1976 Act, namely:

(a) where the complaint concerns an officer covered by the Police (Discipline) (Senior Officers) Regulations 1977;

(b) where the complaint has been withdrawn or the complainant has indicated that he does not wish any further steps to be taken—see paragraphs 24 to 27 below[1];

(c) where disciplinary charges have been preferred in respect of the matter or matters complained of and the officer has admitted the charges—see paragraph 103[1];

or unless the Board have dispensed with the relevant statutory requirements under Regulation 4 of the Police (Withdrawn, Anonymous etc Complaints) Regulations 1977 . . .

C. Responsibility for handling of complaints and disciplinary matters

17. It is clearly desirable that in the great majority of cases in which disciplinary charges are eventually brought, the chief constable should have no prior knowledge of the case until it comes before him at a formal hearing under the Discipline Regulations. The Discipline Regulations and the Police (Complaints) (General) Regulations accordingly provide that all the functions exercised by a chief officer under section 49 of the Police Act 1964, sections 2, 3, 4(5) or 5(2) and (3) of the Police Act 1976 or under the Regulations, with the exception of those concerned with the actual hearing, are capable of delegation to the deputy chief constable. In accordance with established

[1]Not cited.

practice, therefore, the deputy chief constable should normally be responsible for the recording and investigation of complaints and other allegations of disciplinary offences, take any decision on the report of the investigating officer and conduct any subsequent dealings with the Complaints Board. Accordingly this circular refers to the chief constable and the deputy chief constable (by which should also be understood an assistant chief constable acting in his place) in relation to the duties which as a rule they respectively perform. In the City of London police the duties in question may be delegated by the commissioner to an assistant commissioner (or to a commander acting in his place); in the Metropolitan Police, they may be delegated by the commissioner to an assistant commissioner or deputy assistant commissioner (or, in the case of duties under the Discipline Regulations only, to a commander where the case arises out of a complaint by a member of the public and to a commander or chief superintendent in any other case) . . .

Timing of investigations

(a) Criminal proceedings

39. Special considerations arise in regard to the timing of the investigation of a complaint under section 49 of the 1964 Act against a police officer where the complaint is related in some aspect to pending criminal proceedings against a member of the public, for example against the complainant or his friends. There may also be difficulty in investigating a complaint where the related trial has been completed but an appeal is pending. It appears to the Secretary of State appropriate that chief officers should adhere to the practices set out in Annex F to this circular, which have the agreement of the Director of Public Prosecutions. The Registrar of Criminal Appeals has also been consulted where appropriate and is of the opinion that the proposed practices will be of value to the Court of Appeal. The practice of consultation by chief officers with the Director of Public Prosecutions on any matter concerning the handling of investigations in cases of special difficulty is unaffected by what is said in the Annex . . .

(b) Civil proceedings

40. It would not be right to refrain from a thorough investigation of a complaint or from bringing disciplinary charges, if that seems appropriate, merely because a complainant might decide to pursue a civil action. The chief constable is not relieved of his disciplinary responsibility simply because of the possibility that a complainant might decide to pursue the matter in a civil court. If, however, a complainant has actually begun a civil action, or has given positive indication that he intends to do so, there may well be difficulties in pursuing matters as far as a disciplinary hearing, although some form of investigation of the complaint is likely to be necessary, eg, in order to prepare for the civil action. Where, therefore, a complainant indicates that he proposes to take civil action it would be right to make it clear to the complainant that his complaint will be investigated to the extent possible, but that any disciplinary action (if appropriate) will not normally be taken until the proceedings in the civil courts have been finished. In deciding whether to defer disciplinary action, the deputy chief constable will, however, need to consider,

not only the likelihood of civil proceedings, but the effect of deferment on the maintenance of force discipline and the interests of the officer concerned . . .

E. Consideration of and action on investigation report

Action by the deputy chief constable

44. When the deputy chief constable receives the report of the investigating officer in a case arising out of a complaint he will need first to consider whether to send the report to the Director of Public Prosecutions in compliance with section 49(3) of the 1964 Act. Thereafter he will consider the disciplinary aspects *either* immediately if it is unnecessary to refer the case to the Director *or* upon receiving the Director's decision as to criminal proceedings where the case is referred.

45. *(a)* Where the case does not arise out of a complaint, the deputy chief constable will decide whether it would be appropriate to bring a disciplinary charge or charges under Regulation 8 of the Discipline Regulations against the officer concerned and, if he does not bring such charges, whether any other action is appropriate to deal with the matter. He may proceed with the preferring and arrangements for the hearing of any charges that he wishes to bring. The Complaints Board are not involved.

(b) Where the case does arise out of a complaint, the deputy chief constable will consider whether it would be appropriate to bring a disciplinary charge or charges against the officer concerned, and if he thinks not, whether any action other than the bringing of disciplinary charges is appropriate. Where he does not propose to bring disciplinary charges he will need to refer the case to the Complaints Board for their consideration. Where he does propose to bring a disciplinary charge he may refer it but if the charge is not admitted, the chief constable may not proceed to a hearing since the Complaints Board have to decide whether the case justifies a tribunal hearing . . .

The role of the Director of Public Prosecutions

47. Section 49(3) of the 1964 Act requires that, unless a chief officer is satisfied that no criminal offence has been committed, he must send to the Director of Public Prosecutions the report of the investigation into a complaint made by a member of the public against a police officer. This provision extends to all types of criminal offences, including traffic and minor offences, and allows no discretion to the deputy chief constable to decide to refer to the Director only those cases where the alleged criminal offence appears to be serious. Nor is the requirement met by referring only those cases where, in the deputy chief constable's view, there is sufficient evidence to show that a criminal offence has been committed: he must be positively satisfied from the report that no such offence has been committed before he can decide not to refer the case.

48. The possibility that a police officer should be charged with a criminal offence may come to notice without anyone making a formal complaint, for example, where a possible offence has been reported by another police officer. Such cases, unless they are of a trivial nature, should be referred to the

Director for advice, even though the circumstances of the offence have required a charge to be preferred forthwith.

49. When a case has been referred to the Director, it is his responsibility to consider whether further inquiries should be made or additional statements taken; and it is open to him to suggest that further inquiries should be undertaken by an officer from another force.

50. The Director will himself inform a complainant direct of his decision whether or not a police officer complained of should be prosecuted. The Director does not give reasons for his decision, but where the decision is against prosecution, the replies sent to the complainant and the deputy chief constable will normally indicate whether he considers that the evidence is insufficient to justify criminal proceedings or that criminal proceedings are not necessary in the public interest. The Director may sometimes indicate to the deputy chief constable that, although criminal proceedings are not appropriate, it is still open to him to consider disposing of the matter by means of disciplinary action.

The relationship between criminal and disciplinary proceedings

51. Section 11 of the 1976 Act states the principle that no officer who has been charged with and either acquitted or convicted of a criminal offence should be charged with a disciplinary offence which is in substance the same as that criminal offence. Apart from this it is not practicable to lay down absolute rules but there are a number of other considerations which may be relevant to the avoidance of double jeopardy in a case which has both criminal and disciplinary aspects.

52. Where it seems that a police officer has committed a criminal offence, the fact that he is a police officer subject to a discipline code is no sufficient reason to refrain from prosecuting him, particularly if the case is one in which proceedings would be taken against a member of the public. It therefore follows that misconduct which amounts to a criminal offence should not be dealt with under the discipline code as an alternative to criminal proceedings when the latter are clearly justified. Nor would it be proper to appear to have recourse to disciplinary proceedings simply because it was thought impossible to establish a criminal charge to the satisfaction of a court of law.

53. In some cases the alleged criminal offence is in itself unimportant and not serious enough to justify prosecution, but it would be entirely proper in the public interest that the misconduct should be dealt with as a matter of internal discipline. An instance of such misconduct might be a technical assault upon another member of the force (which is particularly specified as an offence against discipline in the discipline code).

54. There are cases in which, in addition to the circumstances pointing to a criminal offence, there are other elements which involve a breach or breaches of discipline. For example, a constable may have left his beat or other place of duty without authority or good cause, in circumstances which suggest that he was responsible for breaking into adjoining property. The evidence may be insufficient to justify prosecution for the criminal offence of say, burglary, but

there is no reason why the officer should not be dealt with for disobedience to orders, or neglect of duty in respect of his action in leaving his beat. Again, a man may be suspected of having misappropriated money or property entrusted to him, but evidence which is essential to support a criminal charge may be lacking. There may, however, be evidence that he has failed to account properly for the money or property, and in such circumstances it would be right to deal with the matter as a disciplinary charge. It is important in such cases that the charge is not framed in such a way as to suggest that the disciplinary authority is purporting to decide whether or not a criminal offence has been committed.

55. In some cases, the decision (of the Director or of the deputy chief constable) whether to bring proceedings may turn on the willingness of a complainant to give evidence in a criminal court. Generally speaking, disciplinary proceedings should not be brought in cases where a finding of guilt would depend upon the evidence of a complainant who was unwilling to give it in criminal proceedings; but where other evidence to prove a disciplinary offence is available proceedings should not be ruled out solely because the complainant's attitude prevents the possibility of criminal prosecution.

56. Where an allegation against a police officer has first been the subject of criminal investigation and it has been decided after reference to the Director (or otherwise) that criminal proceedings should *not* be taken, there should normally be no disciplinary proceedings if the evidence required to substantiate a disciplinary charge is the same as that required to substantiate the criminal charge. There will be cases, however, in which disciplinary proceedings would be appropriate as in the circumstances described in paragraphs 53 and 54 above. It must not be assumed that when the Director has decided not to institute criminal proceedings this must automatically mean that there should be no disciplinary proceedings.

57. Where a disciplinary charge is brought in a case in which the Director has decided that there should be no prosecution, the accused officer should be supplied with a copy of the Director's letter notifying his decision, unless the deputy chief constable, after such consultation with the Director as may be necessary, considers that there are special reasons against doing so in a particular case.

F. Complaints cases: functions of the Complaints Board

Summary of procedures

64. . . . It should be noted that where a case has been referred to the Director under section 49(3) of the 1964 Act there is no reference to the Complaints Board until the Director has reached his decision on the case (section 5(1) of the 1976 Act) and that the Board are concerned only with the disciplinary aspect of the matter or matters complained of.

65. If on consideration of the investigating officer's report the deputy chief constable decides not to bring formal disciplinary proceedings he will refer the case to the Complaints Board. If the Complaints Board accept that no disciplinary charges are called for they will notify the deputy chief constable

accordingly, who will tell the officer concerned, and themselves notify the complainant, sending a copy of their notification to the deputy chief constable. If the Complaints Board are not satisfied they may ask the police for further information, and may discuss the matter with the deputy chief constable either before or after this is provided. In the last resort they may direct that disciplinary charges be brought.

66. Disciplinary charges may be brought by the deputy chief constable in three circumstances:

(a) when he first considers the investigating officer's report and without reference to the Board. There is no requirement in the 1976 Act that he should obtain authority from the Board to prefer charges . . .

(b) after discussion with the Complaints Board as a result of which he has accepted their recommendation that charges should be brought . . .

(c) on the direction of the Complaints Board, failing agreement under *(b)*.

If the officer, when notified of the charge(s), states that he admits the charge(s) the Complaints Board have no concern (or further concern) in the case, although they will be notified of the outcome of the case and the punishment awarded by the chief officer in due course . . . If the officer, when notified of the charge(s), indicates that he intends to deny the charge(s), and the charge was brought in the circumstances described in *(a)* or *(b)* above the case may be heard either by the chief constable sitting alone or by a disciplinary tribunal comprising the chief constable as chairman and two members of the Board. (In either case, where the case has been remitted under Regulation 14 of the Discipline Regulations, the chief constable's place will be taken by another chief constable.) Where a charge is brought in the circumstances described in *(c)*, a disciplinary tribunal will always be held if the officer states that he denies the charge(s).

67. The Complaints Board will decide in each case after considering a recommendation from the deputy chief constable whether there are exceptional circumstances justifying a hearing before a disciplinary tribunal. At a disciplinary tribunal the finding will be reached by all three members, if necessary by a majority although the fact will not be disclosed. If the officer is found guilty the chief constable will decide punishment after consultation with other members of the tribunal . . .

(a) Recommendation by the Complaints Board

77. Where the Complaints Board consider that a disciplinary charge should be preferred against an officer in respect of a matter complained of which has not already been the subject of disciplinary charges, they will recommend to the deputy chief constable the charge which they consider should be preferred, giving reasons for their recommendation. The Complaints Board must be specific as to the charge which they regard as appropriate. The deputy chief constable will inform the Complaints Board whether he accepts their recommendation and if he does, proceed to prefer the charges. (The Complaints Board will normally indicate at the same time whether they consider that the charge should be heard by a disciplinary tribunal . . .)

(b) Direction by the Complaints Board

78. Where the deputy chief constable disagrees with the Complaints Board's recommendation to prefer a disciplinary charge, he should inform them, giving his reasons. The Complaints Board may accept this; or they may enter into further discussion; or they may direct that specified charges be brought, again giving reasons for their direction in writing. If a direction is made, the deputy chief constable should prefer the charge forthwith and inform the officer concerned and the complainant that the charge has been brought at the direction of the Board. If the officer denies a charge brought on the direction of the Board the charge will automatically be heard by a disciplinary tribunal. The Secretary of State made clear to Parliament that he expected that the power to direct the preferring of charges would not be used very often and then only as a last resort . . .

Evidence and burden of proof

106A. The Royal Commission on the Police thought it of great importance that disciplinary proceedings should be fair and made as uniform as possible throughout the service, but they did not consider that it followed that every feature of a criminal trial should be faithfully copied in the hearing of a disciplinary charge. In particular, they recommended that a disciplinary tribunal should not be bound by technical rules of evidence (see paragraphs 459–461 of the Commission's Final Report). The Secretary of State commends these recommendations to chief officers.

106B. Occasionally an appeal to the Secretary of State has raised the issue of the standard of proof required in police disciplinary hearings; in particular it has been argued that it would not be enough for a disciplinary offence to be found proved on a mere balance of probabilities. It may be helpful to chief officers to note that where this issue has arisen on an appeal it has been decided on the basis that the offence must be proved beyond reasonable doubt.

Annex F

Timing of a complaint where there are pending criminal proceedings

Investigations before the trial

1. A common type of case where problems of timing may arise is one in which the complaint and allegations involved in it are directly or closely associated with criminal proceedings which are pending. In such a case, save in exceptional circumstances of the kind mentioned in paragraph 6, it is suggested that the complaint should be regarded as being in effect *sub judice* and that investigation should ordinarily be deferred until the conclusion of the trial. The desirability of identifying all possible witnesses as soon as possible and taking from them statements relevant to the complaint is appreciated but in the normal case it is outweighed by the other considerations mentioned in paragraphs 2 to 5 below.

2. First, the investigation usually begins with the complainant being interviewed and questioned as to the details of his complaint and a statement being taken from him, provided he desires to make one. An inquiry of this nature of necessity involves a probing examination of the complainant on

matters touching upon offences with which he has been charged and which are still subject to determination by the court.

3. Such an inquiry is open to criticism in that it facilitates the obtaining of incriminating statements from the complainant, and the exposing of his defence to the pending proceedings. The undesirability of such a course is underlined by the terms of Rule III(b) of the Judges' Rules, which provides:

> "It is only in exceptional cases that questions relating to the offence should be put to the accused person after he has been charged or informed that he may be prosecuted. Such questions may be put where they are necessary for the purpose of preventing or minimising harm or loss to some other person or to the public or for clearing up an ambiguity in a previous answer or statement."

4. Secondly, the interview might well involve the identification of witnesses whom the defence propose to call. If the investigation is pursued the investigating officer will need to interview these witnesses with a view to taking statements from them.

5. Thirdly, the complainant would require to be cautioned before being questioned, certainly if any statements made by him and indeed by any possible witnesses are to be made available to the prosecuting solicitor for use by the prosecution. To caution the complainant in these circumstances could well inhibit him from supplying any information and could be regarded as having the effect of discouraging him from pursuing his complaint.

6. There may, however, be exceptional circumstances where it is proper to proceed with the investigation of the complaint provided that the complainant is legally represented and that it is clear that the solicitor representing him, while fully appreciating the prejudice which could result to his client were he to be interviewed prior to the determination of the proceedings, indicates that he nonetheless desires that the complaint should be investigated immediately. One such example might be if the complaint appears so cogent that it makes the deputy chief constable doubtful after taking legal advice (see paragraph 8 below), whether it is proper to continue with the prosecution at all.

7. Where a complaint is investigated before trial the report of the investigation would, where this is necessary by virtue of section 49(3) of the 1964 Act, be sent to the Director of Public Prosecutions. It may be that the Director would not feel it right to give any decision as to proceedings being taken against the police officer or officers concerned until the pending proceedings had been disposed of but, dependent on the nature of the complaint and of the evidence available in support of it, the Director might think it right to give advice as to the desirability of continuing with the pending proceedings against the complainant.

8. The Secretary of State suggests that the prosecuting solicitor or counsel should in all cases be informed at an early stage of any relevant complaint and of its nature. The deputy chief constable may care to seek their advice as to when the investigation should take place, seeking further advice from the Director in cases of difficulty.

9. To sum up, it is suggested that in the type of case mentioned in paragraph 1:

(a) if the complainant is not legally represented, he should not, save in exceptional circumstances, be interviewed, but should be told that the investigation of the complaint will be suspended until after the trial;

(b) if the complainant is legally represented, his solicitors should be told that it is proposed to suspend the investigation until the pending proceedings have been disposed of since it would involve interviewing their client and questioning him on matters touching upon the charges preferred against him and might well necessitate interviewing any witnesses whom it might be possible he intended to call on his behalf. The solicitors should also be informed that if the investigation were to proceed any statements made by the complainant or by the relevant witnesses would be made available to the prosecution;

(c) if notwithstanding this warning, the solicitors still stated that the complainant wished that enquiries be not delayed pending his trial, then the deputy chief constable may think it proper for the investigation to proceed. The complainant might so wish if he thought it might bring to light evidence which would result in the prosecution being withdrawn. The complainant should be cautioned before any question were put to him or any statement taken from him;

(d) the solicitors should in such circumstances be asked to state in writing that they agree to the complaint being investigated and realise that the result may be given in evidence;

(e) the police legal advisers should be informed at an early stage of any relevant complaint and of its nature.

Police investigations in complaints and other matters affecting conviction after trial but before an appeal

10. If a person who has been convicted at a magistrates' court appeals to the crown court, his appeal is heard by way of a rehearing of the case. The considerations set out in the previous paragraphs regarding the investigation of a complaint before trial apply equally where an appeal against conviction has been made to the crown court.

11. The same objections do not apply, however, to investigation preceding an appeal from conviction at the crown court because the hearing of an appeal by the Court of Appeal does not constitute a retrial, the appellant rarely appears and fresh evidence is involved in only a very few cases. For the most part the question before the Court of Appeal is whether there was anything wrong with the conduct of the trial at the crown court. It is considered desirable that any material relevant to an appeal, including any such material which arises in the context of a complaint, should be before the Court of Appeal at the time of the hearing. Where this has not happened, it has sometimes been necessary for the case to be referred back to the court by the Secretary of State under section 17 of the Criminal Appeal Act 1968 for reconsideration in the light of fresh evidence arising from subsequent police investigations.

12. The Secretary of State therefore wishes to commend to chief officers the practice of rather greater flexibility as regards investigations following conviction in the crown court but before an appeal may have been heard. It is an essential element in such greater flexibility of practice that the defence should agree in writing to provide access to the defendant and their witnesses for the purpose of the investigation under section 49 of the 1964 Act. Investigations might for instance be appropriate in the following circumstances:

(a) at the request of the trial judge or the Court of Appeal;

(b) when information about documents in the possession of the police or the examination of exhibits has been requested by the appellant, either direct or through the Registrar of the Court of Appeal;

(c) because matters come to the attention of the police which throw doubt on the validity of the conviction.

There may be other cases.

13. It is not suggested that the investigation of a complaint should proceed automatically at this stage but that the deputy chief constable should consider seeking the advice, where necessary, of his legal advisers and/or the Director whether it would be appropriate to proceed with enquiries (see paragraph 8 above). Where, after such consultation, there are still doubts about whether it is proper to begin or to continue with enquiries before the hearing of an appeal, it is suggested that the deputy chief constable should inform the Registrar of the Court of Appeal what is proposed and why, so that the Court may, if they think it appropriate, indicate that they would see objection to enquiries proceeding. It would also help the Court of Appeal if the deputy chief constable informed the Registrar of any case where enquiries were proceeding before appeal at the beginning of those enquiries, if he considered that the outcome of the investigation might substantially affect the appeal.

14. When it is decided to proceed with an investigation pending appeal, the deputy chief constable should keep his legal advisers informed of progress, and notify them especially of any developments that may bear upon the conviction under appeal. In cases where it is not possible to assess the authenticity of information coming to light until all enquiries have been completed the deputy chief constable should apprise them of that situation. The prosecuting solicitor and, where appropriate, counsel will be able to advise whether any new material is relevant, and, if so, how it should be assembled so that it will be admissible in evidence, if necessary. They will also arrange for any such evidence to be made available to the Court of Appeal and, in accordance with the usual procedure, for copies to be supplied to the defence.

15. There should be no alteration in the normal rule that the report of the investigating officer is a confidential document that should not itself be disclosed.

APPENDIX 20

Text of the leaflet "Police and Public" about complaints against the police under the Police Acts 1964 and 1976

This leaflet explains the procedure for members of the public who consider they have grounds for complaint against the conduct of a member of a police force in England and Wales. It also explains the way in which complaints are investigated and what action may be taken on them.[1]

The procedure described in this leaflet applies only to complaints about incidents occurring after 31 May 1977.

The handling of complaints

The law requires the chief officer of each police force to see that complaints against members of his force are promptly recorded, and are investigated. The deputy chief constable of a force outside London, or a senior officer in the Metropolitan or City of London Police, is responsible for considering what action to take as a result of each investigation. There is also an independent element in the procedure. This is provided by the Director of Public Prosecutions where a complaint suggests that a police officer may have broken the criminal law, and by the Police Complaints Board where there may have been an offence against police discipline. The records of complaints are regularly inspected by HM Inspectors of Constabulary and police authorities are required by law to keep themselves informed about the manner in which complaints are dealt with.

Making a complaint

Any complaint about the conduct of a police officer should be made in writing to the chief officer of the police force concerned (who is the Chief Constable of a force outside London and in London the Commissioner of Police of the Metropolis or of the City of London Police), or by calling at any police station. Only the police have the authority to investigate complaints against police officers. If a complainant writes to the Police Complaints Board, or to anyone other than the appropriate chief officer, his complaint has to be sent on to that chief officer; otherwise it cannot be investigated.

[1]The relevant statutory provisions in England and Wales are sections 49 and 50 of the Police Act 1964, the Police Act 1976, the Police (Discipline) Regulations 1977, the Police (Complaints) (General) Regulations 1977, the Police (Copies of Complaints) Regulations 1977 and the Police (Withdrawn, Anonymous etc Complaints) Regulations 1977. Under these provisions the chief officer can delegate his responsibilities for investigating and considering a complaint to his deputy or, in the Metropolitan or City of London Police, to another senior officer.

The investigation of a complaint

The investigation of a complaint against a police officer is carried out by a senior officer who may come from a different police force. It will normally start at once. If, however, the complaint is closely associated with criminal proceedings against the complainant or someone else and those charges are to be heard in court, the investigation will not as a rule begin until after the court proceedings are completed. The complainant will be asked to make a full statement, and the police will also seek information from anyone else who can help to establish the facts. The police officer who is complained about will also have an opportunity to make a statement. At the end of the investigation, a report will be sent to the deputy chief constable.

Criminal proceedings

Police officers, like everyone else, are subject to the law of the land. When a deputy chief constable receives the report of an investigation into a complaint he must first send it to the Director of Public Prosecutions unless he is satisfied that no criminal offence has been committed. The Director will consider whether or not criminal proceedings should be brought and he will inform both the deputy chief constable and the complainant whether or not he proposes to prosecute. If there is a prosecution, the complainant can be called upon to give evidence before the court.

Disciplinary proceedings

Police officers are also subject to a strict discipline code. The deputy chief constable will therefore consider (after any reference has been made to the Director of Public Prosecutions) whether as a result of the investigation of a complaint the evidence is such as to justify bringing a disciplinary charge. If the deputy chief constable decides that a disciplinary charge would not be justified he must send a report to the Police Complaints Board. If the Board accept that no disciplinary charges should be brought, they will inform the deputy chief constable and the complainant. If, however, the Board disagree with the deputy chief constable, they may recommend, and in the absence of agreement direct, that disciplinary charges should be brought. Where charges are to be brought the police will inform the complainant. (Even if a complaint proves to have some substance, it may not be necessary to deal with it by formal disciplinary charges; for example, advice to the officer concerned may be more appropriate.)

Hearing of disciplinary charges

Where disciplinary charges are brought against a police officer, there is a formal hearing. This will normally be before the chief officer alone but, in exceptional circumstances, the Police Complaints Board may direct that the charges should be heard by a tribunal consisting of the chief officer and two members of the Board. The hearing is in private, but, unless the accused officer has admitted the charges, the complainant has a right to attend and will normally be expected to give evidence.

Appendix 20

Civil proceedings

A complainant may have a remedy at civil law. The police cannot give advice as to whether there is cause for a civil action: this is a matter for a solicitor. A Citizens Advice Bureau will be able to provide a list of solicitors practising in the area who can advise on this matter and give information about legal aid and advice schemes. If a complainant wishes to bring a civil action, the investigation of the complaint may sometimes be deferred until the civil action has been completed.

The rights of the officer

A police officer against whom a complaint has been made will normally receive a copy of the original complaint or of an account of it if the complaint was not made in writing. He is given a copy automatically if he is charged with any disciplinary offence as a result of the complaint; if he is not charged he can ask for a copy when the case is closed. A false and malicious complaint against a police officer may lead to his bringing legal proceedings for defamation.

Reminder

This leaflet explains what happens if you make a complaint about the conduct of a police officer. Inquiries into complaints are thorough and take a lot of police time. Before you complain please think carefully whether your complaint is against the police; it might, for example, be against some part of the law that the police have to enforce.

Remember that the police do a difficult and dangerous job on behalf of us all.

APPENDIX 21

Arrangements for inspecting the Metropolitan Police: Announcement in Parliament by the Home Secretary, House of Commons Official Report, 12 December 1978, cols 99–100

With my agreement, the Commissioner has decided to strengthen arrangements for the inspection of the Metropolitan Police with effect from 1 January 1979.

The following details of the arrangements are being promulgated in Police Orders today:

> "A Deputy Assistant Commissioner has been appointed Inspector of the Metropolitan Police. He will operate under the control and direction of the Deputy Commissioner, to whom he will report direct. He will be assisted by two Commanders as Deputy Inspectors. Together with three Chief Superintendents, who will act as staff officers, and a small clerical staff, these officers will comprise a new Force Inspectorate.
>
> The duties of the Inspectorate will be to provide a continuing assessment of the efficiency and effectiveness of the Force, including headquarters branches but excluding those branches responsible to the Receiver, and to visit branches and divisions to ensure that: the policies laid down for the Force are understood and properly implemented; the functions of the branch or division are being carried out correctly and in the most efficient manner; the branch or division is adequately manned and equipped; and new developments and schemes are being considered or introduced as appropriate. It is anticipated that each branch and division will be inspected at regular intervals, and the Inspectorate will examine carefully the use of manpower and methods of work. To assist them in their work the Inspectors will be able to call on the services of specialist support units such as Management Services Department and the costing and audit branches of Finance Department. In the course of inspections particular attention will be paid to the procedures and methods of handling complaints against police and matters of police discipline.
>
> It will be open to an officer of any rank to approach a member of the Inspectorate at any time to make representation or to discuss any matter."

The following are additional features of the arrangements:

> "My Department will be consulted about the inspection programme, will be able to call for particular matters to be examined by the Inspectorate, and will receive copies of all inspection reports for my information.

If the Deputy Commissioner, in the exercise of his responsibility for controlling the operation of the Inspectorate, considers that a matter should be, and has not been, brought to my notice he will have the right and duty to submit a formal memorandum to the Commissioner with the request that it should be forwarded to me.

The Deputy Commissioner, accompanied by the Inspector, will attend regular meetings of HM Chief Inspector of Constabulary and HM Inspectors, and there will be close cooperation at staff officer level between HM Inspectorate and the Metropolitan Police Inspectorate. This cooperation is expected to enhance the development of common standards and procedures in areas where consistency or compatibility is desirable."

APPENDIX 22

Prosecuting solicitors' departments

Table 22.1. Forces with prosecuting solicitors' departments (excluding Metropolitan and City of London[1] police forces)

Police force	Strength of legally qualified staff as at 1 January 1980[2]
Avon and Somerset	6
Cambridgeshire	8
Cheshire	10
Cleveland	10
Cumbria	6
Derbyshire	18
Devon and Cornwall	10
Dorset	9
Durham	8
Dyfed-Powys	8
Essex	17
Gloucestershire	5
Greater Manchester	59
Gwent	6
Hampshire	29
Humberside	8
Kent	21
Lancashire	27
Lincolnshire	8
Merseyside	37
Norfolk	7
Northamptonshire	9
Northumbria	24
Nottinghamshire	33
South Wales	29
South Yorkshire	32
Suffolk	10
Sussex	27
Thames Valley	25
West Midlands	56
West Yorkshire	40

[1]City of London Police use the City of London Solicitor's Department (the legal department of the Common Council).
[2]These figures include only qualified lawyers.

Table 22.2. Metropolitan Police Solicitor's Department

Grade	Legally qualified staff in post 31 August 1980[1]
Solicitor	1
Deputy Solicitor	1
Assistant Solicitors	10
Senior Legal Assistants	18
Legal Assistants	32
Total	62

[1]These figures include only qualified lawyers.

APPENDIX 23

Statistics of cautioning

Table 23.1. Persons cautioned as a percentage of persons found guilty or cautioned in England and Wales by sex and age, 1957–1977.[1]

Year	Males[2]		Females	
	Aged 10 and under 17	Aged 17 and over	Aged 10 and under 17	Aged 17 and over
1957	22	4	31	9
1958	21	3	31	9
1959	21	4	32	10
1960	21	4	33	9
1961	20	4	30	8
1962	20	3	29	7
1963	20	3	31	8
1964	22	4	31	9
1965	22	4	35	9
1966	23	3	36	9
1967	24	4	35	10
1968	26	3	39	10
1969	32	3	46	10
1970	35	3	52	10
1971	44	4	65	10
1972	45	4	70	10
1973	46	4	70	10
1974	46	4	70	9
1975	45	3	69	9
1976	44	3	66	9
1977	47	3	70	9

[1]Adjusted for changes in legislation.
[2]Other offenders ie companies, public bodies etc are included with males because separate figures are not available before 1976.

Table 23.2. Persons cautioned as a percentage of persons found guilty or cautioned in England and Wales in 1977 by police force area, type of offence, sex and age.

Police force area	Indictable offences				Non-indictable offences (excluding motoring offences)			
	Males		Females		Males		Females	
	Aged 10 and under 17	Aged 17 and over	Aged 10 and under 17	Aged 17 and over	Aged 10 and under 17	Aged 17 and over	Aged 10 and under 17	Aged 17 and over
Avon and Somerset	40	2	69	10	44	7	54	11
Bedfordshire	48	4	73	10	45	7	42	7
Cambridgeshire	47	3	65	7	52	9	42	12
Cheshire	42	1	75	7	31	9	46	6
Cleveland	27	1	57	2	37	6	41	9
Cumbria	43	2	60	12	28	4	41	6
Derbyshire	43	6	69	23	20	7	15	12
Devon and Cornwall	70	11	84	29	44	11	65	9
Dorset	55	8	83	20	49	12	60	12
Durham	40	2	62	4	2	4	7	4
Essex	55	6	78	18	57	5	44	3
Gloucestershire	50	3	64	6	57	14	52	5
Greater Manchester	40	1	70	3	23	6	28	13
Hampshire	50	3	76	10	45	4	39	6
Hertfordshire	45	1	75	5	21	5	33	9
Humberside	31	3	44	6	39	7	47	8
Kent	43	2	70	9	34	5	39	4
Lancashire	52	3	80	14	49	7	47	10
Leicestershire	50	3	64	9	71	10	69	25
Lincolnshire	62	11	72	14	52	14	65	8
London, City of	41	—[1]	83	1	9	1	20	—
Merseyside	40	—[1]	72	1	52	2	65	8
Metropolitan Police District	49	—[1]	68	—[1]	53	—[1]	52	22
Norfolk	54	6	74	12	1	—[1]	7	—
Northamptonshire	47	7	70	22	2	5	22	1
Northumbria	47	2	78	6	29	3	28	7
North Yorkshire	51	5	74	15	27	6	16	3
Nottinghamshire	56	9	78	17	31	7	55	7
South Yorkshire	44	7	65	17	36	8	17	19
Staffordshire	46	5	71	17	23	5	13	9
Suffolk	64	15	76	36	55	8	50	11
Surrey	58	6	81	11	47	10	59	22
Sussex	60	5	73	13	50	6	58	5
Thames Valley	49	4	67	11	43	7	49	10
Warwickshire	42	8	61	23	44	8	37	7
West Mercia	61	4	80	11	41	10	56	8
West Midlands	44	3	69	13	33	3	29	13
West Yorkshire	44	3	67	7	38	5	34	10
Wiltshire	67	12	80	33	25	4	—	5
Total England	47	3	71	9	42	4	40	12
Dyfed Powys	75	4	83	8	65	9	56	2
Gwent	46	4	60	5	52	4	32	5
North Wales	43	8	74	18	42	21	57	16
South Wales	29	2	60	11	17	2	15	7
Total Wales	40	4	65	11	35	6	31	7
Grand total England and Wales	47	3	71	9	42	4	39	12

[1]Less than ½ per cent.

Table 23.3. Persons cautioned as a percentage of persons found guilty or cautioned in England and Wales in 1977 by type of offence sex and age.

Type of offence	Males					Females				
	All ages	Aged 10 and under 14	Aged 14 and under 17	Aged 17 and under 21	Aged 21 and over	All ages	Aged 10 and under 14	Aged 14 and under 17	Aged 17 and under 21	Aged 21 and over
Violence against the person	8	56	24	2	4	20	61	35	7	11
Sexual offences	33	73	64	54	13	56[1]	83[1]	100[1]	60[1]	46[1]
Burglary	15	47	18	1	1	29	63	31	3	4
Robbery	3	23	6	—[2]	—[2]	6	25	11	—	—
Theft and handling stolen goods	24	76	43	3	4	34	87	63	5	11
Fraud and robbery	6	70	38	3	2	11	79	52	5	6
Criminal damage	16	60	29	2	2	19	69	38	5	6
Other indictable offences	3	69	30	3	2	7	95	53	5	3
Total indictable offences	19	67	34	3	3	31	85	58	5	10
Non-indictable offences (excluding motoring offences)	7	64	36	4	4	13	71	33	28	9

[1]These percentages are subject to wider fluctuations owing to the small number of persons involved.
[2]Less than ½ per cent.

Table 23.4. Persons cautioned as a percentage of persons found guilty or cautioned for indictable offences in England and Wales in 1978 by police force area and age.

Police force area	Aged 10 and under 17	Aged 17 and over
Avon and Somerset	44	4
Bedfordshire	53	8
Cambridgeshire	44	4
Cheshire	46	1
Cleveland	42	2
Cumbria	44	3
Derbyshire	43	10
Devon and Cornwall	69	15
Dorset	67	10
Durham	42	2
Essex	57	8
Gloucestershire	51	6
Greater Manchester	41	1
Hampshire	58	4
Hertfordshire	51	2
Humberside	38	4
Kent	54	5
Lancashire	51	4
Leicestershire	33	4
Lincolnshire	64	10
London, City of	21	1
Merseyside	46	1
Metropolitan Police District	46	—[1]
Norfolk	57	6
Northamptonshire	45	13
Northumbria	52	3
North Yorkshire	47	6
Nottinghamshire	58	9
South Yorkshire	47	9
Staffordshire	47	8
Suffolk	64	22
Surrey	57	8
Sussex	53	5
Thames Valley	49	3
Warwickshire	43	6
West Mercia	62	4
West Midlands	50	6
West Yorkshire	46	4
Wiltshire	59	14
ENGLAND	49	4
Dyfed-Powys	67	3
Gwent	45	4
North Wales	49	7
South Wales	34	3
WALES	43	4
ENGLAND AND WALES	49	4

[1]Less than ½ per cent.

APPENDIX 24

Consents to prosecution: Note by the Director of Public Prosecutions

1. The Commission has asked me to provide information on the numbers of cases, classified by type of offence, referred to me and the Attorney General where consent to prosecution is required, the number of cases in which consent is withheld and, if possible, the grounds, by broad classification, for withholding consent. I now set out [in Table 24.1] the number of cases referred to me in 1977 in which my consent was required and, out of such cases, the number in which I withheld consent. [In Table 24.2] I similarly set out cases concerning the consent of the Attorney General; in some of these cases the Attorney General (or the Solicitor General) refused consent, and in some I decided that no action was justified and therefore did not seek his consent.

2. The figures in the columns showing "No Action" cases indicate only those cases in which no action was advised for any offence. In some cases, although no action was advised in respect of the offence requiring my consent or the Attorney's consent, proceedings were advised for other offences. For example, in some allegations of gross indecency proceedings were advised only for the offence of indecent assault and no consent was granted. The result of such classification is that the "withheld consents" figure may in fact be higher than is shown.

3. It has not been possible to classify the grounds on which consent was withheld in the cases enumerated [in Tables 24.1 and 24.2]. In some cases consent is withheld because the evidence is insufficient to justify proceedings. In others, although the evidence is sufficient, it may be that in the public interest proceedings are not merited. I have already mentioned in paragraphs 103–127 of my first Memorandum[1] the varied factors which, in my view, can properly be taken into consideration for this purpose.

[1]Written evidence of the Director of Public Prosecutions to the Royal Commission on Criminal Procedure.

Appendix 24

Table 24.1. Cases submitted in 1977 requiring the consent of the Director of Public Prosecutions.

Statute	Number of applications (cases) submitted	Number of applications when "No action" advised ie where consent not granted
BANKRUPTCY ACT 1914	31	15
CRIMINAL LAW ACT 1967, s. 4(1) (assisting an offender)	82	28
CRIMINAL LAW ACT 1967, s. 5(2) (wasting police time)	375	130
EXCHANGE CONTROL ACT 1947 (Fifth Schedule, Part II)	32	14
HEALTH & SAFETY AT WORK ACT 1974	5	4
INSURANCE COMPANIES ACT 1974	1	1
LOCAL GOVERNMENT ACT 1972, s. 94 (failing to declare pecuniary interest)	28	25
MARINE ETC BROADCASTING (OFFENCES) ACT 1967	1	—
MENTAL HEALTH ACT 1959, ss. 126 and 128 (ill-treatment of/sexual intercourse with patients)	45	30
PROTECTION OF DEPOSITORS ACT 1963	6	3
REHABILITATION OF OFFENDERS ACT 1964, s. 9(2) (unauthorised disclosure of spent convictions)	9	9
SEXUAL OFFENCES ACT 1956 (incest cases)	270	63
SEXUAL OFFENCES ACT 1967 (buggery; gross indecency etc)	609	117
SOUTHERN RHODESIA ACT 1965 (breach of S. Rhodesia sanctions order)	3	3
SUICIDE ACT 1961, s. 2(1) (aid/abet suicide)	13	9
THEFT ACT 1968, s. 30 (theft of/damage to property of spouse)	161	68
	1671	519

Table 24.2. Cases submitted in 1977 requiring the *fiat* of a Law Officer

	Number of applications (cases) submitted	Number of applications where "No action" advised, ie where *fiat* not granted
CHILDREN & YOUNG PERSONS (HARMFUL PUBLICATIONS) ACT 1955 ("horror comics")	4	4
COINAGE OFFENCES ACT 1936, s. 4(3)	3	3
COUNTER INFLATION ACT 1973	3	2
CRIMINAL JUSTICE ACT 1967, s. 3	3	2
EXPLOSIVE SUBSTANCES ACT 1883	20	4
NEWSPAPERS, PRINTERS READING ROOMS REPEAL ACT 1869	5	5
OFFICIAL SECRETS ACTS 1911–1939	33	31
PREVENTION OF TERRORISM (TEMPORARY PROVISIONS) ACT 1976	5	1
PREVENTION OF CORRUPTION ACT 1906	317	215
PUBLIC BODIES (CORRUPT PRACTICES) ACT 1889	18	12
PUBLIC ORDER ACT 1936, ss. 1 and 2	3	3
PUBLIC ORDER ACT 1936, s. 5A (as amended)	29	27
SEXUAL OFFENCES (AMENDMENT) ACT 1976	1	1
THEATRES ACT 1968	3	3
	447	313

APPENDIX 25

The criteria for prosecution: Note by the Director of Public Prosecutions

Of all the decisions which have to be made by those with responsibility for the conduct of criminal cases, by far the most important is the initial one as to whether or not a charge should be preferred. Naturally the degree of importance depends to some extent on the gravity of the offence but a wrong decision either way can have disastrous consequences affecting not only the suspect but, in certain circumstances, the whole community. If a guilty man is not prosecuted, he may go on to cause untold further harm; yet if an innocent man is prosecuted, he and his family may be seriously affected even if the offence is comparatively minor and he is ultimately acquitted.

Hence whenever there is some room for doubt as to whether the evidence is sufficient, every effort is made to ensure that the decision is reached dispassionately after due deliberation and by a person experienced in weighing the available evidence.

Sometimes, of course, a degree of haste is inevitable if there is a danger that the suspect will disappear, commit further offences, interfere with vital witnesses or otherwise impede the investigation.

There is, however, a tendency for some police officers to charge a man when none of these circumstances apply and where there is no reason why he should not be bailed under section 38(2) of the Magistrates' Courts Act, 1952, or merely told that the circumstances will be reported. The result is that my Department from time to time has to advise that a charge should be withdrawn or to refuse consent to prosecution where this is required by statute.

The test normally used in the Department in deciding whether evidence is sufficient to justify proceedings is whether or not there is a reasonable prospect of a conviction; whether, in other words, it seems rather more likely that there will be a conviction than an acquittal.

We set an even higher standard if an acquittal would or might produce unfortunate consequences. For example, if a man who has been convicted of some offence is subsequently acquitted of having given perjured evidence at his trial, that acquittal may cast doubt on the original conviction. Likewise an unsuccessful prosecution of an allegedly obscene book will, if the trial has attracted publicity, lead to a considerable increase in sales.

In such cases we are hesitant to prosecute unless we think the prospects of a conviction are high. We also tend to adopt a somewhat higher standard if the

trial is likely to be abnormally long and expensive and the offence is not especially grave.

There are some who maintain that it is right to prosecute whenever there is a bare *prima facie* case as, it is said, to raise the minimum standard above this level is to usurp the proper function of the courts. In my view, however, the universal adoption of a "bare *prima facie* case" standard would not only clog up our already over-burdened courts but inevitably result in an undue proportion of innocent men facing criminal charges.

It is not of course easy in borderline cases to decide whether or not there is a reasonable prospect of a conviction, and this difficulty remains whatever the standard may be.

The prosecutor certainly cannot, or should not, base his decision merely on the number of people who have made statements implicating the accused but should, in evaluating the evidence, ask himself (and where necessary ask the police officer who has interviewed the witnesses) questions along the following lines:

1. Does it appear that the witness is exaggerating, or that his memory is faulty, or that he is hostile to the accused, or is otherwise unreliable?
2. Has he a motive for telling less than the whole truth?
3. Has he previous convictions, or are there other matters which might properly be put to him by the defence to attack his credibility?
4. What sort of impression is he likely to make as a witness? How is he likely to stand up to cross-examination? Does he suffer from any physical or mental disability?
5. If there is conflict between eye-witnesses, does it go beyond what one would expect and hence materially weaken the case?
6. If there is a lack of conflict between eye witnesses, is there anything which causes suspicion that a false story may have been concocted?
7. Are all the necessary witnesses available to give evidence, including any who may be abroad?
8. If identity is likely to be an issue, how cogent and reliable is the evidence of those who purport to identify the accused?
9. If the case depends in part on confessions by the accused, are there any grounds for fearing that the evidence may not be admitted or that they are of doubtful reliability having regard to the age and intelligence of the accused?
10. Are the facts of the case such that the jury is likely to be sympathetic towards the accused?

This list is not of course exhaustive, and the questions to be asked depend upon the circumstances of each individual case, but it is introduced to indicate that, particularly in borderline cases, the prosecutor must always delve beneath the surface of the statements. He must also draw, so far as is possible, on his own experience of how evidence of the type under consideration is likely to "stand-up" in court and commend itself to a jury before reaching a conclusion as to the likelihood of a conviction.

Having ultimately decided that the evidence is sufficient to justify proceedings, the prosecutor must then go on to consider whether the provable facts and the whole of the surrounding circumstances are such that it is incumbent upon him in the public interest to institute a prosecution. In many cases the answer will be an unhesitating "Yes" but in some it may be as difficult as the question of evidential sufficiency.

Again, there are some who maintain that if the evidence is sufficient, a prosecution must necessarily follow as, it is said, mitigating circumstances should always be left to the court to weigh before passing sentence.

I, however, strongly prefer to adopt the point of view expressed by Lord Shawcross who, when he was Attorney General, said in a House of Commons debate:

> "It has never been the rule in this country—I hope it never will be—that suspected criminal offences must automatically be the subject of prosecution. Indeed the very first Regulations under which the Director of Public Prosecutions worked provided that he should . . . prosecute . . . 'wherever it appears that the offence or the circumstances of its commission is or are of such a character that a prosecution in respect thereof is required in the public interest'. That is still the dominant consideration".[1]

He then went on to say that, in deciding whether or not to authorise a prosecution, we must have regard to "the effect which the prosecution, successful or unsuccessful as the case may be, would have upon public morale and order, and with any other considerations affecting public policy". Hence my overall aim is to try not only to be fair to the victim of a crime and to the offender himself, but to try to satisfy responsible public opinion that the criminal law is being administered impartially in the interests of the whole community.

The factors which can properly be taken into consideration on public policy grounds are many and varied. They will naturally depend on the special facts of each particular case but in general it can be said that the more minor the offence, the greater the attention that should be paid to mitigating circumstances.

It would not, for instance, normally be in the public interest to prosecute for an offence which can only be tried on indictment (particularly if the expense would be high) if it seems probable that the sentence would be no more than a conditional or absolute discharge.

The most common factors, and my attitude towards them, are as follows:

a. Staleness

One must have regard not merely to the date of the last known offence at the time the file is considered but the probable time interval when the case comes to trial, as up to eighteen months—and sometimes even longer—may elapse between the decision to prosecute and the eventual verdict.

Broadly speaking I am hesitant to prosecute if the last offence was committed three or more years before the probable date of trial unless the offences are of

[1]HC Debates Vol 483, Col 681 (29 January 1951)

such gravity that, despite the staleness, a custodial sentence of some length is likely to be imposed. Hence the less serious the offence, the greater the weight to be attached to the date of its commission.

I do, however, pay less regard to staleness if the complexity of a case has necessitated prolonged police enquiries or if the accused has caused or contributed to the staleness by disappearing or covering his tracks.

b. Youth

The younger the offender, the more one should consider whether a caution will suffice, particularly if he is of previously good character, has a good home background and is in steady employment.

I frequently consult the police officer in charge of the case as to the likelihood of a repetition of the offence if I am in doubt, and will take into account the attitude of the accused's parents and the extent to which the matter has caused concern in the neighbourhood.

c. Old age and infirmity

The older or more infirm the offender, the more I am reluctant to prosecute unless there is a real possibility of repetition or the offence is of such gravity that it is impossible to overlook. In general, it seems right not to prosecute whenever a court is likely to pay such regard to the age or infirmity of the offender as to induce it to impose only a nominal penalty, although there may be exceptional circumstances (such as if the accused still holds a position of some importance) when proceedings are required in the public interest regardless of what penalty may be imposed.

One must of course also consider whether the accused is likely to be fit enough to stand his trial. For this purpose I sometimes obtain from the defence solicitor any medical reports which have been made on his client and may arrange, through him, for an independent medical examination.

d. Mental illness or stress

The defence solicitor, knowing that the police are investigating his client's conduct, may sometimes send me a psychiatric report to the effect that the accused is suffering from some form of mental illness and that the strain of criminal proceedings will lead to a considerable and permanent worsening of his condition. This is nearly as worrying as, say, a report that the accused has a weak heart and that the shock of prosecution may be fatal.

Once again, I will normally try to arrange for an independent examination and will in any event give anxious consideration to such reports as I may receive. This is a difficult field because in some instances the accused may have become mentally disturbed or depressed by the mere fact that his misconduct has been discovered and I am sometimes dubious about a prognosis that criminal proceedings will adversely affect his condition to a significant extent.

I do not normally think it is right to pay much regard to evidence of mental instability which is not coupled with a prognosis as to the adverse effect of proceedings (unless it is of such a nature as to effect any issue of *mens rea*) as such instability may increase the likelihood that the offence will be repeated.

e. Sexual offences

My decisions are often strongly influenced by the relative ages of the offender and the "victim" if there is no element of corruption by the former and the latter was a fully consenting party.

Hence I do not normally prosecute, say, a youth of 17 for unlawful sexual intercourse with a girl of 15 but the larger the gap between their ages, the more I am likely to take proceedings.

Similarly I do not normally prosecute a man of 22 for a homosexual offence against a man of 19 although if, for instance, the elder went into a public toilet intent on finding a partner and the younger was or might become a male prostitute, I would probably decide to prosecute both.

I sometimes get cases in which it is abundantly clear that a girl of 15 has persistently seduced a number of men considerably older than herself. In such circumstances I may either take no proceedings or prosecute only those men who are of such maturity that it can reasonably be said that they should have resisted the temptation. I may at the same time suggest that the authorities should consider whether the girl is in need of care and protection.

f. Perjury

This is often difficult to prove but, if there is sufficient corroboration as required by section 13 of the Perjury Act 1911 and a reasonable prospect of a conviction, I will unhesitatingly take proceedings against a prosecution witness if his perjured evidence goes to the heart of the issue before the court. Sometimes, however, his perjury, although technically material, may be on a somewhat peripheral issue and it may then be proper to advise a caution if he lied to protect his own interests rather than with an intent to pervert the course of justice.

It is, however, necessary to apply somewhat different considerations when perjury is committed by a defendant although it has never been my view that he can in all circumstances lie with complete immunity, particularly if he conspires with or suborns other witnesses.

When perjury by a defendant has been unsuccessful, it is necessary to have regard to the punishment inflicted by the court and to assess whether a subsequent prosecution for perjury would be likely to result in any substantial increase of his sentence. It is also essential that the evidence should be so exceptionally strong that a conviction is virtually certain, because of the doubts which an acquittal would cast upon the verdict of guilty in the original case. Usually, although not necessarily, it is the emergence of some additional and compelling evidence after the original trial which removes the last trace of doubt.

Even, however, where there is abundant evidence against a defendant who has unsuccessfully lied without involving others, I would not normally think it right to prosecute unless there are aggravating factors.

One cannot of course lay down any hard and fast rules about such factors but in general I will consider whether the lies necessarily involved an attack on the truthfulness (as opposed to recollection or ability to identify) of one or more

prosecution witnesses; whether the lie was clearly planned before the hearing or arose on the spur of the moment during cross-examination; and the degree of persistence in maintaining the lie.

g. Miscellaneous offences

There are other offences (such as bigamy) in which experience has shown that the courts are unlikely to impose more than a nominal penalty unless there are exceptional and aggravating circumstances. In such cases I normally advise that a caution will suffice.

h. General

In some cases, I think it is proper to have regard to the attitude of a complainant who may have gone to the police in the heat of the moment—as in many husband/wife assault cases—but later expresses a wish that no action be taken. Usually in such circumstances I would not prosecute unless there was suspicion that the change of heart was actuated by fear or the offence was of some gravity.

My attitude would be the same in the case of, for example, a comparatively minor theft or criminal damage if the owner of the property expressed a wish that there should be no prosecution.

Finally if, having weighed such of the above factors as may appertain to the case, I am still in doubt as to whether proceedings are called for, I would throw into the scales the good or bad character of the accused, the attitude of the local community and any information about the prevalence of the particular offence in the area or nationally. Should doubt still remain, I consider that the scales should normally be tipped in favour of prosecution as if the balance is so even, it could properly be said that the final arbiter must be the court.

APPENDIX 26

Consistency of prosecution policy and practice: Note by the Director of Public Prosecutions

I have been asked to provide factual data to illuminate particular arrangements for, and effects of, centrally directed measures to ensure consistency of prosecution practice. At the outset, I should make it clear that my statutory duties (now contained in section 2 of the Prosecution of Offences Act 1979) do not include the giving of advice on general prosecuting policy. Section 2(1)*(b)* places on me the duty "to give such advice and assistance to chief officers of police, justices' clerks and other persons (whether officers or not) concerned in any criminal proceedings respecting the conduct of those proceedings" as may be prescribed by the Attorney General. General prosecuting policy is not, in my view and that of my predecessors, a "criminal proceeding" and consequently it has not been the practice of this Department to offer unsolicited advice on matters of general prosecuting policy. The occasions on which the Director offers unsolicited advice to the police are very limited. On the other hand, I can see no particular difficulty about offering such general advice, if that duty were placed upon me. Indeed, as I indicated in paragraph 260 of my first Memorandum,[1] this is a way of improving uniformity of policy which I would favour.

From time to time I do by invitation attend ACPO regional and other conferences of senior officers and discuss general prosecuting policy. For example, in November 1977 I spoke at the ACPO Seminar on Public Order with particular reference to demonstrations. In August 1977 I advised ACPO at their request on topics arising out of a regional conference; these concerned the charging of a less serious offence in appropriate cases, the proper use of the charge of affray, and the responsibility of those concerned in the prosecution for the acceptance of a plea of guilty to a lesser charge. My Principal Assistant Directors and Assistant Directors attend conferences for senior detective officers at which they advise on more detailed and specific matters of investigatory and prosecuting practice. I and my senior officers also give a number of lectures each year to detectives of all ranks up to and including that of superintendent at which we frequently explain our policies and give advice on a variety of matters.

Some measure of uniformity of prosecution practice is also promoted by applying consistent policies to the cases which are referred to me. My role in these cases will vary. It may involve advising against proceedings; or advising

[1]Written evidence of the Director of Public Prosecutions to the Royal Commission on Criminal Procedure.

that there should be a prosecution in which event either I may assume responsibility for the conduct of the case or I may leave the prosecution in the hands of the police granting, where necessary, my consent.

APPENDIX 27

Pre-trial reviews in the Crown Court

Note by the Lord Chancellor's Department

In October 1974 at the Central Criminal Court an experimental scheme was introduced to hold pre-trial reviews in selected criminal cases. The scheme, for which semi-formal rules were drafted, was intended to eliminate avoidable waste of time in the hearing of complicated cases and its application was thus initially confined to complicated fraud cases expected to last a number of weeks. Any case, however, for which the trial date had been fixed might be set down for review on the application of the solicitor for any party, or on the initiative of the court itself, to identify the essential matters in issue and avoid the unnecessary attendance of witnesses or production of exhibits at the trial itself.

2. The procedure was subsequently adopted in various forms for the Crown Court in each Circuit and generally has been found to be of most assistance in long or complicated cases. Some Circuits have issued "practice notes" of their own on how the procedure should be used and, in particular, the North Eastern Circuit combined its procedure with a "plea day" scheme. Under this scheme cases where the Court has been notified that the defendant intends to plead guilty and cases where the likely plea is in doubt are generally listed in the fifth week after committal for the plea to be taken. If, in the event, a plea of not guilty is entered the court may then proceed to a pre-trial review in suitable cases. In the case of notified pleas of not guilty the procedure adopted is similar to that on other Circuits.

3. No final conclusion has been reached on the best form of procedure to be adopted generally and the current schemes are still being evaluated. It does appear, however, that it is in the larger cases where the issues are complex and the evidence is extensive that the most worthwhile reductions occur in the amount of preparation required before trial and in savings in court time. Indeed, a number of the original "practice notes" have already been modified to reflect this. Copies of the latest notes about arrangements at the Central Criminal Court and in the North Eastern Circuit are attached. Practice Rules in similar terms to those of the Central Criminal Court have been issued by the Presiding Judges of the Western, Midland and Oxford, and Northern Circuits.

4. It is difficult to assess the proportion of cases in which a pre-trial review would produce worthwhile savings. To be worthwhile, the savings achieved on

preparation and trial work must naturally exceed the additional cost of the review itself. On this basis, the proportion of cases in which worthwhile savings would be achieved is likely to be relatively small. For example, in the first six months of 1978, 23.5 per cent of all contested trials in the Crown Court lasted for less than three hours, and 70 per cent lasted for less than nine hours. Some savings might be achieved if a two-day case (approximately ten hours) were reduced to one day or even 1½ days, but these would be small given the cost of the pre-trial review itself. Consequently it is probably only in cases likely to last more than two days that the pre-trial review would generally be an economic proposition, as the daily sums of money involved are greater and there is a real possibility of significant savings in time.

CENTRAL CRIMINAL COURT

Practice Rules

On the direction of the Recorder these Practice Rules replace the existing rules on and after 21 November 1977.

They give a greater flexibility in regard to the number and type of cases which may be listed for Practice Directions.

Richard Grobler
Courts Administrator

The Practice Rules

1. Any case may be listed for practice directions within those Rules upon an application in writing made to the Court by solicitors acting for any party, or by any unrepresented party, provided that a copy of the application is sent at the same time to all other parties and provided that the Court is satisfied that the case is fit for such practice directions. If no party makes application the Court may list the case for such practice directions of its own volition.

2. The Court shall determine the time and place of the hearing.

3. At least 14 days' notice of hearing shall be given, unless the parties agree to shorter notice, and that notice shall not be given on a date earlier than 14 days after the preferment of a bill of indictment.

4. *(a)* Hearings for practice directions under Rule 5 may be dealt with in Chambers before any Judge of the Court.

(b) A represented Defendant shall be present at hearings in Chambers unless he elects not to attend.

(c) Hearings for directions and orders under Rule 6 and the making of orders under Rule 7 shall be held and made in open Court by the Judge allocated to try the case.

(d) All Defendants shall be present in Court at hearings under Rule 4(c) except with the leave of the Court.

(e) Hearings under Rules 4(a) and (c) shall be attended by Counsel briefed to conduct the case on trial or in special circumstances

Counsel specifically instructed to deal with the matters arising under Rules 5 and 6.

5. At a hearing under Rule 4(a) Counsel will be expected to be able to inform the Court,

(a) of the pleas to be tendered on trial;

(b) of the prosecution witnesses required at trial as shown on the committal documents and any notices of further evidence then delivered and of the availability of such witnesses;

(c) of any additional witnesses who may be called by the prosecution and the evidence that they are expected to give; if the statements of these witnesses are not then available for service a summary of the evidence that they are expected to give shall be supplied in writing;

(d) of facts which can be and are admitted and which can be reduced to writing in accordance with section 10(2)(b) of the Criminal Justice Act 1967, within such time as may be agreed at the hearing and of the witnesses whose attendance will not be required at trial;

(e) of the probable length of the trial;

(f) of exhibits and schedules which are and can be admitted;

(g) of issues, if any, then envisaged as to the mental or medical condition of any Defendant or witness;

(h) of any point of law which may arise on trial, any question as to the admissibility of evidence which then appears on the face of the papers and of any authority on which either party intends to rely as far as can be possibly envisaged at that stage;

(i) of the names and addresses of witnesses from whom statements have been taken by the prosecution but who are not going to be called and, in appropriate cases, disclosure of the contents of those statements;

(j) of any alibi not then disclosed in conformity with the Criminal Justice Act 1967;

(k) of the order and pagination of the papers to be used by the prosecution at the trial and of the order in which the witnesses for the prosecution will be called;

(l) of any other significant matter which might affect the proper and convenient trial of the case.

6. At a hearing under Rule 4(c) in open Court, the Judge who is to try the case may hear and rule upon any application by any party relating to the severance of any count or any Defendant and to amend or provide further and better particulars of any count in the indictment. The Judge may order particulars relating to any Count to be delivered within such time as he may direct.

7. The Judge may make such order or orders as lie within his powers as appear to him to be necessary to secure the proper and efficient trial of the case.

8. Subject to the provisions of sections 9 and 10 of the Criminal Justice Act 1967, admissions made under Rule 5 may be used at the trial.

No 297

11 November 1977

Directions by the Presiding Judges of the North Eastern Circuit

In accordance with section 4(5) of the Courts Act 1971 and on behalf of the Lord Chief Justice and with the concurrence of the Lord Chancellor I revoke my directions of 5 October 1976 in respect of all cases committed for trial to the Crown Court on the North Eastern Circuit on or after the 16 January 1978 and for them I direct instead:

1. (1) Within three weeks from the date of committal, or such longer period as may be specified by the court if notice has been given under paragraph 2 of these directions, it shall be the duty of the solicitor acting for each defendant in a case to give to the court listing information in the form set out in Appendix 1. [Not attached]

   (2) In the absence of such information or if the information indicates that a plea of guilty is likely or that the plea is unpredictable, subject to court vacations and paragraph 3 of these directions, the listing officer will list the case for plea in the course of the fifth week following the week of committal, having taken into account the convenience of all concerned. Such fifth week shall be known as the plea week. The listing officer may list the case earlier with the consent of the parties or where the interests of justice so require.

   (3) If such information indicates that a plea of not guilty is likely, the listing officer will list the case for trial in the normal way. Before he does so he may, having regard to the circumstances of the case, the information he has received and the convenience of all concerned, list the case for pre-trial review or require the solicitor and counsel acting for a party to give to the court a signed certificate in the form set out in Appendix 2. [Not attached]

2. (1) If any party to any proceedings will not be ready or will find it inconvenient to proceed by the plea week, it shall be the duty of the solicitor acting for him to give to the court and to all other parties, within three weeks from the date of committal, notice in writing stating

   (a) the reasons why the party will not be so ready or will find it inconvenient;

   (b) the earliest time when he will be so ready or will find it convenient;

   (c) whether the case is likely to proceed as a plea of guilty or not guilty.

   (2) A solicitor acting for a party receiving notice in accordance with sub-paragraph (1) above may within 24 hours of its receipt (excluding

Saturday and Sunday) give to the court and to all other parties a counter-notice in writing opposing or seeking to vary the adjournment sought.

(3) Any notice and any counter-notice given under the preceding sub-paragraphs shall be considered by the court who may order that the case shall remain in the list for the appointed plea week or that it shall be listed at some other time. The court will notify the parties and other interested persons of the decision.

3. Where the interests of justice so require the court itself may take a case out of the plea week list. The court will notify the parties and other interested persons of its action and will inform them of the day when the case will be listed.

4. If on arraignment in a case listed for plea a defendant:

(a) pleads guilty to the whole of the indictment, or pleads guilty to a lesser charge or to part of the indictment and such plea to the lesser charge or part of the indictment is acceptable to the court, he will be dealt with at the time he pleads subject to:

(i) the interests of justice;

(ii) any application from a party to the proceedings;

(b) pleads not guilty, a pre-trial review will be held, unless the judge otherwise orders.

5. If a case proceeds to pre-trial review under paragraph 4(b) of these directions or is listed for pre-trial review, counsel, who should be counsel briefed to conduct the case at the trial or counsel otherwise appropriately instructed, should be in a position to assist the court in estimating the probable length of the trial, and, subject to his duty to his client, to inform the court of such of the matters set out below as are relevant:

(a) the name and availability of any prosecution witness who will be required at the trial and whose evidence is contained in the committal documents or in any notice of further evidence already delivered;

(b) any additional witness who may be called by the prosecution, his availability and the evidence which he is expected to give;

(c) the order in which it is intended to call the prosecution witnesses;

(d) any alibi not disclosed in accordance with section 11 of the Criminal Justice Act 1967;

(e) any fact which is or likely to be admitted in accordance with section 10 of the Criminal Justice Act 1967;

(f) the availability of any defence witness;

(g) any question which may arise at the trial as to the admissibility of evidence;

(h) any issue which may arise at the trial as to the mental or medical condition of any defendant or witness;

(i) any point of law which may arise at the trial and any authority which relates to it;

(j) any other significant matter which may affect the trial of the case.

Unless the judge otherwise orders the above matters (a)–(j) shall be dealt with in chambers and unless he elects not to attend the defendant shall be present whether the judge sits in open court or in chambers.

6. At a pre-trial review the judge may deal in open court with any application for

(a) the severance or amendment of any count in the indictment;

(b) further and better particulars of any count in the indictment;

(c) the separate trial of any defendant;

and may make such orders as appear to him necessary to secure the proper and efficient trial of the case. If the judge on the application refuses to make an order such refusal shall not preclude a further application on the same matter to the trial judge, if different.

7. In these directions a "judge" means a judge of the High Court, a Circuit judge or Recorder.

LESLIE BOREHAM

A presiding judge of the North Eastern Circuit

Dated 3 December 1977

Some examples of existing practice in pre-trial disclosure of evidence in cases to be tried on indictment (Extracted from the Report of the Working Party on the Disclosure of Information in Trials on Indictment)

... 12. Within the office of the Director of Public Prosecutions there is no laid-down policy but the practice, with minor variations, is along the following lines:

(a) When an edited statement is served for the purposes of a committal, the defence are given a copy of the original statement or statements upon which the edited version has been based. This is usually done at the committal but may sometimes be done shortly before or shortly after it.

(b) If the Director's Office is not serving a statement which clearly might assist the defence or calling the maker of the statement, the professional officer in charge of the case may supply his name and address soon after the committal or may decide to ask Counsel to advise regarding this and all other statements not served.

(c) When, after committal, Counsel is sent his brief he is always asked to advise "whether the prosecution has any duty to make available to the defence information on any matters dealt with in Archbold's current paragraph 443". His attention may be directed to any statements which might be of particular interest to the defence and he will be informed of any names and addresses already supplied.

(d) In response to this, some Counsel will almost invariably advise that all names and addresses should be supplied even if it is apparent that many of the statements are wholly irrelevant to any conceivable line of defence; others are more selective and do try to confine themselves to those which might be of some assistance.

(e) If the defence ask to see any statements, this will usually be acceded to on a Counsel to Counsel basis unless prosecuting Counsel considers that there are particular reasons why certain ones should not be disclosed. However it is usually the case that defence Counsel are not given sight of any statements until, or very shortly before, the commencement of the trial.

(f) If there are an exceptionally large number of statements, arrangements are sometimes made between committal and trial for the defence Solicitor to peruse these at the local police station and to be given a copy of any in which he expresses an interest.

(g) If a witness is to give evidence at the committal at the instigation of the prosecution, his statement will not normally be included in the bundle of statements served on the defence. If however his evidence materially differs from that statement, a copy will thereupon be given to the defence so that they may cross-examine him upon it.

(h) Previous convictions of prosecution witnesses are not normally disclosed unless Counsel so advises. Sometimes this will be done during the trial on a Counsel to Counsel basis. The tendency however is not to disclose unless the previous conviction, eg for perjury, is clearly relevant and it is also apparent that the evidence of the witness will be challenged.

(i) A copy of Forensic Science reports, including opinions of handwriting and similar experts, is always supplied at or soon after the committal.

(j) At or soon after the committal the defence, on request, will also be supplied with the name and address of any witness, whether or not such witness has attended an identification parade, who is known as having stated that he saw, or as being likely to have seen, the criminal in the circumstances of the crime, together with a copy of any description of the criminal given by such a person. This is in accordance with an answer by the Attorney General in Parliament on 27 May 1976.

13. (a) The Solicitor's Department of the Metropolitan Police adhere to a policy which, in 1974, was formulated in the following terms:

"Initially the prosecution should inform the defence of the names and addresses of the witnesses whom they do not intend to call but not provide statements unless they have a statement which of itself would tend to show the prisoner to be innocent. In such a case the statement should be provided. If after providing the names and addresses the defence request copies of the statements of such witnesses then these should be provided unless the prosecution have a compelling reason for keeping the statement to themselves, for example if the statement is that of a witness whom the prosecution suspect the defence may threaten to make him change his evidence.

Previous convictions of prosecution witnesses will be disclosed Advocate to Advocate both at the Magistrates' Courts and the Crown Courts, even when there is no request for the information, in accordance with the dicta in *R v Collister and Warhurst*. In addition if a request for such information is made by defence Solicitors prior to the hearing, the information will be given in a letter sent by Recorded Delivery. In cases of exceptional urgency the information may be given over the telephone. It is considered that it is right that the defence should have this information in advance if they request it so that they may with their Counsel properly consider the strategy of their defence. It is emphasised that information should be given in advance only when requested.

Difficulty sometimes arises when the police are not sure that one of the witnesses is identical with a person having a criminal record. In such

cases a reply to a request for information about the character of prosecution witnesses should be carefully worded, for example 'Mr..... has been convicted on two occasions viz..... there may be convictions recorded against other prosecution witnesses and if this proves to be the case information will be given as soon as possible'.

Reference to the disclosure by Counsel to defending Counsel of the previous convictions will continue to be made in briefs in view of the possibility that some defending Solicitors might fail to inform their Counsel of the information given to them or that the defendant might change his Solicitor prior to the trial."

(b) In order to bring other matters to the notice of the defence, before the committal proceedings if possible, the Solicitor's Department of the Metropolitan Police follows the practice set out below:

(i) In general, copies of statements made by witnesses whom the prosecution have decided shall give oral evidence in committal proceedings are provided to the defence, and whenever an edited statement is used in such proceedings a copy of the original statement is supplied to the defence. There are occasions when no such disclosure is made, but, in such circumstances, the defence are notified that an edited statement is being used.

(ii) In cases involving disputed evidence of visual identification, any material discrepancies in first descriptions provided by eye-witnesses who are being called for the prosecution are revealed to the defence. Further, details of any person not called by the prosecution who has said that he saw the offender are also provided. Copies of any statements made by those persons, and of any descriptions given by them, are also supplied.

(iii) A copy of any Forensic Science report in the possession of the prosecution is given to the defence irrespective of whether the maker is called for the prosecution.

(iv) Details of previous convictions of a co-defendant are supplied on request, but not otherwise.

Whenever a copy of a statement of a witness for the prosecution has not been supplied to the defence, and that witness gives evidence which is inconsistent with the contents of his statement in some material particular, a copy is supplied to the defence while the witness is in the witness box so that he can be cross-examined upon it.

14. The practice followed by the Chief Prosecuting Solicitor for Greater Manchester is as follows:

(a) A Principal Prosecuting Solicitor decides which of the persons whose statements are submitted are to be used as prosecution witnesses; whether or not the proceedings are *prima facie* suitable for committal proceedings under section 1 of the Criminal Justice Act 1967; whether or not, in any event, copies of all or any of the statements of the prosecution witnesses should be served on the defence and whether or

not any of the statements requires editing. If editing is required this is done by the Principal Prosecuting Solicitor who is checking the file.

(b) It is not standard practice to deliver to the defence copies of the statements of persons who are not to be called as witnesses by the prosecution nor copies of the originals of edited statements, nor is it standard practice to disclose automatically such of the contents of original statements as may have been excluded in editing. Each case is considered on its own merits and, if the Chief Prosecuting Solicitor considers that it is appropriate to do so, he will disclose to the defence any material parts of the contents of a statement that it would help them to have or even deliver a copy of the statement itself should the occasion warrant it.

(c) In the case of committal proceedings where a witness is to be called to give oral evidence, whether or not a copy of his statement will be served under section 2 of the Criminal Justice Act 1967 is decided by the Chief Prosecuting Solicitor having regard to the purpose of calling the witness in person and any other relevant criteria. In such a case where a witness, a copy of whose statement had not been served on the defence, gave oral evidence which differed materially from that statement a copy of the statement would be made available to the defence for him to be cross examined on it.

(d) Where a material statement has been taken from a person who it is not intended to call as a prosecution witness at the trial and a copy of whose statement is not to be served on the defence, the name and address of that person will be tendered to the defence after the committal proceedings. Similarly the name and address of any person known to the Chief Prosecuting Solicitor who in his view might be of some assistance in establishing a conceivable line of defence (even if that person has not made a written statement) will be supplied to the defence on request. In particular, on request the defence will be supplied with the names and addresses of any person whether or not he attended an identification parade who is known by the Chief Prosecuting Solicitor to have stated that he saw or to have been likely to have seen, the criminal in the circumstances of the crime, together with a copy of any description of the criminal given by such person. Any such information is normally supplied after committal. Counsel is always informed of the Chief Prosecuting Solicitor's decision in such matters and is commonly asked to advise whether or not further disclosure would be proper.

(e) Where the defence ask to be notified of the previous convictions of prosecution witnesses, it is the practice of the Chief Prosecuting Solicitor to arrange for details of any such convictions to be made available at Court on the date of trial. It is not his practice actively to enquire whether or not a witness has convictions without special reason nor is it his regular practice voluntarily to disclose previous convictions of prosecution witnesses unless Counsel so advise or the conviction is clearly relevant, for example, for perjury and it is apparent that the evidence will be challenged.

15. It will be apparent from the outline of the policies set out in the last three paragraphs that there are considerable variations in matters of detail. Doubtless many other variations are practised by other prosecuting solicitors but we have not considered it necessary to explore this further.

Section 48 of the Criminal Law Act 1977

48. (1) The power to make rules conferred by section 15 of the Justices of the Peace Act 1949 shall, without prejudice to the generality of subsection (1) of that section, include power to make, with respect to proceedings against any person for a prescribed offence or an offence of any prescribed class, provision

(a) for requiring the prosecutor to do such things as may be prescribed for the purpose of securing that the accused or a person representing him is furnished with, or can obtain, advance information concerning all, or any prescribed class of, the facts and matters of which the prosecutor proposes to adduce evidence; and

(b) for requiring a magistrates' court, if satisfied that any requirement imposed by virtue of paragraph *(a)* above has not been complied with, to adjourn the proceedings pending compliance with that requirement unless the court is satisfied that the conduct of the case for the accused will not be substantially prejudiced by non-compliance with the requirement.

(2) Rules made by virtue of subsection (1)*(a)* above

(a) may require the prosecutor to do as provided in the rules either

(i) in all cases; or

(ii) only if so requested by or on behalf of the accused;

(b) may exempt facts and matters of any prescribed description from any requirement imposed by the rules, and may make the opinion of the prosecutor material for the purposes of any such exemption; and

(c) may make different provision with respect to different offences of different classes.

(3) It shall not be open to a person convicted of an offence to appeal against the conviction on the ground that a requirement imposed by virtue of subsection (1) above was not complied with by the prosecutor.

express the hope that our review of police powers will be available in time for it to be taken into account in the course of that examination.

Surreptitious surveillance

3.53. The use by the police of methods of surreptitious surveillance such as telephone tapping, eavesdropping by electronic means and long range observation may, when it is directed against persons in their own homes or business premises, be regarded as an invasion of privacy akin to a search of the premises. So far as interception of communications by post or telephone is concerned, this has long been recognised, and the use of these methods by the police is regulated by the system of warrants issued by the Home Secretary.

3.54. The Government's White Paper issued in April 1980 on the *Interception of Communications in Great Britain*[1] gives details of the number of warrants issued, but does not distinguish between those concerned with national security and those relating to the investigation of crime. We are concerned only with the second category, but we were unable to obtain from the Home Office separate figures of their numbers. It is, however, clear from the totals given in the White Paper that the use of warrants for criminal investigation is at present on a very limited scale. Other forms of surreptitious surveillance are not subject to any formal statutory regulation, but guidance on their use has been given to the police by the Home Office and there are provisions in police force orders controlling their use.[2]

3.55. The general question of the intrusion by electronic surveillance into a person's privacy was considered by the Younger Committee[3] but not in the context of criminal investigation, which was outside its terms of reference. Nonetheless the Younger Report provides for our purpose a useful definition of surveillance devices. They encompass devices which enable one to overhear or see a person who believes that he has taken adequate measures to protect himself from surveillance. This definition has the advantage that it will take account of new forms of surveillance as technology develops.

3.56. The use of telephone tapping and other methods of surveillance is a subject on which we did not receive a great deal of evidence, and we have not been able to carry out a detailed study of the present practices, or of the possibilities for future technological developments. But although we have no evidence that the existing controls are inadequate to prevent abuse, we think that there are strong arguments for introducing a system of statutory control on similar lines to that which we have recommended for search warrants. As with all features of police investigative procedures, the value of prescribing them in statutory form is that it brings clarity and precision to the rules; they are open to public scrutiny and to the potential of Parliamentary review. So far as surveillance devices in general are concerned this is not at present so. There is the further consideration that, as a party to the European Convention for the Protection of Human Rights and Fundamental Freedoms, the United Kingdom is required by Article 8 of the Convention to bring these matters under statutory control.

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[1]London HMSO Cmnd 7873.
[2]See the *Law and Procedure Volume*, paras 57–59 and Appendix 10.
[3]*Report of the Committee on Privacy*, London HMSO 1972 Cmnd 5012.

3.57. We therefore recommend that the use of surveillance devices by the police (including the interception of letters and telephone communications) should be regulated by statute. The specific practices subject to regulation should be set out in secondary legislation to enable new techniques to be incorporated as they are developed. Each occasion for the use of a device should require specific authority, in the form of a warrant issued by a magistrates' court (by which we mean magistrates sitting formally with a clerk). Application for a warrant, which would have to be *ex parte* and heard in private, should contain reasons for the intrusion; and the evidence should be recorded in writing. A warrant should be issued only if the court is satisfied that other methods of investigation have been tried and proved ineffective; if there are reasonable grounds to believe that the evidence will be of substantial value, and that its use will enable those responsible for a particular crime to be identified, or the particulars of offences thought to have been committed by particular individuals to be determined; and if the matter under investigation involves a grave offence.[1]

3.58. As with search warrants, authorisation should be specific, limited in place and duration and should contain the reasons for the intrusion. At the hearing of the application the interests of the person subject to surveillance should be represented by the Official Solicitor or a similar body; we see this as necessary as a means of securing consistency in practice. Unless judicial authority to the contrary is obtained, the person subjected to the surveillance should be told of the surveillance after the event, as is the requirement in a number of other countries. By these means, it should be possible for the justification of surveillance to be challenged, and, if not justified, for redress to be obtained. These proposals would enable the police to use evidence obtained by surveillance in court, which they are at present unable or unwilling to do in relation to telephone tapping.

3.59. We do not consider that the application of such controls will cause any substantial hindrance to the police in their work, especially against the background of the apparently stringent control exercised by the Home Secretary over the issue of warrants for telephone tapping. Some provision should be made for the police to act initially without judicial authorisation in an emergency, provided that they apply for retrospective authorisation.

3.60. We consider that these matters should be placed upon a statutory footing. But we recognise that our proposals provide no more than a schematic description of the system of control which we would like to see, and we are unable to take the matter further without more detailed knowledge of the present practices. It will, moreover, be necessary in devising a new system to take account of the findings of the European Court in the case of *Malone*, in which it has been alleged that the present controls over telephone tapping fall short of the requirements of Article 8 of the European Convention for the Protection of Human Rights and Fundamental Freedoms.

[1]See para 3.7.

Chapter 3

Arrest

Existing powers of arrest and their rationale

3.61. We consider in the rest of this chapter those coercive powers which involve depriving a person of his liberty (arrest) or which are exercised when a person has been lawfully deprived of his liberty, that is, when he has been arrested (detention upon arrest).

3.62. In brief, the power of arrest can derive from one of the following sources: the common law; a warrant issued by a magistrate; and without warrant from a specific statutory provision.[1] The common law power is for dealing with breaches of the peace. A magistrate may issue a warrant for the arrest and production at court of anyone suspected of committing an offence which is triable on indictment or for which the penalty is imprisonment, or if the address of the suspected person is not well enough established to enable a summons to be served on him. Arrest on warrant for a criminal offence, as opposed to fine default or failure to answer bail, is now relatively rarely used.

3.63. By far the most commonly used power of arrest is that under s. 2 of the Criminal Law Act 1967.[2] This put into statute the ancient common law power to arrest without warrant for a felony which had to be replaced when the 1967 Act abolished the distinction between felonies and misdemeanours. The Criminal Law Revision Committee, upon whose recommendation the Act was based, sought only to find a reasonable basis for producing a statutory power of arrest. They recognised that it was outside their terms of reference to consider the rationale of powers of arrest in general.[3] The salient elements of s. 2 are that for an arrest under it to be lawful the offence must be one carrying a penalty of five years imprisonment (an "arrestable offence"); and there must at the minimum be suspicion on reasonable grounds that the person to be arrested either has committed, is committing or is about to commit the offence.

3.64. The other powers of arrest under statute are multifarious.[4] They fall outside the definition of "arrestable offence" in the 1967 Act and come broadly into four categories: arrest where the person is committing the offence, arrest where there is reasonable suspicion of an offence, arrest where the offender's name is not known or he is likely to abscond, and arrest of someone who is unlawfully at large (for example an escaped prisoner). Why some and not other offences carry these powers of arrest is impossible to discern.

3.65. Such rationale as may be perceived in the existing powers of arrest seems to us to be broadly as follows. The ultimate purpose of arrest is to bring before a court for trial a person who commits a criminal offence or is reasonably suspected of so doing. But because arrest deprives the citizen of his liberty its use is to be restricted generally to offences that carry the penalty of imprisonment (there are some exceptions in the case of offences of causing a public nuisance, for example being drunk and incapable) and to persons

[1] A fuller account will be found at paras 42–56 of the *Law and Procedure Volume.*
[2] Set out in full at para 44 of the *Law and Procedure Volume.*
[3] *Seventh Report of the Criminal Law Revision Committee on Felonies and Misdemeanours*, London HMSO 1965 Cmnd 2659.
[4] See the *Law and Procedure Volume*, Appendix 9.

against whom the summons procedure will not be effective. Arrest may also be used to prevent or terminate the commission of an offence. The general power of arrest without warrant is further restricted to more serious offences.

3.66. The period of detention upon arrest[1] may be used for certain purposes, and the power of arrest is also related to these. Indeed the purposes for which the existing powers of arrest are used in practice can be put in the following terms. It may be used to prevent the suspect destroying evidence or interfering with witnesses or warning accomplices who have not yet been arrested. Where there is good reason to suspect a repetition of the offence, especially but not exclusively offences of violence, it may be used to stop such an occurrence. Finally, the criterion of having reasonable grounds for suspicion sufficient to justify arrest is not necessarily sufficient to justify a charge; hearsay evidence, for example, may be sufficient grounds for reasonable suspicion, but it is not sufficient for a person to be charged, since it will not be admissible as evidence at trial. Accordingly, the period of detention may be used to dispel or confirm that reasonable suspicion by questioning the suspect or seeking further material evidence with his assistance. This has not always been the law or practice but now seems to be well established as one of the primary purposes of detention upon arrest.[2]

3.67. The point is clearly made by Lord Devlin in the case of *Shaaban Bin Hussein v Chong Fook Kam*[3]. "'Reasonable cause' is a lower standard than information sufficient to prove a *prima facie* case. Reasonable cause may take into account matters that could not be put into evidence at all or matters which, although admissible, would not on their own prove the case. The circumstances of the case should be such that a reasonable man acting without passion or prejudice would fairly have suspected the person of having committed the offence. It is important that hasty or ill-advised police action should be avoided. If on the other hand the police hesitate too long to arrest a person when they have proper and sufficient ground for suspicion against him, they may lose the opportunity of arresting him or may enable him to destroy evidence . . . Suspicion arises at or near the starting point of an investigation of which the obtaining of *prima facie* proof consists of admissible evidence. Suspicion can take into account matters that could not be put in evidence at all."

The main issues

3.68. As is readily apparent from this and the more detailed account in the *Law and Procedure Volume*[4] and as has been strongly pressed in the evidence to us, there is lack of clarity and an uneasy and confused mixture of common law and statutory powers of arrest, the latter having grown piecemeal and without any consistent rationale. In this area the main concern of many of our witnesses is for clarification, rationalisation and simplification of the law. The task of the police is said to be made more difficult because of the complexity of

[1]See para 3.94.
[2]See the *Law and Procedure Volume*, paras 68 ff.
[3](1969) 3 All ER 1626.
[4]*Op. cit.*, paras 42–56.

the law under which they operate. And it is scarcely surprising if the citizen is uncertain of his rights.

3.69. The lack of clarity in the law and the uncertainty of its effect are said to give rise to a variety of problems: it is argued that too many people are arrested and not subsequently prosecuted; there are complaints that people are arrested without being told of the fact of and grounds for the arrest; people are wrongfully arrested solely for the purpose of questioning them, where there is no reasonable ground for suspecting them of a specific offence. Where the offence involved carries a power of arrest, arrest is varyingly used by different police forces as a means of bringing suspects into the criminal process.[1] Some of our witnesses believe that the use of summons should be increased so that people can be brought to court without being deprived of their liberty, and it is said to be a cheaper way of initiating proceedings. The variation in practice is however claimed to be justified by reference to the characteristics of the area to be policed, for example the anonymity and floating population of the large metropolitan area presents particular problems in identifying and locating offenders and getting them before the courts. Attention is also drawn to the lack of an arrest power in respect of some quite serious offences, for example indecent assault, and it is suggested that the definition of arrestable offence should be widened to cover at least such offences. It has also been put to us that someone who refuses to give his name and address can effectively prevent the police enforcing the law in respect of offences which do not carry a power of arrest, since a summons cannot be served upon him.

3.70. The law about the circumstances in which someone can be arrested, as we have noted, is complicated but in general only someone who has been seen to commit an offence or who can reasonably be suspected of committing an offence can be arrested. Representations have been made to us that this restriction can hamper the police in solving crimes in circumstances where an offence has clearly been committed and where a number of people are involved some of whom may be witnesses and one or more may be suspects; an example is an affray in a public house. Without a power to hold them all, or at least to detain them long enough to take names and addresses, the police cannot isolate the suspects and may have difficulty in securing witnesses. It has been suggested that there should be a power to demand the name and address of witnesses to an offence, even where the suspect is known.

The relevant factual material

3.71. The general pattern of the use of arrest may be seen from the criminal statistics and from statistics on the operation of s. 62 of the Criminal Law Act 1977.[2] In 1978 of the 486,000 people proceeded against for indictable offences nearly 370,000 (76 per cent) had been arrested; 116,000 (24 per cent) were brought to court by summons. But just over 300,000 of those who had been arrested were released by the police on bail to appear at court. Thus about

[1] See R Gemmill and R F Morgan-Giles: *Arrest, Charge and Summons: Current Practice and Resource Implications* (Royal Commission on Criminal Procedure Research Study No 8, London HMSO 1980), chapter 3 and Appendix A.

[2] *Criminal Statistics England and Wales 1978*, London HMSO 1979 Cmnd 7670, Table 8.1, p 156 *Home Office Statistical Bulletin* 18 March 1980 Issue 5180.

67,000 (14 per cent) were held in custody by the police after arrest and up to their first court appearance. In the same year, of the 415,000 proceeded against for non-indictable offences other than motoring offences, 230,000 (55 per cent) were brought to court by summons and 185,000 (45 per cent) had been arrested. Of those arrested 153,000 were released on bail to appear at court. Thus about 32,000 (8 per cent) were held in custody by the police after arrest and up to their first court appearance. Additionally, people are arrested on suspicion and then released without any proceedings being brought. National figures are not available on this but our research suggests that somewhere between 10 per cent and 20 per cent of all arrested persons may be dealt with in this way. Many people are also arrested on warrant, for fine default, failure to answer a summons, or for breach of bail. In 1979 the total of persons arrested was about 1.4 million.

3.72. These general figures conceal a variety of practices. The national figures on the use of arrest do not distinguish between adults and juveniles but it is worth noting that juveniles (persons under 17) constituted 36 per cent of those found guilty or cautioned for indictable offences in 1978. This suggests that many juveniles are liable to have been arrested, whereas our research indicates that juveniles are on the whole less likely to be arrested than adults and, if arrested, are less likely to be detained in custody.[1] There are marked differences between police forces in the use of summons and arrest for indictable offences. The 1976 figures (the latest year for which such figures were available in this form) showed for example Cambridgeshire, Cleveland, Greater Manchester and the Metropolitan Police District bringing 1 per cent or less of adults accused of indictable offences to court by summons and Derbyshire, Thames Valley, Warwickshire, West Yorkshire, Wiltshire, Dyfed, Powys and North Wales bringing 40 per cent or over of such persons to court by this means.[2] Our research also indicates that some of those proceeded against by way of summons will at some stage have been arrested.[3] But only a minority, although a substantial one, of defendants are kept in custody after charge and up to their first court appearance.

3.73. Our research does not bear out the assertion that proceeding by way of summons is less expensive than by way of arrest. For straightforward offences where there is a guilty plea the use of arrest and charge makes possible economies of preparation which are not possible where summons is used under existing procedures. It is therefore cheaper.[4] For cases where the defendant is expected to plead not guilty, this advantage disappears and there appears to be little difference on cost grounds between summons and charge followed by bail after arrest.

3.74. How the period of detention following arrest is used is clearly shown by our research. It is used not only to confirm but also to dispel suspicion. Softley, for example, in his study of interrogation at four police stations showed about a tenth of suspects in his sample being released unconditionally at the end of their first appearance at the police station and about a fifth

[1]See Gemmill and Morgan-Giles, *op. cit.*, Tables 3:1, 3:2, 3:3 and 3:6, pp 16 ff and Appendix A.
[2]*Ibid*, Appendix A.
[3]*Ibid*, Tables 3:3 and 3:6, pp 18 and 20.
[4]*Ibid.*, chapter 4.

against whom no formal action was finally taken.[1] The cases Steer cites in his study of the police role in uncovering crime[2] give a picture of the way in which investigations are conducted after reasonable suspicion has been aroused and of the kinds of circumstances in which it may be dispelled or confirmed.

The Commission's proposals

Restrictions upon arrest: the necessity principle

3.75. Our proposals on arrest without warrant have two main and interrelated objectives: to restrict the circumstances in which the police can exercise the power to deprive a person of his liberty to those in which it is genuinely necessary to enable them to execute their duty to prevent the commission of offences, to investigate crime, and to bring suspected offenders before the courts; and to simplify, clarify and rationalise the existing statutory powers of arrest, confirming the present rationale for the use of those powers. In attempting to limit the power of arrest, we have no intention of inhibiting the police from fulfilling their functions of detecting and preventing crime. But we do seek to alter the practice whereby the inevitable sequence on the creation of reasonable suspicion is arrest, followed by being taken to the station, often to be searched, fingerprinted and photographed. The evidence submitted to us supports the view of the Police Complaints Board, expressed in their triennial report, that police officers are so involved with the process of arrest and detention that they fail at times to understand the sense of alarm and dismay felt by some of those who suffer such treatment.[3] However efficient and speedy the procedures are (we know from our research that some forces are quicker with this than others[4]) arrest represents a major disruption to the suspect's life. That disruption cannot, in our view, be justified if it is not necessary to take him to the station for one or more of the following reasons: to find out his name and address; to prevent the continuation or repetition of the offence; to protect persons or property; to preserve evidence in connection with that offence; to dispel reasonable suspicion or to turn it into a *prima facie* case (as indicated by Lord Devlin in *Shaaban Bin Hussein*[5]); or to ensure that the accused gets to court. We know that many forces use summons more readily than arrest for indictable offences. We are well aware that the conditions of policing in the large anonymous urban areas may create particular problems but we do not consider that they justify arrest followed by a period of more or less protracted detention in every circumstance in which arrest is technically possible.

3.76. We recommend that, as under the present law, arrest of a person by a constable without a warrant should be possible only where that person is committing, has committed[6] or is about to commit an arrestable offence, or is suspected on reasonable grounds by the constable of any of these acts. Our

[1] *Op. cit.*, chapter 7.
[2] *Op. cit.*, chapter 4.
[3] *Police Complaints Board Triennial Review Report 1980*, London HMSO Cmnd 7966, para 47.
[4] See Gemmill and Morgan-Giles, *op. cit.*, pp 23–25.
[5] Cited at para 3.67.
[6] The constable should also, as is now the case, be able to exercise this power not only where an offence has been committed but also where he suspects on reasonable grounds that an offence has been committed.

proposals on the definition of an arrestable offence are at paragraphs 3.82 and 3.83. But in order to limit detention upon arrest to those cases where the circumstances indicate it is necessary ("the necessity principle"), and by that means to diminish the use of arrest and to produce more uniform use of such powers, we recommend that detention upon arrest for an offence should continue only on one or more of the following criteria:

(a) the person's unwillingness to identify himself so that a summons may be served upon him;

(b) the need to prevent the continuation or repetition of that offence;

(c) the need to protect the arrested person himself or other persons or property;

(d) the need to secure or preserve evidence of or relating to that offence or to obtain such evidence from the suspect by questioning him; and

(e) the likelihood of the person failing to appear at court to answer any charge made against him.

3.77. We considered whether these criteria should be applied statutorily at the point of arrest, so that an arrest made and detention continued when one or more of them did not apply would thereby be rendered unlawful. But we think that it would not be practicable to place so stringent a requirement upon police officers in the street. Often decisions will have to be taken urgently and in the midst of disturbances or otherwise confused situations. The earliest point at which the criteria should be applied by statute is when the arrested person is brought to the police station. At that point the officer receiving the suspect into his custody[1] should be required by statute to enquire not only into the validity of the arrest, as is done now, but also whether it is essential to keep the arrested person at the police station on the basis of the criteria that we have set out above. His decision to keep the person in custody and his reasons for it should be recorded on the new custody sheet.[2] In applying these criteria he should have regard to the nature and seriousness of the offence, the nature, age and circumstances of the suspect, and the nature of the investigation that is required. It is not always necessary to detain a person in custody in order to question him or to carry out other enquiries, or, if he has to be detained, to lock him up; and the current police practice of dealing with juveniles without resorting to the use of custody, for example by questioning them at home, should be encouraged. The continuation of detention upon arrest solely for the purpose of clearing up other offences would not be permitted by these provisions.

3.78. These provisions have broadly the same effect as and could be put in terms similar to those set out in Schedule 1 to the Bail Act 1976 for the purpose of the court's decision not to grant bail. We considered the possibility of using that Act as the basis for our own proposals. However the rather different circumstances of arrest and the need to make provision for the police to be able to detain a person on arrest for the purposes of investigation suggest that a separate and distinct set of criteria should be devised to deal with detention upon arrest.

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[1]We discuss this officer's identity at para 3.112.
[2]See para 3.113.

3.79. We believe that the application of these criteria on arrival at the police station should and will affect the decisions of arresting officers. Indeed we recommend that the Home Office should issue guidance to the police so that these criteria are applied to the arrest itself. Where an officer on the street has grounds for arrest and the offence carries a power of arrest, he should consider whether it is necessary for him to detain and take the arrested person to the police station or whether he can dispose of the case in some other way, for example by telling the person that he will be reported for prosecution.

Notice to appear at the police station

3.80. To help to reduce the use of arrest we would also propose the introduction here of a scheme that is used in Ontario enabling a police officer to issue what is called an appearance notice. That procedure can be used to obtain attendance at the police station without resorting to arrest provided a power to arrest exists, for example to be fingerprinted or to participate in an identification parade. It could also be extended to attendance for interview at a time convenient both to the suspect and to the police officer investigating the case. The use of an appearance notice in this way can be regarded as a procedure analogous to the present power to bail for further enquires under s. 38(2) of the Magistrates' Courts Act 1952, but without the need for prior arrest and attendance at the police station. Failure to appear in response to a notice should be made an offence, as is failure to answer to bail.

The arrestable offence

3.81. The exercise of any power of arrest should be restricted as we have proposed. To what offences should the power of arrest without warrant apply? The present line for general powers of arrest, with warrant, is drawn at imprisonable or indictable offences (which are not necessarily the same) and, without warrant, at offences liable to five years imprisonment on conviction. The latter criterion, as we have noted, owes its origin to an attempt to convert the old common law power of arrest for a felony to statutory form. It has no deeper rationale than that (the multitude of other statutory powers of arrest do not depend upon any similar notion of seriousness). Neither the Criminal Law Revision Committee, who recommended the provision, nor Parliament gave any consideration in this context to the principles that should be the basis for the general powers of arrest. The five year criterion catches the armed bank robber and the first time shoplifter alike, but it misses some serious offences (indecent assault upon a child of 13 for example). Some have suggested raising the threshold in order to avoid having the power of arrest for comparatively trivial incidents. However, unless the threshold was placed so high as to exclude all but the gravest offences, it would still leave problems with offences which can range from the trivial to the serious and which because of that have a very high maximum penalty. (Theft, which carries a penalty of ten years, is the prime example.) Further, as this solution would exclude an additional number of serious offences from being arrestable it would be likely to increase difficulties in the enforcement of the law and the prosecution of offences. On the other hand to lower the threshold in order to bring in offences like indecent assaults upon children of 13 and over will bring in many more (of a wide ranging variety, which might be regarded by many people as less serious), and

which might be seen as an excessive increase in police powers. Furthermore the application of a threshold of, for example, two years imprisonment provides no more logical a cut off point than that of five years imprisonment.

3.82. This presents an awkward dilemma which we have not found it easy to resolve. There seem to us to be a number of possible ways out of it. One might be to abandon the present five year criterion, to establish an altogether different criterion of seriousness which does not rely upon the penalty available on conviction of the offence concerned, and then to examine the statute book and give a power of arrest in respect of the particular offences which meet the new criterion. In view of the number of offences on the statute book this would be a mammoth task, even if the alternative criterion of seriousness could be generally agreed, and a task that would have an uncertain legislative outcome, since Parliament would not only have to agree the new criterion but also its application to each individual offence. We do not think this a practical approach. Another approach would be to leave the existing statutory provisions broadly as they are; this approach maintains the present confusing array of statutory powers and the anomalies created by the criterion of five years imprisonment, but it avoids the difficulties of trying to produce an alternative criterion and then applying it to offences across the whole statute book and also the possible risks of giving the police a wider power of arrest than they have at present. If a case can be made for creating a power of arrest in respect of an offence for which it does not currently exist, for example in relation to sexual assaults upon children, then there should be specific statutory provision made for it. Conversely some existing powers of arrest need close scrutiny. This is the approach that three of us favour on the grounds that five years imprisonment is the appropriate measure of the seriousness of offences for which the police should have a power of arrest, and that the case has not been made for change. They consider that the alternatives might alter but would not remove the anomalies presented by the existing law and they see grave risks in increasing police powers of arrest, because, in their view, it would give a strong incentive to the police to use arrest more extensively at a time when the trend should be in the opposite direction.

3.83. The majority of us considers however that the need to place the existing powers on a consistent and rational footing cannot be ignored. Their approach is based upon the following considerations. Parliament has established as the criterion of seriousness of offence for arrest on warrant that the offence is either indictable or imprisonable.[1] The power of arrest without warrant is required to deal with situations where it would not be practicable or reasonable to require a warrant to be obtained. But the purposes for which arrest is used, whether on warrant or not, and to which we have referred in paragraph 3.65, are the same. Accordingly the same criterion of seriousness of offence can and should apply to both types of arrest, with the exception that the police should not as a general rule have a power to arrest without warrant for offences which do not carry the penalty of imprisonment. The majority of us, therefore, proposes that an arrestable offence for the purposes of any arrest without warrant should be defined as an offence which is punishable with imprisonment;

[1]Sections 24 and 104(4) of the Criminal Justice Act 1967.

but the exercise of the power of arrest should be subject to the "necessity principle".[1] This will make it possible to remove the present distinction between general and particular statutory powers of arrest. Those of us who take this position do not think that redefinition of the arrestable offence in this way will in practice result in an increase in the total number of arrests. Rather they believe that the restrictions upon arrest and detention upon arrest proposed in paragraph 3.76 are such as to ensure that arrest will be less frequently and widely used even if the definition of arrestable offences is widened. The most prevalent offences either already carry a power of arrest or are non-imprisonable and will not be affected by the redefinition of the arrestable offence. Accordingly it would, in their view, be misleading to represent the extension of the power of arrest to other less frequently committed offences as a significant increase in police powers.

3.84. If the proposal of the majority of us for altering the definition of arrestable offences is adopted, consideration will need to be given to whether a particular power of arrest will be required for certain offences which are at present arrestable but not imprisonable on first conviction. These are mainly offences involving some form of public nuisance; street betting, gaming in a public place, drunkenness offences, breach of the peace, wilful obstruction of the highway and soliciting as a common prostitute are examples. Whether special provision should be made for a statutory power of arrest in respect of these offences will need to be reviewed in the light of the restrictions we have proposed upon the exercise of the general power of arrest, particularly those applying to the prevention of continuing offences and the identification of the offender.

3.85. There will also be a consequential change for the power of arrest without warrant by someone other than a police constable (a matter which takes us beyond our terms of reference). However, if the activities of other law enforcement agencies, such as HM Customs and Excise, are left out of account, we would observe that this power of arrest is at present, so far as we are aware, used mainly by store detectives or shop owners in respect of shoplifters, and the proposed alteration in the definition of arrestable offence would not affect the power they exercise. It seems doubtful whether anyone other than a constable will take advantage of any increased power of arrest which he might theoretically be given by the proposed change in the definition of an arrestable offence. A person who made such an arrest is required to deliver the person whom he has arrested directly to a constable or to a court. As soon as the constable received the accused person into his custody he would be required to have regard to the proposed criteria for prolonging detention upon arrest.

3.86. Where there is no power of arrest without warrant for an offence, generally the police are able to proceed by way of summons, or by application for a warrant to arrest (the provisions for which we recommend should be retained). But where a person refuses to give his name and address and the police do not know it, that person can in effect prevent the law from being enforced because it is not possible to serve a summons upon him. Two of us

[1] See para 3.76.

take the view that this problem is not such as to justify making available the power of arrest, that is the power to deprive a person of his liberty, for offences which cannot carry a prison sentence. The majority accepts that this may be a very rare occurrence, but considers that the police should have some means available to them of dealing with the situation when it arises, since othewise the law can be openly flouted. Accordingly they recommend that if a police officer actually sees an offence being committed for which he has no power of arrest without warrant and if he does not know the offender and the offender positively refuses to give his name and address (or an address where a summons may be served upon him), the officer should have the power to arrest for the offence concerned (there should not be a separate offence created of refusing to give name and address). Detention upon arrest for this reason should terminate immediately the person gives the particulars that he has refused to give or they are otherwise ascertained. If the particulars are not forthcoming he should be brought before a magistrates' court immediately, charged with the offence he has committed, as is required of a person arrested upon a warrant. We recognise that the existence of this power could possibly cause friction between the police and members of the public, and this is an additional reason why our two colleagues are concerned about the proposal. There must therefore be restrictions and adequate safeguards upon its use. For the arrest to be lawful the officer must actually see the person committing the offence, and the person must positively refuse to give his name and address. The officer must make it clear that he is a police officer; he must indicate what offence has been committed and explain that he has a power to request name and address and to arrest and detain the offender for so long as he positively refuses to supply them. To minimise dispute over whether the offender knew that the officer was in fact a police constable and whether name and address were actually given, the offender should be invited to write his name and address in the officer's note book.

Notification of grounds of arrest

3.87. The case of *Christie v Leachinsky* outlines the conditions that have to be met if an arrest is to be valid. Viscount Simon's judgment in that case set out the position.[1] In brief, the person who is being arrested has to be told that he is being arrested and why. We recommend that this should be put upon a statutory footing. The person who is being arrested should be told in clear and unambiguous terms, preferably using the word "arrest", that he is being arrested and why. Those reasons should be recorded in writing upon the custody sheet.[2]

Arrest under the Vagrancy Act 1824

3.88. Before we began work and during the course of our enquiry there was considerable controversy over the offence under s. 4 of the Vagrancy Act 1824, colloquially known as "sus", which carries a power of arrest under s. 6 of the Act; and we received a substantial amount of evidence on the matter. We were deeply concerned about the friction between certain sections of the community and some police forces which the use of the provision undoubtedly causes, but

[1][1947] AC 578–579. Quoted at para 52 of the *Law and Procedure Volume.*
[2]See para 3.113.

the offence itself, being part of the substantive criminal law, is, strictly speaking, outside our terms of reference. Our consideration of the matter has, however, been overtaken by events. The subject has been examined in detail by the Home Affairs Sub-Committee of the House of Commons on Race Relations and Immigration.[1] We welcome the Government's announcement of its intention of bringing forward legislation which will include the repeal of the suspected person offence,[2] and we hope that this will contribute to the improvement of relations between the police and young people, particularly those from minority groups.

The position of witnesses

3.89. The powers of arrest which we propose should apply only to persons suspected of committing an offence. We do not propose that the present position should be overturned and that the police be given specific power to detain for enquires whether in the street or in the police station on a criterion other or less than the present one. We do not consider that so fundamental an infringement of the freedom of the citizen to go about his business would be warranted by the potential advantages for the control of crime. One exception might be made to this principle, which we shall discuss in paragraphs 3.91–3.93. We should make it clear, however, that the application of the criteria limiting detention upon arrest proposed in paragraph 3.76 will give statutory recognition to the right of the police to question in custody, if necessary, arrested persons who are reasonably suspected of an offence. The controls that are to be placed upon such questioning we shall discuss in chapter 4.

3.90. It follows that we do not accept the suggestion of some of those who gave evidence to us that there should be a power to ask witnesses of an offence, as opposed to suspects, their name and address and to arrest on refusal. If such a power were given, we have no doubt that it would generally be used with sense and discretion. But there is a risk that it might be misapplied and the results of that could be damaging to police relations with the public, particularly in areas where those relations tend generally to be delicate. We doubt if having such a power would solve the problem of the reluctant or obstreperous witness, who is, in any event, unlikely to be particularly reliable if he is acting under compulsion. The traditional and accepted principle is that the public have a social or moral duty to assist the police but not one that goes beyond that. Equally traditional is the view that the police should and do police by consent. We believe that there would have to be more compelling reasons than have been put to us for society to consider abandoning either of these principles. We note that even the police service does not unanimously support the proposal for coercive powers against witnesses. We reject the idea.

Power of temporary detention

3.91. There is one set of circumstances, however, where the police could be given power temporarily to detain persons who are not suspects on the precise

[1] *Race Relations and the "Sus" Law*, Second Report from the Home Affairs Committee Session 1979–80, London HMSO 1980, HC 559.

[2] *Her Majesty's Most Gracious Speech to Both Houses of Parliament* delivered on Thursday 20 November 1980

definition we are using or to stop vehicles. Circumstances do from time to time occur where the police must respond immediately to an incident where there is reason to believe that a grave offence has been committed or is imminent and where temporarily detaining people in the immediate vicinity of the incident will assist in identifying or apprehending the offenders, preventing or terminating the offence or securing or recovering property or a person. An example was the murder in 1979 on a Glasgow to London express carrying football supporters. The train was stopped en route and no-one was allowed to leave it until the police had made sufficient enquiries to identify a suspect. It could not be said that every person on the train could be suspected on reasonable grounds of having committed the murder. But in the eyes of the public the police would have been failing in their duty if they had not taken some such action to deal with the situation. We considered whether it would be desirable to regularise by legislation the exercise of such a power in exceptional circumstances, so that the police are not at risk of a claim for wrongful arrest should someone exercise his undoubted right under the present law to try to walk away.

3.92. The availability of such a power would have to be restricted to the immediate vicinity of a grave incident. The incidents we have in mind fall into four broad groups: those where people's lives are at risk (there has been a death, or grave personal injuries inflicted or there is good reason to believe that they will be; there has been the use or threatened use of firearms); those involving serious sexual attacks on women or children; those where there is risk of grave damage to or loss of property (there has been an explosion or the discovery of an explosive device, or a serious fire or the discovery of an incendiary device, or articles of national importance or of exceptional value have been lost); and those where someone is missing and is himself at risk or is putting others at risk (there has been a kidnapping or hostage-taking, or a child is missing and believed to be at risk, or a person has escaped from lawful custody and his continued liberty presents a threat to persons or property). Where such an incident occurred, the police could be given a power to detain persons within the immediate vicinity or to stop vehicles within a distance reasonable in the circumstances. The exercise of the power would have to be justified, should it be challenged subsequently, on the grounds that its exercise was reasonable in all the circumstances and that it assisted in identifying or apprehending suspected offenders, preventing or terminating an offence, or securing or recovering property or a person. Its exercise should be confined to no longer than necessary to achieve the purposes for which it was used.

3.93. We are aware that when incidents of this type occur members of the public generally cooperate most willingly with the police. Two of us fear that the effect of legislating for this situation would be that where previously the police would have sought and obtained the cooperation of the public they will in future resort as a matter of course to their statutory powers. This would inevitably, in their view, have a bad effect upon relations between the police and the community. They think that it would be difficult to provide satisfactory safeguards for the exercise of such a power or to ensure that it was used only in exceptional circumstances. They do not think the case for breaching the principle that a person should be detained only if reasonably suspected of an arrestable offence has here been made out. Notwithstanding these arguments,

the majority of us considers that the police should not be left without guidance and at risk of an action for wrongful arrest in these circumstances. They further believe that prescribing a specific and strictly limited power provides more protection to the public than if the matter were left unregulated and that this will diminish the possibility of the police being able to proceed by the use of bluff. They, therefore, propose that the police should be given a power to detain people in the circumstances set out above while names and addresses are obtained or a suspect identified or the matter otherwise resolved. Once that had been done or a person gave his name and address he would be free to leave the incident. Failure to give name and address would not be an offence and a person would be detained only as long as was reasonable in all circumstances of the case. Similar provisions would apply to the stopping of vehicles.

Detention upon arrest

3.94. Once an arrest has occurred and not immediately been terminated by the application of the proposed limitations, how long should the police have power to detain the suspect? What should be the safeguards upon such detention? We are here concerned with the period after the officer taking charge of the suspect at the police station has satisfied himself that there are grounds for keeping the suspect in custody at the police station. We refer to this as "detention". There are two complementary elements to developing safeguards. The first is to provide for overall limits upon the length of the detention. The second is to secure proper arrangements for the care of the suspect and the protection of his rights so long as he is detained.

The existing provisions and criticisms of them

3.95. Powers and procedures relating to detention in custody after arrest are covered in paragraphs 61–67 in the *Law and Procedure Volume*. Briefly, the law on the permitted period for which a suspect may be kept in custody after arrest without being charged or brought before a court is uncertain in its effect, but such detention is allowed by the law and is common police practice. The relevant statutory provision is concerned primarily with police bail, the principle of which dates back to the Metropolitan Police Act 1829. Many of our witnesses press for curtailment and precise definition of the period of detention prior to charge or presentation before a court. Examples of substantial periods of detention have been cited to us. And the ineffectiveness of *habeas corpus* as a remedy for lengthy detentions has been frequently referred to. On the other hand too short a period or too inflexible a time limit is seen by some as certain to hamper the investigation of crime.

The relevant factual material

3.96. We have been able to build some picture of the time which suspects spend in police custody prior to charge and release on bail or retention for court. Over all, about three-quarters of suspects are dealt with in six hours or under and about 95 per cent within 24 hours. It is very rare for persons to be held for much longer than this without charge. The detailed studies of police interrogation found none who were held for more than 48 hours.[1] But a survey

[1]Softley, *op. cit.*, Table 2:2, p 61 and Barnes and Webster, *op. cit.*, Table A:10, p 62.

done for us by the Metropolitan Police between 1 October and 31 December 1979 showed 212 persons (0.4 per cent) out of 48,343 held for 72 hours or more before charge or release without charge. Juveniles appear to be more speedily dealt with.[1] The length of detention appears to vary slightly with the type of offence; Softley found that those suspected of burglary for example were on average held substantially longer than those suspected of shoplifting.[2] But the length of time that people are held both before charge and before being brought to court varies from force to force, possibly according to the procedures used.[3]

The Commission's proposals

"Helping police with their enquiries"

3.97. We would begin by emphasising that, with the exception of the circumstances mentioned in 3.93, there must be no half way house between liberty and arrest upon the terms which we propose. When we use the words "detention" and "detain" we refer only to action taken after a lawful arrest. But people often go voluntarily to the police station to help the police in the investigation of crime and there may sometimes be a doubt about whether they are free to leave. We therefore recommend that, as is already the practice in some forces, when the conditions for arrest exist or come into existence the police should tell the person who has been voluntarily at the police station that he is now under arrest and not at liberty to leave. At this point a custody sheet for him must be started.[4] Other rights will then come into operation, although the right to go free has, for the time being, been removed.

The need for change

3.98. The existing law is, in our view, inadequate to regulate length of detention. It provides in effect for a person taken into custody for a "serious" offence to be brought before a magistrates' court "as soon as practicable" and, for any other offence, within 24 hours, if he has not been released on bail or otherwise before then. (There are slightly different provisions in respect of juveniles, but they do not affect this point.[5]) The lack of definition of the terms "serious" and "as soon as practicable" gives flexibility but produces uncertainty both for the police and the suspect.

3.99. As we have noted, our research shows that detention beyond six hours occurs only in a quarter of cases and for beyond three days only in a tiny percentage. There is already some guidance on time limits; 24 hours for other than serious cases for all suspects and 72 hours for juveniles in certain limited circumstances.[6] But these do not lead to all people being detained up to these limits. Rather, the demands and pressures of police work appear to condition how long people are detained, a view that is confirmed by Irving's study in

[1]Softley, *op. cit.*, Table 2:4, p 62.
[2]*Ibid.*, Table 2:3, p 62.
[3]Gemmill and Morgan-Giles, *op. cit.*, pp 23 ff.
[4]See para 3.113.
[5]See the *Law and Procedure Volume* paras 90–91.
[6]Section 38(1) of the Magistrates' Courts Act 1952 and s. 29(5) of the Children and Young Persons Act 1969; see *Law and Procedure Volume*, paras 65 and 91.

particular.[1] It is not only the type of offence that affects this, although it may play some part.[2] There is great variation in the circumstances in which suspects come into police custody, in the condition of the suspect when he arrives, in the pressures of work on the investigating officers, and in the nature of the case to be investigated. All are factors that can affect the time that it takes to decide whether the suspect should be charged or if and when he can be released.

3.100. These factors seem to us to militate against short and absolute time limits. Four and six hours have been most commonly suggested, but those who have suggested them do not appear to have based their proposals upon any close study of police work in this country but to be using proposals from elsewhere, for example, those of the Australian Law Reform Commission. (We note the six hour detention period in the recent Criminal Justice (Scotland) Act 1980 but believe that rather different considerations are to be applied in that jurisdiction where arrest must be followed immediately by charge and where the police have very limited powers to release suspects on bail.) Any time limit must, in our view, enable the police to do their job properly but must have due regard to the rights of the person detained. An absolute limit established by reference to some arbitrarily imposed mathematical norm would require so many exceptions as to render it virtually useless as a control upon unwarrantably long detention. Conversely a relatively long period, for example 48 or 72 hours, would give no guidance for cases that do not warrant such lengthy detention, while still being subject to the objection that exceptional cases will occasionally require extension (even the present 72 hour limit in s. 29(5) of the Children and Young Persons Act 1969 allows for extension where a juvenile cannot be brought before a magistrates' court by reason of illness or accident).

Definition of the period of detention

3.101. Although we see objections to absolute time limits, we believe that there must be some statutory means of regulating the time that suspects can be held in custody. What should be the starting and terminal points of any such period? Regarded strictly, since the liberty of the subject is at issue, the time should run from the moment of arrest to the moment of release from police custody or into the control of the court. Yet there are serious operational difficulties about using arrest as the starting point, if the arrest takes place outside a police station. The purposes of arrest and of detention upon arrest may be achieved immediately upon or soon after arrest (the prevention of the offence for example) but other purposes may be achievable only after the person has been taken to a police station where the case can be further investigated. From the point of view of the police, time taken in travelling or in waiting to be moved from one police station to another where the matter is to be investigated may not be useful for the achievement of those other purposes. That time may be considerable, particularly if a suspect is arrested in one part of the country and has to be taken to another. Furthermore if there are to be, as we shall propose, fixed points during a suspect's time in custody at which a supervising officer must enquire into the need for his continued detention,

[1] *Op. cit.*, pp 112–114.
[2] See para 3.96.

provision will be necessary to overcome the difficulties that prolonged travelling might cause for such supervisory arrangements; the means of doing this must not be so complicated as to be impracticable or so imprecise as to render the arrangements for supervision ineffective. However, from the point of view of the suspect a time limit running from the time when he arrives at the police station where the matter is to be investigated ignores waiting and travelling time and what may happen in it.

3.102. In the generality of cases there will be little problem. Offences are investigated locally. Travelling time is, on average, short.[1] And investigations do not take long.[2] It is the unusual case that will cause problems and there are real difficulties in finding a practicable solution which has due regard to the rights of the suspect. It should be a requirement that arrested suspects, if they are to be detained and are not already at a police station, are taken to one immediately so that their detention may become subject to the general supervisory measures which we shall be proposing. Where possible that should be the station at which the enquiry is to be to undertaken. On balance, having regard to the practicalities of the matter, we consider that any time limit should begin to operate from the time that an arrested suspect arrives at the first police station to which he is taken and that any travelling time should be discounted. The custody sheet will, as it does now, record the time of arrest, and times of arrival and departure from any particular station. Accordingly it will be possible for supervising officers, the suspect, if he is released uncharged, and ultimately the courts to review and challenge unreasonably prolonged travelling time.

3.103. Obviously release (either on bail or unconditionally) brings detention to an end. But should the point at which someone is charged (or told that he will be prosecuted) or the point at which he is brought before a court (charged with an offence[3]) be used as the limit which is deemed to end police detention? There are difficulties with either. Magistrates' courts do not sit every weekday in all parts of the country; they sit rarely on Saturday and scarcely ever on Sunday. If the police were required to bring an arrested person before a court within 24 hours or to release him, the only option for a person who is arrested on a Saturday afternoon would be to release him. Using the point of charge places no restriction upon the length of custody after charge and before presentation at a court. What we propose is a combination of these approaches, but one which seeks to minimise the difficulties each presents.

Length of detention

3.104. Our own proposal, while retaining some of the flexibility of the present arrangements, is designed to bring greater certainty to them, to provide continuous and accountable review of the need to retain a suspect in custody, and in the case of longer periods of detention to ensure that some form of outside and independent scrutiny of the police discretion is possible. The provisions of the Children and Young Persons Act 1969 and of the Magistrates'

[1]Gemmill and Morgan-Giles, *op. cit.*, Appendix C.
[2]Softley, *op. cit.*, Table 2:2, p 61 and Barnes and Webster, *op. cit.*, Table A:10, p 62.
[3]This is how s. 38 of the Magistrates' Courts Act 1952 is interpreted. It is not what it says, and it may not even have been the intention of the original nineteenth century provision.

Courts Act 1952 to which we have referred provide the model,[1] but with some significant modifications and additions. We rely upon the limitations to be placed upon arrest as the basis for continuing review of the need to detain the suspect. Once the need to detain the suspect on the grounds set out in paragraph 3.76 is removed, the presumption should be that the suspect is to be released (either on bail for further enquiries or charged, or unconditionally). It should be the statutory duty of the officer who takes charge of the suspect when he is brought into the station to satisfy himself immediately whether the criteria for detaining the suspect apply.[2] If one or more apply, that should be recorded upon the custody sheet and the suspect should be informed orally of the specific grounds for his continued detention. After six hours at the station, if the suspect has not yet been charged, an officer not connected with the investigation and, if possible, of the rank of uniformed inspector or above should be required to enquire into the case, to satisfy himself that grounds for detaining the suspect still exist, and to record those grounds in writing and inform the suspect of them. Beyond this, with the exception discussed in paragraph 3.106, persons suspected of an offence for which they have been arrested and detained must within 24 hours be released unconditionally, released on bail for further enquiries, charged and released on bail to appear at court, or charged and brought before the court that day, if there is a court available, or, if not, the next day (Sundays excluded). Although six hours and 24 hours will be the statutorily fixed review points in the process, we would expect that, as now, investigating and supervisory officers will keep a case of detention prolonged beyond six hours under close review. The existing statutory provisions on time limits on custody for adults and juveniles should be repealed; and consideration will need to be given to the consequences of this in respect of other relevant provisions of the Children and Young Persons Act 1969.

3.105. We see the statutory requirement for reviews on arrival at the police station, at six hours and at 24 hours as providing formally the necessary and progressive measure of internal and external supervision of the police discretion to detain an arrested suspect. Obviously there is room for argument over the points at which such reviews should be required. On the basis of the evidence available to us from the detailed research we commissioned on police practice and of our own study of police procedures on the ground, we have concluded that these strike the right balance between fairness to the suspect and workability. Requiring a review on arrival is essential and does no more than formalise existing arrangements. To set the second review much earlier than six hours (by which time about three quarters of suspects are released under present arrangements) runs two risks. It might so increase the number of cases to be reviewed where the reasons for the detention are perfectly proper that the review would become a mere formality and therefore of little protection to the suspect; and because it would increase the number of cases to be reviewed, it might have the effect of actually prolonging detention for those who would otherwise have been released before six hours by interrupting and delaying the natural course of the investigation. We do not believe that it will operate to

[1]Section 29 of the Children and Young Persons Act 1969 and s. 38 of the Magistrates' Courts Act 1952.

[2]See paras 3.77 and 3.112.

produce a norm, so that people will tend to be kept for six hours even if they could be released earlier. As we have indicated, the existing 24 hour time limit does not produce that effect, nor do similar time limits in other countries. The pressures of work upon the police, and the demands that having a suspect in custody place upon them, coupled with good general supervision, seem to us likely to be far stronger constraints. We would not, however, favour going beyond six hours before the second review takes place.

3.106. The exception to the requirement to release a suspect within 24 hours or to bring him before a court the next day will be for those suspected of grave offences.[1] We accept that there are circumstances which prolong an investigation and delay charging beyond 24 hours (the need to check forensic evidence, for example); and where the police should not release the suspect, because, for example, he is likely to abscond. Such cases are a small minority, but provision must be made for them if the police are to be able to solve grave offences and bring persons accused of them before the courts. We consider, however, that the provision for detention beyond 24 hours uncharged can be justified only in respect of serious crimes, and that not later than 24 hours after a person is brought into a police station under arrest there should be some form of outside check upon the way that the police are exercising their discretion to detain. We therefore propose that where a suspect has not been charged within 24 hours the police should be required to bring him before a magistrates' court sitting in private (as the person will not have been charged). Provision should be made for the suspect to be legally represented, although one of us considers that the police should be able to apply to the court for refusal of legal representation. They do not necessarily need to wait 24 hours before doing this. It may be clear from an early point in the investigation that detention beyond 24 hours will be necessary, for example because forensic checks have to be carried out on a weapon or because the suspect will have to be taken some distance to another police station where the offence is to be investigated. The court should be empowered to authorise a further limited period in custody, to release on bail or to release unconditionally. In making that decision the court would use the same criteria as the police will be using to justify continuing detention upon arrest. The magistrates should be able to fix a period of not more than 24 hours in which the person should be charged or, if still uncharged, brought before them again. At any subsequent appearance they should have the same power but subject to a right of appeal.

3.107. There will be circumstances where at the elapse of a 24 hour period of detention a magistrates' court will not be available, for example at night or, as court sittings are currently arranged, on a Sunday. In some cases the police, realising their enquiries will not be complete within 24 hours, may have been able to anticipate this and get the suspect before a court earlier, but on occasion, for example where an unforeseen delay in completing enquiries occurs or where someone is arrested very late on a Saturday evening, this will be impossible. What is to be done then? One possibility is simply to require the suspect to be brought before the next available court. But at weekends that could result in suspects being held for two days or more before they are

[1]See para 3.7.

brought before a court; and both to allay public unease about suspects being held uncharged for protracted periods and for the protection of the suspect's interests we consider that it is desirable to find some means of giving an outsider access to him if he cannot be brought before a court at or before the 24 hour point. People to make visits of this kind could come from panels of magistrates, lay people, social workers or solicitors. We recommend they should be solicitors. The duty solicitor schemes and legal aid list are a starting point for providing national coverage of solicitors available to perform this function (we discuss fully in chapter 4 the general question of the provision of legal advice to suspects); any other scheme would have to be organised from scratch. The primary function of the visit will be to ensure that the suspect's welfare and interests are being attended to, thus bringing a measure of openness at this stage of the process. The visit by the solicitor would, therefore, not be to give legal advice, but he has the knowledge and experience to give it if requested. This visit would not remove the requirement for the suspect to be brought before a court on that or the next day, and we recommend that consideration should be given to providing facilities, particularly in cities, for magistrates' courts to sit on Sundays if required for this purpose.

Habeas corpus

3.108. Application for a writ of *habeas corpus* has been represented to us as ineffective as a remedy against prolonged detention under the existing law; it seems to be infrequently used in connection with detention by the police now, but this may derive from the imprecision of the law as much as from any defects in the procedure. Our proposals for internal and outside review of police detention should provide improved supervision and a statutory framework within which it can be more readily ascertained than at present whether an arrest or detention upon arrest is lawful or not. Where an arrest has been unlawful or detention unlawfully prolonged the possibility of a writ for *habeas corpus* will remain available.

Police bail

3.109. Existing police powers to release persons on bail are to be found in s. 38(1) of the Magistrates' Courts Act 1952—bail to appear at court after charge—and s. 38(2)—bail to return to the police station after further enquiries. Our evidence indicates no major concern about how the police exercise these powers, except that it is suggested that the existence of the powers is used as an inducement to a suspect either to talk or to comply with other police requirements, for example for fingerprinting. Irving's research suggests that the inducement does not have to be explicitly offered (which would be contrary to the Judges' Rules) for it to be present as a factor operating on the suspect's mind. We shall discuss one aspect of this problem further when we deal with the issue of voluntariness. But we envisage that the risk of improper pressure being brought to bear upon a suspect to be fingerprinted or to do something else which he is not legally required to do will be substantially removed if our proposals are implemented so that there is a presumption in favour of release and that reasons for refusing release are recorded.

3.110. Some changes of detail to provide rather more flexibility in police bail and in consequence to encourage its use have been suggested to us. We consider that it should be possible for the police to impose conditions when, after charge, they grant bail to appear at court, and for them to renew the period of bail if they have to undertake further enquiries. If either of those powers were given, it would be necessary to allow the person concerned to appeal against the police decision; such an appeal should be to a magistrates' court. We see no need for an appeal against police refusal to release on bail, since the matter will in the nature of things be as speedily before a court as the bail appeal could be. We recommend accordingly.

The care of the detained suspect and the protection of his rights

3.111. The second main element of our proposal is to secure proper arrangements for the care of the suspect and the protection of his rights so long as he is detained. Arrangements to these ends already exist in all forces. They give effect partly to the provisions in the Administrative Directions to the Judges' Rules (for example on refreshments), partly to statutory and non-statutory requirements on, for example, legal aid and bail, and partly to Home Office circulars of guidance to the police, which cover a miscellany of matters about dealing with suspects in custody, for example on the accommodation of juveniles. They also reflect practices that have grown up over the years in individual forces, which do not derive from central guidance. A survey of the practice in seven forces which was carried out for us showed that, in consequence, although the main features of the way suspects are looked after in custody are the same, the arrangements differ in detail between forces. The differences are most marked in the way that suspects are made aware of their rights while they are in custody and in the extent to and manner in which a record is kept in one place of decisions made about the suspect's exercise of his rights. We believe it is possible to determine the best practice in notification and documentation in these respects and we recommend that it should be adopted throughout the country.

3.112. We consider that what is the general practice needs to be reaffirmed, namely that, as soon as a suspect is brought into a police station under arrest, accountable responsibility for his welfare, for seeing that he is aware of his rights, for answering enquiries about his whereabouts and for decisions on his detention passes out of the hands of the arresting or investigating officer and into the hands of another officer. Who should this be? The answer to that question clearly depends upon the nature of the police station concerned and the volume of business done at it. We take the view that where the number of suspects dealt with at a police station warrants it there should be an officer whose sole responsibility should be for receiving, booking in, supervising and charging suspects. He should be of no less rank than sergeant and should be of the uniformed branch. He should be responsible to the sub-divisional commander. At other stations, it should be one of the responsibilities of the officer in charge of the station to deal with arrested suspects. Usually that officer will be of the rank of uniformed sergeant or above. In one or two man stations that cannot be so. In those circumstances the strict demarcation between the responsibilities of the arresting or investigating officer and of the officer who

has the duty to look after suspects cannot be maintained. However, we do not think that should affect the general position; indeed only in unusual circumstances will suspects be detained for any length of time at small stations. We suggest that it should be required practice for suspects who are to be detained in custody for longer than six hours to be taken to a station which has the facilities of staff and accommodation to deal with them. It has been put to us that where the arresting officer or officer in charge of the investigation outranks the officer who has responsibility for the suspect in custody, in effect the latter will lose his independence and his ability adequately to secure the suspect's welfare. We think that force orders should make it absolutely clear that the position is as we have proposed, namely that responsibility and, therefore, accountability for the suspect lie with the station or charge officer and through him to the sub-divisional commander. Any officer attempting to override that authority would be in breach of force orders.

3.113. We have already mentioned the desirability of producing a document that is uniform throughout the country and upon which the events of a suspect's time in custody are recorded. We have suggested some matters for inclusion and as our proposals develop in the chapter on questioning shall be suggesting additional items for inclusion on that sheet. Many of these are already recorded by some forces (for example, notification of the Judges' Rules rights) and some are recorded by all forces (for example, the timing of provision of refreshments). So far as we are aware, all the matters of record that we are proposing are recorded in one force or other but practice is variable. The novelty of our recommendation is not therefore in the content of the custody sheet but in the fact that it should have a uniform content throughout the country. A custody sheet should be started as soon as an arrested suspect is brought to a police station, even though his detention is not to be prolonged, and as soon as any person who has come to the station voluntarily is put under arrest. It, or a copy of it, should accompany him if he is transferred to another station, and a copy should be available to the suspect when he is released, if he requests it.

Search on arrest

Existing powers

3.114. The first of the coercive powers consequent upon arrest and detention is search. This is usually undertaken for somewhat different purposes from stop and search and different considerations apply to it. There is at present a power at common law to search an arrested person and his surroundings. It is available only where there are reasonable grounds for believing the person arrested has a weapon which he could use to escape or injure himself or others, or evidence material to the offence with which he is charged (by implication, the offence for which he was arrested). Arrest has to occur before the power to search becomes available. The police cannot search simply because the right to arrest exists.

The Commission's proposals

Search of the person on the street

3.115. We start with search in the street of a person (or his immediate surroundings, including a vehicle). Under the limitations we propose on arrest,

the police officer will inform the person of the grounds and then will decide whether to detain the person and take him to the police station in accordance with the criteria set out at paragraph 3.76. What should be the extent of his power to search at this point? The present situation, in which an arrested person is routinely but superficially searched for evidence material to the offence for which he is arrested or for a weapon, does not from the evidence submitted to us appear to have given rise to any substantial difficulty. We have received no proposals which command any significant measure of support for restriction or extension of this power as a consequence of arrest. We recommend that for the sake of certainty and clarity it should be put upon a statutory basis.

Search of the person at the police station

3.116. On an arrested person's arrival at the police station any more thorough search that is required for evidence can take place. There is also the current practice of searching a person, listing and placing in safe keeping all his possessions on his reception under arrest at the station, and taking anything from him which he might use to harm himself or others. There is no statutory authority for this procedure. Once a person is in custody at the police station, the police are responsible for him and his possessions and the procedure is undertaken for administrative reasons related to that responsibility (safe-keeping of the property, prevention of subsequent allegations of misappropriation by police officers and for the protection of themselves and of the suspect while he is in custody). We recognise that the process can be humiliating and disturbing, particularly for the person who is experiencing custody for the first time. At the same time risks are involved if people are left with their property or are not carefully searched; escapes, suicides and attacks upon police officers have occurred. We therefore consider that it is proper for such searching to be authorised if a person is to be detained at the police station, and we recommend that the procedure should be placed on a statutory footing, subject to the following qualifications.

3.117. We share the view expressed by the Police Complaints Board in their Triennial Review Report 1980 and by the Divisional Court in a recent case that it should not be applied routinely in every case.[1] We further consider that the full search procedure should not occur until the officer taking charge of the suspect has satisfied himself that the grounds for continued detention exist. In other words, the justification for detention must be established before procedures consequential upon detention are set in hand. A superficial search for weapons and for evidentiary articles, if the circumstances of the case require it, should be sufficient at this stage. We see that there may be practical difficulties and risks in making exceptions after this point. We doubt if it is practicable to lay down all encompassing guidelines on the circumstances in which people should or should not be deprived of their property or of articles of clothing which they might use to harm themselves or others or to effect an escape. Station officers will have to be left to use their discretion sensibly, but if that is so they should not be blamed or be liable to an action if something goes wrong. Other than in exceptional cases we suggest that a person should

[1] *Op. cit.*, para 48 and *Lindley v Rutter* reported in The Times, 1 August 1980.

not be deprived of his watch. Our proposals on the length of detention make it desirable that an arrested person should know what the time is. Clearly it will be necessary to record that a watch has been left with a suspect.

3.118. An extreme and manifestly disagreeable form of search is that for illegal drugs, colloquially called "strip search". We recognise that such searches may be necessary if the law, for example in relation to the importation and supply of prohibited drugs, is to be effectively enforced. We consider that strip searches should take place only at a police station, so that they are supervised and monitored. If they involve examination of intimate parts of the body they should be carried out only by a medical practitioner, and only in respect of the most serious offences. We would suggest that such searches should be confined to grave offences.[1] The nature of the places of concealment will limit the range of such offences in respect of which intimate searches will be necessary. One consequence of this approach is that search of body cavities for drugs will be permitted only when the offence suspected is one of supplying, importing or exporting drugs. In view of the nature of this intrusion, the justification for each search should be reviewed by a subdivisional commander and the fact of and reasons for the search should be recorded, before the search takes place, on the new custody sheet.

Search of premises

3.119. The common law power of search of an arrested person extends to his "immediate surroundings" but it is not clear whether it extends to the premises of a person arrested elsewhere. It appears, however, that such a search will be unlawful if there is no connection between it and the offence for which the arrest took place.[2] Submissions to us agree that this uncertainty should be resolved one way or the other. Such powers should be subject to statutory prescription to enable both the police to know their powers and suspects to be aware of their rights. Without clear prescription there is, it is suggested, too much scope for abuse; the police may be tempted to arrest someone on one charge in order to search his premises for evidence of some completely different offence. Searches with the consent of the arrested person are said to be uncontrolled; and that it is easy for the police to obtain consent which is not genuine, for example by holding out the prospect of bail. But whatever the uncertainty in the law, the police do search the premises of an arrested person and the practice is well established. Indeed, this seems to have been so when the Royal Commission on Police Powers and Procedure looked at the matter in 1929. That Royal Commission recommended the practice should be "regularised".[3]

3.120. We think there is a need for some power to search premises on arrest (and vehicles, which seem to us to raise the same sort of issues), since such searches can and do contribute to the investigation and detection of offences.[4] If the police need to conduct such searches, they should be statutorily empowered to do so subject to suitable safeguards. The questions to be

[1]See para 3.7.
[2]See the *Law and Procedure Volume*, para 29.
[3]*Op. cit.*, para 121.
[4]See, for example, Steer, *op. cit.*

addressed are what form the power should take and how its use should be regulated.

3.121. The criterion for search on arrest should be similar to that for any other lawful search, being based on suspicion on reasonable grounds that there are on the premises (or in a vehicle) occupied by or under the control of the arrested person articles material to the offence for which the person has been arrested or a similar offence. Search of any other premises at this stage should be under warrant. It has been suggested that all search of premises on arrest should be subject to the warrant procedure on the grounds that unjustified searches do take place; one of us would support this proposal. The majority of us has concluded however that for the reasons given earlier it is preferable to put the responsibility on the police.[1] They are also concerned that requiring the police to obtain a warrant could delay the suspect's release from custody, and also that this would place considerable pressure on suspects to consent to searches. In order to minimise the risk of "fishing expeditions", there should be some police procedure for ensuring that the decision to search premises and the reasons for it are recorded prior to the search. Responsibility for recording this could be placed upon the station officer. In order to avoid subsequent disputes, this procedure should be used in every case even if the arrested person consents.

3.122. The safeguards on statutory search after arrest will and should be similar to those on search before arrest.[2] The approval of a police officer will replace the magistrates' warrant. But apart from that there will be the same basis of reasonable grounds for suspicion, the decision should be recorded and be available if there are disputes afterwards. We recommend the same approach to exclusion of evidence as we propose for search on warrant. Material evidence found in a search on arrest for a specific offence will be admissible at trial if it relates to that or a similar offence; if it does not but is found incidentally to the search it will be admissible if a warrant could have been obtained in order to search for or obtain it. There should be monitoring and review of the records of searches by supervising officers. When premises are searched in the absence of the arrested person, any other person occupying them should be informed of the reasons for the search, where possible; the search should be conducted in a manner appropriate to what is being searched for; and an independent person should be present, if available. Receipts should be given for anything seized.

The enforcement of the rules on arrest, detention, and search upon arrest

3.123. The powers of arrest and the criteria restricting detention that we have proposed should be set out in a single statute, and the various procedures surrounding them and for dealing with the treatment of persons in custody should be controlled by subordinate legislation. Any failure by the police to meet these standards should occasion disciplinary review. The remedy of action for wrongful arrest or trespass or assault in the cases of wrongful searches should continue to be available. Additionally, when an arrested person is at the police station, failure to pay due regard to the statutory criteria should

[1]See para 3.33.
[2]See paras 3.46 ff.

constitute the grounds of an action for wrongful imprisonment. But in line with our general approach to the automatic exclusion of evidence, all but one of us would think it inappropriate for a wrongful arrest alone to be a sufficient basis for the exclusion at the trial of the arrested person of evidence obtained subsequently.

Other procedures during custody

3.124. When a person is in custody there is a variety of procedures which he may be requested or compelled to undergo, in addition to being questioned. These are being fingerprinted or photographed, the taking of body samples and participation in identification parades. We have received submissions upon all of these matters and deal with them at this point because in various ways they raise issues similar to those raised by the use of the coercive measures discussed in this chapter.

Fingerprinting

Its uses, the present law and the issues

3.125. Most of the evidence submitted to us on these topics focuses on fingerprinting. The major use of fingerprinting, some would say the primary use, is to fix the identity of an accused person with certainty, so that when he is brought before the court and if he is convicted the court can be aware, for sentencing purposes, of his previous record. But fingerprints can also play an important part in the detection of certain types of crime. A print found at the scene of a crime or on a weapon can be shown to be that of a particular person, who may be identified in a number of ways. He may be suggested as the likely offender by the officer in the case, and if his fingerprints are on record, a comparison is possible. A suspect may be in custody for the offence or a similar offence and once his fingerprints are taken he can be linked with the crime or weapon where the original print was found. Finally, where the crime is sufficiently serious, a detailed search in the records (still a time consuming process) may eventually reveal the identity of the offender. Our research suggests that the general value of these aids in the process of investigation can be overstated. For example, in his study Steer says that fingerprints were the main source of information which first established the suspect in the mind of the investigating officer in about 2 per cent of detected indictable crime.[1] Similarly Baldwin and McConville suggest that important forensic evidence (of any kind, not just fingerprints) directly implicated the defendant in only 5 per cent of the cases they examined.[2] That is not to say that the taking and comparison of fingerprints is not valuable in the investigation of certain kinds of crime. In addition fingerprints are used to confirm suspicion that has arisen from other methods of investigation. Finally, fingerprints are an investigative aid in that they can establish innocence as well as guilt. Where fingerprint evidence is available, it will frequently be conclusive and therefore provide hard evidence leading to conviction and lessen the need for reliance upon interrogation. The value of the detailed search for prints at scenes of crime (a technique that has been considerably developed in recent years and will no doubt continue to be improved) should not be impaired.

[1] *Op. cit.*, Table 3:4, p 73.
[2] *Op. cit.*, p 19.

3.126. The present law is that people can be fingerprinted voluntarily or, if aged 14 or over, by order of a magistrates' court after charge.[1] Fingerprinting without consent or the authority of a court is an assault. It is alleged that at present consent to be fingerprinted is not freely given because the police withhold bail until it is forthcoming. It is also asserted that the police take fingerprints as a matter of routine and in many cases where there is no real necessity for it. Even the need for taking fingerprints to identify the offender to ascertain his previous convictions (if any) is questioned: does this really have to be done in relation to minor offences or where the accused is already well known to the police? On the other side, it is argued that the police need to take fingerprints, sometimes before charge, to identify an offender, or to link a suspect with a particular offence. Fingerprints are also necessary, it is said, to enable the court to be certain about the accused's previous convictions when it comes to sentencing him after conviction.

3.127. We have received few representations that the use of fingerprinting should be restricted, although some people see this as the only way of ensuring that fingerprints are not taken with purely nominal consent. A small number seek extension of the powers to the period before charge. An extension is also sought in relation to those over the age of criminal responsibility but under 14 (the 10–13 age group). Further, some police representatives have recommended that they be given powers to fingerprint all people in a particular area and there was a proposal for compulsory fingerprinting of the whole population.

The Commission's proposals

3.128. We reject national fingerprinting as of very doubtful value as a general investigative aid, and as contrary to our position that intrusions upon the person should be allowed, in general, only if there is reasonable ground to suspect the person concerned of involvement in crime. For that reason also we are not disposed to recommend giving powers to fingerprint everyone in a particular area. So far as we are aware people agree voluntarily to being fingerprinted when a major enquiry is in progress.

3.129. In most cases, both for the purposes of identification and investigation, fingerprints are given voluntarily. In line with our general approach fingerprints should be taken only where necessary and not as a matter of routine. At present it seems to have become so much a matter of a routine which the police expect the suspect to go through that disputes do arise about whether consent is genuine and this can be a source of complaint. A person from whom fingerprints are being sought should be told the circumstances in which his fingerprints can be taken compulsorily. We endorse the recommendation of the Police Complaints Board that the person being fingerprinted should signify his consent in writing (a space could be provided upon the custody sheet).[2] This should assist in removing a potential source of disputes, and our proposals for a presumption in favour of release from custody should provide a further safeguard against pressure to consent. Refusal to be

[1]Or after summons for an imprisonable offence. There is an additional provision in respect of juveniles but it has not yet been brought into force. See the *Law and Procedure Volume*, paras 95–99.

[2]*Triennial Review Report 1980, op. cit.*, para 50.

fingerprinted will not of itself constitute grounds for continuing detention, and if the police are well aware of the identity of the suspect, they will not need to fingerprint him compulsorily for identification purposes.

3.130. For the purpose of identifying the accused with certainty after charge the police need a power to take the fingerprints of a person who refuses to give them voluntarily and that power is available under the present law. We recommend that it should be retained, subject to the modifications and safeguards we propose in the following paragraphs. We would envisage that the power should also apply for the purposes of criminal records in respect of a person who has been convicted, who has not so far been fingerprinted and who refuses at that stage to be fingerprinted. For the purpose of investigation we accept that the police may need on occasions, which are unlikely to be frequent, to be able to fingerprint a suspect against his will before charge. It also may be of use to them to take palm and footprints for investigative purposes.

3.131. So far as safeguards are concerned, where consent is not given, the need for fingerprinting in any particular instance should, as with the application of other coercive powers, be specifically justified. For the purposes of investigation the criterion should be reasonable grounds for believing that fingerprinting would go towards confirming or disproving a suspect's involvement in a particular crime. For the purposes of identification, the criterion should be reasonable grounds to doubt whether the accused's identity has been sufficiently established in order to prove his antecedents to the court of trial. Fingerprints taken in connection with a particular offence if the person is not proceeded against or if he is not convicted of that offence should be destroyed. This should not be confined as at present to fingerprints taken under court order. A person whose fingerprints are being taken should be informed at the time of this, and that he has the right if he wishes to witness the destruction. We have considered whether a fingerprint order after charge should continue to have to be made by a magistrates' court. One of us believes that the magistrates' authorisation should be required for all purposes. Fingerprinting is an invasion of privacy and can involve the use of force. The majority of us, however, doubts whether the magistrates can bring an adequate degree of supervision to compulsory fingerprinting; the police are in many cases unable to reveal to the court why fingerprints are being sought, since the information necessary to prove this will be prejudicial to the suspect. They take the view that in this matter also the police should be accountable for their decision.[1] And as with search of premises on arrest, a requirement to wait until the authority of the magistrates has been obtained could both delay a suspect's release and constitute considerable pressure on him to give consent. They therefore recommend that the power to take fingerprints, palm and footprints should be exercisable upon the written and reasoned authority of a sub-divisional commander.

3.132. All aspects of the proposals we have made in the preceding paragraphs should apply equally in respect of adults and of juveniles aged 14 years and over. In addition fingerprints should be taken from a juvenile

[1] See para 3.33.

voluntarily only with the consent of his parent or guardian. On the minimum age for being fingerprinted, some of us feel the case for fingerprinting 10–13 year olds has not been made out. The lack of power to fingerprint offenders in this age group does not appear to lead to difficulties for the police in investigating crime; nor will it often be necessary to fingerprint such offenders for identification purposes. Those of us who take this view also believe that it is wrong in principle to make offenders aged under 14 the subject of this type of formal criminal record and thus to mark them out as criminals. They do not consider that they should be subjected to the indignity of being fingerprinted. Most of our number disagree with the objection of principle and doubt whether being subjected to fingerprinting is the ordeal which it is represented as being. Such children should be included in any provisions for fingerprinting because they form a high proportion of those involved in committing indictable offences, 14 per cent of all indictable offences cleared up by the police in 1978. The proportion of young offenders involved in such offences has not only greatly increased over the last 20 years but so has their involvement in more serious thefts and burglaries. Most of us, therefore, recommend that the minimum age for being fingerprinted should be lowered to ten, the same as that for criminal responsibility.

Photographing

3.133. Photographing raises broadly similar issues as fingerprinting, although it will not generally prove useful in the detection of crime as distinct from the identification of the offender. We recommend that compulsory photographing should be permitted on the same basis as for fingerprinting, and subject to the same authorisation procedures, safeguards and arrangements for destruction as will apply for compulsory fingerprinting. Photographing the suspect with his consent should continue to be possible, but consent should be genuine and recorded in the same way as we have proposed for voluntary fingerprinting.

Medical examination and the taking of body samples

3.134. Medical examination and the taking of body samples can constitute very serious intrusions upon the person and raise particularly difficult questions, both of principle and of practice. The Commission has considered whether the present situation should remain under which no examination may be undertaken without the person's consent and there is no sanction for refusal to be examined or to give samples, however unreasonable.

3.135. There is a case in some circumstances for the police to be able to take samples from a suspect or to submit him to medical examination without his consent. But in respect of certain kinds of body sample, for example blood, semen and urine, it is difficult to see how procedures for these purposes could be made effective, or are even acceptable, whether with or without judicial authority. Physical compulsion is unlikely to be effective, because it is difficult to take such body samples by force from a person who is determined to resist, and the use of such force is inherently objectionable. It may well be, as has been suggested to us, that the existence of a judicial order coupled with a sanction would secure a suspect's cooperation, but this is doubtful in the case

of the most serious offences where a guilty suspect might have so much to lose by giving a sample or submitting to examination.

3.136. At present the only provision for sampling coupled with a sanction for failure is that in ss. 5–12 of the Road Traffic Act 1972, which make it an offence unreasonably to refuse to supply blood or urine samples and, in the case of unfitness to drive, permit such refusal to be corroborative of the prosecution case. This is not, however, a particularly helpful precedent in relation to the taking of body samples for other offences. The likelihood is that many offences requiring body samples to confirm or disprove the suspect's involvement will be particularly serious offences, such a murder or rape where blood or semen could establish a person's innocence or be highly suggestive of guilt. Unless an offence of refusal were to be created carrying the same maximum penalty as the substantive offence under investigation, which in these cases would be life imprisonment, it would always be in the guilty suspect's interest to refuse to give a sample. We do not think it feasible or proper to provide sentences up to life imprisonment for mere refusal to give a sample, however unreasonable the refusal may be. The alternative, of allowing refusal to be corroborative of the prosecution's case, may be of some use where there is other, admissible, evidence against the suspect; it will not solve the problem where there is only reasonable suspicion against the suspect and refusal to supply the sample prevents the prosecution from taking the matter to court.

3.137. The use of physical compulsion to obtain intimate body fluids, such as blood or semen, seems to us to be objectionable, and none of us would recommend that it should be made lawful to obtain such samples in this way. If such samples are taken with the consent of the person concerned, they should be taken only by a medical practitioner. But where the intrusion is not so intimate, for example the examination of the finger nails for forensic purposes, or the taking of samples of hair, or even of saliva, we consider that such physical examination or the taking of such samples should be permitted under compulsion, where evidence is sought tending to confirm or disprove the suspect's involvement in any grave offence.[1] We do not see this as being any more serious an intrusion on the suspect' person than the type of body search to which we have referred in paragraph 3.118. All but one of us consider that authority to take such samples from or to make such examination of a suspect should be given by a sub-divisional commander and the reasons for it recorded. It may be appropriate that they should be taken only in the presence of or by a medical practitioner.

Identification procedures

3.138. Pre-trial identification procedures (showing photographs of suspects to potential witnesses and the arrangements for identification parades, for example) were examined shortly before we began work by a committee under the chairmanship of Lord Devlin.[2] Most of the substantive recommendations of the Devlin Committee have been implemented by one means or other, but not

[1]See para 3.7.
[2]*Report to the Secretary of State for the Home Department of the Departmental Committee on Evidence of Identification in Criminal Cases*, London HMSO 1976 HC 338.

by statute. It is a subject on which we received some evidence, although little that was relevant to the situation after the Devlin Committee's recommendations were substantively implemented. The Government during the course of our enquiry reviewed the effect of the practice direction issued by the Attorney General following the case of *Turnbull*,[1] which implemented, though in a different way from that proposed by Devlin, the Committee's recommendations on evidence on identification. The review concluded that the operation of the *Turnbull* guidelines was satisfactory and the Government has stated that no further action will be taken for the time being. We have noted this statement. After so detailed and prolonged a review by others of this area of pre-trial criminal procedure, we do not make any proposals of detail. We would, however, comment that, in accordance with our general approach, there is a case in principle for regulating by statute identification procedures as well as other aspects of pre-trial criminal procedure. We therefore recommend that when the Government is considering legislation in the field of pre-trial criminal procedure it should examine the possibility of making identification procedures subject to statutory control as well.

[1] *R v Turnball* (1976) 63 Cr App R 132:

CHAPTER 4

Questioning and the rights of the suspect

Introduction

4.1. The evidence submitted to us, our knowledge of other countries and the results of our research[1] all lead us to the conclusion that there can be no adequate substitute for police questioning in the investigation and, ultimately, in the prosecution of crime. Since the police must continue to be allowed to question suspects, we must consider the following critical and related questions: what, if anything, needs to be done about the suspect who refuses to answer some or all questions (the "right of silence")? How best to safeguard this and other rights of a suspect who is being questioned (the Judges' Rules)? And how most effectively to secure that statements made to the police are reliable and accurately recorded?

The accuracy of the record

The main issues

4.2. We start with the potential for improving the accuracy of the record of the suspect's statements to the police which the court will hear, because to a degree this conditions the possible solutions to the problems presented by the right of silence and the Judges' Rules. Questioning in custody takes place behind closed doors in the police station. Generally, for adult suspects, the only witnesses of what went on are the suspect and the police themselves. And yet the product of questioning may be the vital evidence against the suspect. The frequency of challenges to the police record of interviews is said to make it essential to have some sort of independently validated record in order, in the eyes of some, to prevent the police from fabricating confessions or damaging statements, or, in the eyes of others, to prevent those who have in fact made admissions subsequently retracting them. It is the "verbals" which give rise to most concern, that is the remarks which are attributed to the suspect in the police officer's subsequent note of the interview but which the suspect is not prepared to endorse by making a written statement under caution. Indeed it is argued by the Circuit Judges that the present methods of recording interviews are in themselves the cause of a substantial number of acquittals of apparently guilty defendants. Many of our witnesses also point to the waste of court time caused by disputes about statement evidence. The most commonly proposed solution is the use of tape recording. The police point to the practical

[1]See the discussion of the role of the police in the investigation of offences at paras 2.9–2.17.

difficulties and the cost of this, and to its possible inhibiting effect upon obtaining criminal intelligence.

The relevant factual material

4.3. The material presented in the following paragraphs relates generally to all the issues discussed in this chapter but has a particular relevance to the problems of improving the accuracy of the record. The study carried out for us by the Cranfield Institute of Technology to assess the resource implications of tape recording interviews found that about 50 per cent of crime suspects were interviewed outside the police station.[1] Of nearly 1,200 suspects interviewed 15 per cent were interviewed only outside the police station, 35 per cent were interviewed both outside and inside and 50 per cent only inside the police station. In their study of confession evidence in Crown Court cases Baldwin and McConville found that in about 10 per cent of the Birmingham cases and 22 per cent of London cases the verbal statements which formed part of the prosecution's case had been made outside the police station.[2] Cases heard in the Crown Court are, of course, a minority and, in any event, not representative of all persons who are questioned. It should also be noted that the majority of statements in the Crown Court sample did not contain admissions, and there were few cases where the prosecution was greatly assisted by evidence of conversations held outside the police station.

4.4. Softley found that 80 per cent of initial interviews at the police station took under half an hour and that only 5 per cent lasted for more than three quarters of an hour.[3] Barnes and Webster reported that a suspect was interviewed on average for about five minutes outside the police station and about 35 minutes in the station[4] (this excluded the taking of a statement). Interviews lasting for up to one hour were exceptional and for more than two hours very rare.[5] The majority of suspects are interviewed once only (60–70 per cent) and 10 per cent or fewer are interviewed more than twice.[6]

4.5. The accuracy of the recording of police interviews is very difficult to assess objectively. The methods generally employed certainly militate against absolute accuracy. As far as we have been able to determine from our discussions with police officers and from our research it is comparatively rare for full verbatim notes to be made. In serious cases extensive written notes are usually taken. But in the great majority of cases notes seem to be confined to the relevant factual material and an attempt to reproduce the exact words used if admissions were made. Statements are generally compiled after the completion of an interview.[7]

4.6. The Judges' Rules make provision for suspects to make statements in writing (the voluntary written statement under caution).[8] These are not necessarily confessions or damaging statements. Our research suggests that

[1] *Op. cit.*, Table 3:1, p 9.
[2] *Op. cit.*, Table 3:3, p 21.
[3] *Op. cit.*, Table 5:1, p 78.
[4] *Op. cit.*, Table 3:1, p 9.
[5] Softley, *ibid.*, and Irving, *op. cit.*, Table 4:4, p 104.
[6] Barnes and Webster, *op. cit.*, Table A:6, p 56 and Softley, *op. cit.*, p 76.
[7] For a detailed account of practice in one police station see Irving, *op. cit.*, pp 128–129.
[8] See the *Law and Procedure Volume*, para 72.

written statements are made in a substantial minority of cases. Softley and Barnes and Webster, using samples of suspects interviewed by the police, found respectively about 30 per cent and about 40 per cent of suspects making written statements.[1] Of those who are subsequently prosecuted the Baldwin and McConville Crown Court samples show about one in three in London and almost one in two in Birmingham making written statements.[2]

4.7. The proportion of court time spent on challenges to police evidence does not seem to be as great as is supposed. It has of course to be remembered that the great majority of persons plead guilty so that they make no challenge to any statements that they are alleged to have made. A study of trials relating to Class IV offences (the less serious) in four Crown Court Centres in 1978 discovered that all legal submissions, which included trials within trials on the admissibility of statement evidence, occupied less than 5 per cent of trial time.[3] The survey did not cover time spent in cross-examination for the purpose of challenging statement evidence. Barnes and Webster found that about 5 per cent of the total time hearing contested cases at the Crown Court was spent on challenges to the authenticity or accuracy of police interrogation evidence, including 1 per cent on trials within trials and 4 per cent on cross examination.[4]

4.8. In a sample of contested trials at magistrates' courts examined by Vennard incriminating statements were adduced in evidence in just under a third of cases and about half of them were challenged. Nearly all challenges to verbal statements were on their accuracy, only 2 per cent of them being challenged on their alleged voluntariness. With written statements the position was reversed, fewer than 10 per cent being challenged for accuracy, whereas nearly 40 per cent were attacked on their alleged voluntariness.[5]

The Commission's proposals

4.9. The written voluntary statement made under caution plays an important part in the investigative process and in the preparation of cases. The accuracy of these statements does not seem to be challenged often and we would not support any change that might diminish their use; nor do we recommend any change to current practice set out in the Judges' Rules and Administrative Directions for the taking of such statements. The difficulties arise mainly when notes are made up after interview and the suspect becomes aware of their content only at a later stage. Even though challenges to the record of such interviews do not take up a large proportion of total court time, their frequency and duration should be reduced. The simplest way of doing so is to improve general police practice in recording interviews.

4.10. At present, evidence of oral statements, especially those made in the course of prolonged interviews, can invite dispute which faces the court with the problem of having to determine the accuracy of the record on the basis only of assertions by the two sides. Part of the difficulty is that this evidence,

[1] *Op. cit.*, respectively at p 81 and p 103.
[2] *Op. cit.*, Table 3:1, pp 13 and 14.
[3] Made available to us by the Lord Chancellor's Department.
[4] *Op. cit.*, Table 3:2, p 10.
[5] Julie Vennard: *Contested Trials in Magistrates' Courts: The Case for the Prosecution* (Royal Commission on Criminal Procedure Research Study No 6, London HMSO 1980), chapter 4.

even though it may be prepared on the basis of notes taken contemporaneously, has been written out afterwards. The accuracy of statements written or dictated by the person interviewed, as we have said, seems less likely to be challenged. There are other difficulties of a practical nature. Sometimes interviews have to be conducted by one officer and in conditions which prevent note taking at the time. Moreover, some suspects are inhibited by note taking or refuse to speak if a note is taken. Even very experienced minute takers will not get down a verbatim record of conversations. That can be done only by highly proficient shorthand writers. No written record after the event can be more than a good summary of the salient points made, unless the interview was conducted in so slow and stilted a way as to allow an almost verbatim record to have been written in longhand. And yet it has been put to us that police officers tend to assert when giving their evidence of interviews that the record they have is verbatim—it is often presented in question and answer form—and a precisely accurate record of all that was said. If two officers are involved their notebooks, and therefore the record of the interview, will usually be identical. Confident defence of accuracy of the record and the exact coincidence of two officers' record can give force to the police evidence. On the other hand it can strain the common sense of the jury or magistrates and therefore often becomes a point of attack.

4.11. How is the accuracy of the record to be improved? Over the last decade discussion of possible solutions to this problem has focused almost entirely upon the value of tape recording at the expense of other possibilities. And yet, as we shall show, experience with tape recording suggests that in the very nature of things it cannot provide a complete answer. We shall first discuss the possibility of improving general standards in the taking of statement evidence from suspects.

Improving note taking practice

4.12. Our proposals build on existing practice and procedures. We are aware that the use of the prepared questionnaire is practicable only in certain types of case and that it is not always possible to have two officers available at an interview, so that one of them can have the responsibility for taking a contemporaneous note. Nonetheless present experience indicates that where prepared questionnaires can be used or contemporaneous verbatim notes taken there are fewer difficulties over challenges at trial to the police record of the interview. We recommend that these techniques should be developed uniformly and to their fullest practicable potential.

4.13. We suggest that in all cases where it has not proved possible to take a verbatim record or full contemporaneous note of the interview or where the suspect does not make a written statement under caution, the product of the questioning (if given in evidence) should be represented to the court as what it is: a minute of the salient relevant points made at the interview. To facilitate this we recommend a new approach. If some sort of contemporaneous record has not been made or if a suspect does not elect to make a written statement under caution, it should become the practice for the interviewing officer at the end of the interview and in the suspect's presence to note down in writing the main relevant points made during the interview. These should be in summary

form and should contain not only admissions or damaging statements but also denials; the summary might also include any remarks made to the police officer outside the police station or before caution. The summary should be read over to the suspect, who should be invited to offer corrections and additions to it if he wishes and also to sign it. If there were another independent person present, as, for example, when a juvenile is interviewed, or the suspect's legal adviser is available, as, on our proposals, it is more likely he will be than at present, that person might also be invited to sign it, if he accepts it as a fair and accurate summary. We recognise that if a suspect has chosen not to make a written statement he may very well be disinclined to sign such a summary. Nonetheless we believe that what we propose represents an improvement over the present practice. Under this the suspect neither signs the officer's record of the interview which is made up after the event nor knows, until sometime afterwards, precisely what goes into it; and the note tends to be represented as a verbatim account rather than as what it is, the officer's recollection of and report on the main relevant points made. Making the summary should generally take no more time than taking a written statement and would replace the time taken on making up the note of the interview after the event. It would have the advantage for both the police and the suspect of being written much closer than at present to the time of the interview and with both parties to the interview present and aware of its content.

4.14. This may at first sight be thought a novel procedure. However we understand that some detectives sum up the interview in this way as a matter of general practice, especially in serious cases, and we observed during our visit to Australia that some forces there have developed a similar procedure of making typewritten summaries. Furthermore it is procedurally not very different from and unlikely to be more time consuming than taking a written statement, which could be made in any case where a suspect so wishes. We therefore think that the novelty is more apparent than real and that such a procedure is workable. But it will need careful preparation and a substantial training programme to introduce. In order to establish it as a general and uniform practice, it may be desirable to include details of the procedure in the code of practice regulating questioning which we shall be proposing.[1]

Improving note taking skills

4.15. There may also be scope for improving the performance of police officers as note takers. So far as we are aware, although officers are instructed on how to keep their notebooks, they are given little training in note taking, which has to be learnt on the job. There are, however, skills that can be taught. We recommend that consideration should be given to including some elementary instruction on this in basic training and to making it and summary writing of the kind we propose an essential feature of CID training and refresher courses. We think there is also a case for giving courses either in shorthand or speed writing to CID officers who are going to specialise in types of job where long interviews are frequent.

[1]See paras 4. 109 ff.

Tape recording

4.16. It will be asked whether it is necessary to bother with these ways of improving the record when the tape recorder is there, almost infallibly, to do the job. Unfortunately the answer is not that simple. There are some very real practical and technical difficulties, as has been shown by the limited trial of tape recording that we mounted, by our examination of foreign experience and by the research done for us by the Cranfield Institute of Technology into the organisational and resource implications of introducing a general system of tape recording.[1] We shall here summarise only briefly the main arguments for and against the use of the tape recorder and discuss them in the light of the salient findings of our research. Since that had to be conducted against a very tight deadline and on limited resources, it could not explore all the problems, such as, for example, the likely incidence of challenges to taped evidence and the grounds for challenge. Its findings have to be read with that in mind.

4.17. Late in our work we also had the opportunity to study the experiment in tape recording being conducted by the Scottish police. But there are differences in the extent to which the police in England and Wales and in Scotland may question suspects on arrest, and these, taken together with the Scottish law on corroboration and the different arrangements for the prosecution of offenders, make it difficult, in our view, to draw useful lessons from the Scottish experience for the taping of interviews in England and Wales.

Tape recording: the main issues

4.18. The proponents of tape recordings believe that it has two major advantages. A tape would provide not only an accurate record of all that was said at an interview but also a monitor upon the way the police conducted the interview. The court would not have to rely upon a police officer's often inadequate memory but would be able to hear the suspect's tone of voice and to determine whether inducements were given or threats made. The savings on lengthy trials within trials would offset the cost of taping.

4.19. Against this, opponents point to the cost, particularly of tamper-proof equipment and of editing and transcribing. They are concerned about the inhibiting effect of the tape recorder on the suspect in relation not only to admissions about the offence concerned but to the gathering of criminal intelligence generally. They foresee attempts to compromise interviewing officers by feigning assaults or false allegations of inducements given before the recorder was switched on; there might also be allegations of tampering. These would give rise to as many trials within trials as occur now. Untaped evidence, it is feared, would be regarded as inferior and there would be problems over the audibility and intelligibility of the recordings.

Tape recording: the practical experience

4.20. The use of a tape recorder to monitor all exchanges between the police and members of the public, both inside and outside the police station, and thus

[1]Throughout this section citations are from Barnes and Webster, *op. cit.* unless otherwise cited. See also *The Feasibility of an Experiment in the Tape Recording of Police Interrogations*, HMSO London 1976 Cmnd 6630.

to record all interviews that are to be used in evidence is, in our view, impracticable. The cost, estimated at about £24 million for the first year and over £13 million annually thereafter, is one consideration.[1] There are also overwhelming operational difficulties. All officers on duty would need to have a recorder immediately available. Recordings made in the open or in public places using a small pocket recorder would often be of poor quality because of background noise; our study has shown that interview rooms in police stations will need acoustical treatment if recordings made there are to be audible when they are played back in court. The problems of non-verbal responses, inaudible replies, and of dialect will all be exacerbated outside the more controlled situation of the formal interview at the police station. In any event, even if non-taped interviews were to be made inadmissible—an approach which, for reasons we shall develop later, we reject—the possibility of improper police behaviour can never be entirely removed; and so long as that is so, no system of recording could eliminate challenge to evidence about what has been said in interview.

4.21. So, if tape recording is to be used, it will in our view have to be confined (other than in unusual circumstances) to interviews in the police station. This is the general practice in the other countries which we have studied. To obtain recordings of adequate quality interviews ought, wherever possible, to take place in rooms which have been brought up to the required acoustical standard.[2] This will undoubtedly cause difficulties. We suspect that there are few police stations in the country which at present have an interview room of an acceptable acoustical standard. Many of the older stations do not even have interview rooms as such. If taped interviews are to take place only in rooms of the specified standard, queuing and delays will inevitably occur at busy times or when, as quite often occurs, a number of suspects are arrested in connection with a particular offence. Nonetheless these difficulties are not insuperable.

4.22. The second major practical problem that has to be faced is that of transcripts. It is difficult to work from the tape itself in the preparation or presentation of the prosecution or defence case. The court, the prosecution and the defence will almost certainly need transcripts if there is a not guilty plea while the prosecution and defence may well want them for pre-trial preparation even where the case is not going to be contested. Experience in the United States supports this conclusion.[3] To equip police stations with recording equipment, to tape-record all interviews inside the station with suspects arrested for indictable offences and to transcribe the tapes in those cases which are subsequently prosecuted would cost £6.5 million annually.[4] Transcription costs would constitute the major component of this cost. Transcription is boring, time consuming and not particularly enticing work. There might be recruitment difficulties if audio-typists are in short supply. Lack of transcription facilities could lead to delay in pre-trial preparation. There are also substantial problems in transcribing accurately the unstructured conversation of which

[1] *Ibid.*, Table 3:5, p 13.
[2] *Ibid.*, pp 82–83.
[3] *Ibid.*, Table 5:7, p 38.
[4] *Ibid.*, Table 3:9, p 15.

many interviews consist. We are advised that the present state of technology does not encourage the view that automatic voice transcription will be available in the foreseeable future. Our conclusion is that if tape recording is to be adopted, some means will have to be found to keep transcription to a minimum.

4.23. In our visits to the USA and to Sweden we gave particular attention to two other objections, that the presence of the recorder would hamper investigation and would enable false allegations of inducements or violence to be fabricated. On the basis of our visits we consider that there is less force in these points than has been supposed. The experience and views of very experienced United States investigators to whom we spoke suggest that the advantages of having admissions on tape far outweigh the drawbacks. While the presence of a recorder inhibits some suspects from talking this cannot constitute a weighty objection since the suspect has a right not to answer questions. And even if that point of principle is overlooked, the objection loses much of its force either if taping is not mandatory or if it is so only for part of the interview. We consider that a routine response could be developed and taught for the purpose of countering any attempt by a suspect to compromise an investigating officer. Police officers in the United States and Sweden could not recall any incidents in which suspects had tried to use the recording to compromise them.

4.24. Similarly we consider our research indicates that the problem of tampering has been exaggerated. Cassette recorders (as opposed to open reel recorders) diminish the possibility of undetectable tampering except with access to expensive and sophisticated equipment whose operation would be beyond the capability of anyone without technical knowledge. Carefully developed routines which rely on officers other than those who are responsible for the case should be sufficient to maintain the security of the tapes. Although there have been defence challenges to the authenticity of taped evidence in this country, they have been in cases such as blackmail and corruption where the tapes have been of recordings made covertly of conversations held outside a police station where the tape may well have passed out of the control of the police. Once tape recording became a routine matter and the novelty wore off, we imagine that the United States and Swedish experience would be borne out here and that challenge to the authenticity of recordings would seldom, if ever, arise. If that were so, special anti-tampering measures would not be needed.[1] But if the experience proved to be otherwise, we are advised that with the recent rapid advance in micro-processor technology it would be possible to develop an electronic tamper-proof device which would be relatively inexpensive but simple to operate.[2] Equally important is to produce simply operated and reliable equipment.

Tape recording: the Commission's proposals

4.25. In formulating our proposals we have had regard particularly to considerations of cost and workability. We concluded from the experience in other jurisdictions and from our own experiment that tape recording of police

[1] *Ibid.*, p 39 for experience in the USA.
[2] *Ibid.*, p 86.

interviews at the station is feasible and that it can produce at a not exorbitant cost a more accurate record of important statement evidence. The need to find and modify interview rooms, to develop and provide simply operated equipment and the necessary transcription facilities, and to train interviewing officers must be faced and points to the flexible and gradual introduction of tape recording.

4.26. Because of the amount of material that would be produced from some interviews that is irrelevant to the purpose of proving the case against the suspect or is inadmissible as evidence (it may relate to previous criminal offences) and because of the problems of transcription, we consider that a scheme for the tape recording of whole interviews with all persons suspected of offences of all kinds is not yet practicable or desirable on a cost and benefit basis. Experience should first be gained through a less ambitious approach. That may show the practicability and value of recording whole interviews in appropriate cases, and we expect that the technique will then be exploited accordingly. In the meantime we would not wish to discourage the police from tape recording the whole or relevant parts of an interview in cases where they can foresee that the evidence will be crucial or that challenge to its authenticity can be expected.

4.27. We base our recommendations upon our proposal that it should become general practice for an interview to be concluded (if there is no written statement) with the officer summarising orally the main points made and at the same time recording them in writing; this could and should include any points made outside the police station.[1] We recommend that that process and, where there is one, the taking of a written statement, should be recorded on tape, with the consent and knowledge of the suspect. He should also be invited to offer his comments upon how he has been treated and, if there is a summary, his comments upon it. The offer made to him and his refusal or acceptance should be recorded. All this would be done openly. Because we had learnt of the use of covert tape recordings by some United States forces and saw the procedure being used in Australia we considered the possibility of testing this in our own experiment. It has the obvious advantage of removing the difficulty that the suspect will be inhibited by the presence of the recorder. Experience has, however, suggested that that difficulty should not be given great weight. There seemed to some of us to be objections of principle to the surreptitious use of recorders and we did not use covert recording in the experiment.

4.28. One of the principal advantages of what we suggest is that it will enable the gist of an interview or the taking of the written statement to be got onto the record without the need for transcription. The officer's written summary and the written statement itself will, in effect, be the transcription of the major part of what is on the tape. The tape should be available as an exhibit, to be played either to the defence lawyer or in court at trial in order to validate the officer's written summary or the written statement if there is a dispute over their accuracy. We would propose that ultimately the requirement should be for the recording of all summaries of interviews and taking of written statements at the police station with persons suspected of indictable offences

[1]See para 4.13.

(whether triable only on indictment or either way). This would mean that all sub-divisional headquarters will have to be equipped for the purpose. On our present costing basis it has been estimated that this would involve a capital cost of £1.35 million and an average annual cost of £800,000. The net cost might be lower if the procedure led to savings at trial. Although conclusions about savings have to be speculative, we note that the main potential saving could be in a change in plea-mix, that is in an increase in guilty pleas, rather than in reducing trials within trials.[1] If that did occur, there could be important and worthwhile benefits in reducing delays in waiting for trial. We believe that our proposal would be as likely to change the plea-mix as a proposal to record whole interviews, and it will involve a smaller gross cost.

4.29. We have already indicated why we think that the introduction of tape recording even on the lines we recommend will have to be gradual. Nevertheless the time for further experiments to test feasibility is past. Equipment trials and the development and sharing of experience for training purposes will be necessary, but tape recording could start now on the basis of administrative guidance from the Home Office. Since it is desirable in the longer term to ensure uniform standards of equipment, interview rooms and procedure, we recommend that the Home Secretary should be empowered to make subordinate legislation to regulate these matters. Consideration will also have to be given to the provisions of adequate facilities for the playing of tapes in court, when there is a challenge to the accuracy of the written record.

4.30. Finally, we reject any suggestions that there should be automatic exclusion as evidence at trial of summaries or of the taking of any written statements which have not been taped. There may be a variety of quite proper reasons why oral evidence has not been recorded: the suspect's refusal, equipment unavailability or failure, the unavailability or temporary unsuitability of the designated interview room. We consider that it would be highly undesirable if untaped evidence came to be seen as necessarily suspect or inferior. But an officer who had not taped in circumstances where he might have been expected to have done so should be required to provide a reasonable explanation of this. The requirement to tape record will be incorporated in the code of practice regulating questioning which we shall be proposing.[2]

The possibility of video recording

4.31. We have also given some consideration to the video recording of interviews on the basis both of United States experience and of a small number of interviews that were recorded on video during our experiment. Video recording is technically feasible; it has the advantages over audio recording that it enables the demeanour of the suspect to be observed and that it can protect the police officer from some false allegations of violence or threats of violence. These advantages may in due course be thought great enough to warrant the use of video recordings here, and we would not want to discourage the police from using video when they felt that the circumstances warrant it. But for the present at least the cost rules out its general use for the limited recording policy we propose (the capital costs are of the order of three times

[1] *Ibid.*, p 10 and pp 15–17.
[2] See further paras 4.109, 4.110 and 4.133.

and the average annual costs twice as great).[1] We do not recommend its introduction at present, but the possibility should be kept under review. Any subordinate legislation should be drafted in such a way as to leave the possibility open.

Other means of validating statements

4.32. Two other means of validating statements have been put to us: by making admissible only statements made in the presence of a solicitor who signs them as true, or only statements made in the presence of or otherwise validated by an examining magistrate. We do not accept these proposals but our reasons for rejecting them can be more conveniently developed when we are discussing other aspects of the control of questioning.[2]

The right of silence

4.33. We have indicated our view that the quality of recording police interviews can and should be improved but that it is impossible to get before the court an entirely accurate record of everything that passed between the accused and the police. Against that background we turn now to the vexed issue of what right the suspect should have not to answer police questions. There is here a series of interrelated issues which are commonly referred to as the right of silence. Since different people understand different things from this expression, its use can sometimes impede rather than assist discussion. But it is impossible to avoid using it. We shall first describe how and why this privilege against self-incrimination plays so central a part in the criminal process in England and Wales and our understanding of how it operates in practice.

The theoretical considerations

4.34. The right of silence, in the sense of the absence of obligation upon the defendant at his trial to respond to the charge with which he is faced, derives from two factors, the nature of an accusatorial system of trial and the impossibility of compelling someone to speak or in speaking to tell the truth.

4.35. In the accusatorial system of trial the prosecution sets out its case first. It is not enough to say merely "I accuse". The prosecution must prove that the defendant is guilty of a specific offence. If it appears that the prosecution has failed to prove an essential element of the offence, or if its evidence has been discredited in cross-examination, there is no case to answer and the defence does not respond. There is no need for it to do so. To require it to rebut unspecific and unsubstantiated allegations, to respond to a mere accusation, would reverse the onus of proof at trial, and would require the defendant to prove the negative, that he is not guilty. Accordingly, "it is the duty of the prosecution to prove the prisoner's guilt",[3] which is, in Lord Sankey's words, the "golden thread" running through English criminal justice.

4.36. The second element in the right of silence is that no one should be compelled to betray himself. It is not only that those extreme means of

[1] *Ibid.*, Table 3:7, p 14.
[2] See paras 4.58 ff and 4.99.
[3] *Woolmington v DPP* [1935] AC 462.

attempting to extort confessions, for example the rack and thumbscrew, which have sometimes disfigured the system of criminal justice in this country, are abhorrent to any civilised society, but that they and other less awful, though not necessarily less potent, means of applying pressure to an accused person to speak do not necessarily produce speech or the truth. This is reflected in the rule that statements by the accused to be admissible must have been made voluntarily, a matter which we shall be discussing later.[1]

4.37. These factors provide the theoretical justification of the right of silence at trial. But at a theoretical level they have no less force at earlier stages, because the trial conditions the way in which investigations are conducted and the prosecution's case is developed. There is during investigation the same impossibility of compelling truthful answers by the use of physical force. An attempt could be made to compel reply by, for example, the threat to use a suspect's refusal to answer police questions as evidence of his guilt at the trial. But because this would require the suspect to answer questions in relation to a suspicion that might as yet be unsubstantiated and unspecified, such an attempt would in effect be subverting that principle of the accusatorial system itself to which we have referred in paragraph 4.35.

4.38. Although the right of silence conditions the task of the police and prosecutor in this way, it does not follow that there is absolutely no duty upon citizens to assist in the investigation of crime. But what is its extent? A constable investigating a crime may question members of the public. Rule 1 of the Judges' Rules states that

> "When a police officer is trying to discover whether, or by whom, an offence has been committed he is entitled to question any person, whether suspected or not, from whom he thinks that useful information may be obtained."

But though the constable is permitted to question, the citizen is under no duty to reply. According to the leading case, while there may be a moral or a social duty to assist the police, there is no legal duty; a citizen may refuse to answer questions put to him by persons in authority.[2] So, unless the police officer has reasonable ground for arrest, the person need not stay to listen to him.

4.39. Yet the absence of any legally enforceable duty on citizens, particularly those suspected or accused of an offence, to assist in the investigative and prosecutorial process does not eliminate the possibility that consequences disadvantageous to the suspect or the accused may result from a failure to put his case. However innocent a person may be, if he is found in suspicious circumstances by a police officer and then refuses to explain himself, he will inevitably attract increased suspicion and may find himself being arrested. A person who when arrested refuses to identify himself may find that he is held in custody for a longer period while his identity is verified. A refusal to answer questions or the evasion of such questions before the caution is administered may also have consequences at any subsequent trial. It cannot of itself constitute proof of guilt but it may form part of the circumstances which the court has to take into account when assessing the evidence. As Professor Sir

[1]See paras 4.68 ff.
[2]*Rice v Connolly* [1966] 2 QB 414.

Rupert Cross says of these circumstances, "Although the accused's silence may be treated as something which has a bearing on the weight of evidence, it is not something which can support an inference that the story told by him in court is untrue; still less can it amount to the corroboration of the evidence given against him."[1] However once a person has been cautioned, that is, told by the police that he need say nothing, the law is that it must be unsafe to use his silence against him for any purpose whatever. Even so, whatever the legal position at this stage, if the jury or the magistrates are aware that a person refused to answer questions under caution or was evasive, that may have some effect upon the way they interpret the evidence before them. Accordingly, although the law may give a person the right to say at all stages of the process "Ask me no questions. I shall answer none", in relying upon this right, he would be wise to have regard to how people are likely to interpret his conduct.

The main issues

4.40. One of the areas of sharpest debate in the evidence to the Commission relates to the right of silence. Those who have made submissions to us have responded to the issue in a variety of ways. Categorising them as either in favour of or opposed to modification of the right is an oversimplification. Broadly, however, the police and some others would follow the Criminal Law Revision Committee and others before it[2] in recommending that the court, once a *prima facie* case has been made, should be allowed to conclude, where appropriate, from the suspect's silence under police questioning that his refusal to answer is indicative of guilt. They would do so on the grounds that it is in the interests of an innocent man to clear himself at as early a stage as possible and that the right of silence or privilege against self-incrimination is a protection only for the guilty. The effect of such a change, it is argued, would be that the innocent would be encouraged to answer and the guilty suspect would keep silent in the police station at his own risk. It would not be an offence for him to do so. Some would want evidence of such silence to form part of the prosecution's case. They follow the often quoted view of Jeremy Bentham: "Innocence claims the right of speaking, as guilt invokes the privilege of silence."[3] The police are not alone in arguing that "sophisticated" or "professional" criminals are able to exploit the right of silence to escape prosecution and conviction.

4.41. There is on the other hand a strong body of opinion which holds to the principle that permitting such inferences from silence, before a specific charge has been formulated and the accused understands what it is, runs counter to the presumption of innocence and the requirement that the prosecution bears the burden of proof. The right of silence is seen by those who take this position as an essential safeguard for the weak, the immature and the inadequate, since its removal could increase the risk of false confessions by those unable to withstand police interrogation.

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[1] *Cross on Evidence*, Fifth Edition, London Butterworth 1979, p 548.
[2] *Eleventh Report Evidence (General)*, *op. cit.*; see, for example, Glanville Williams: "Questioning by the police: some practical considerations", *Crim L R*, 1960, 325–346, p 325.
[3] *Treatise on Evidence*, p 241.

4.42. Some witnesses to us have sought a middle way between these opposing positions. They are prepared to allow the court to draw an inference of guilt from a failure to answer questions but only if two conditions apply. First the suspect must be made fully aware of the case against him and secondly there must be strict safeguards upon the conduct of the interview (the interview should, for example, be tape recorded, and a solicitor be present, or it should be supervised by a magistrate).

The relevant factual material

4.43. The issues on the right of silence need to be discussed against the background of what is known about the way suspects react on being questioned by the police. A significant number of those arrested and taken to the police station (of the order of 20 per cent) are not subsequently prosecuted. A proportion of these appears to offer an explanation which satisfies the police.[1] Of those questioned most make a response of some kind. Softley found that six out of ten of those interviewed made a confession or an admission.[2] Only 4 per cent of those interviewed refused to answer all questions of substance and 8 per cent refused to answer some questions. Those suspects with a criminal record appeared from Softley's study to be more likely to exercise their right of silence and less likely to make a confession or admission when questioned.[3] Irving's comment is pertinent: "To remain silent in a police interview room in the face of determined questioning by an officer with legitimate authority to carry on this activity requires an abnormal exercise of will. So uncommon is it for a person to remain silent while being questioned, that when it does occur, any observer would be forgiven for making the fallacious assumption that the abnormal behaviour is associated with some significant cause (in this context guilt as opposed to innocence). The innocent . . . do not exercise their right of silence; they talk, usually volubly."[4] But it does not follow from that that those who talk necessarily incriminate themselves.

4.44. So far as those who are prosecuted are concerned, the research into summary contested trials showed that about a third of defendants had made an incriminating statement, and a further third had made some form of denial.[5] It has, of course, to be remembered that the overwhelming majority of those who are prosecuted plead guilty. At the Crown Court only a very small proportion of defendants had evidence against them which did not contain a statement of any kind (less than 4 per cent in the Birmingham sample and 7 per cent in London).[6]

4.45. The importance of confession or statement evidence to the prosecution case at trial was examined for us by Vennard and Baldwin and McConville.[7] The former suggests that the availability of a full confession can be an important factor in securing conviction in summary trials, particularly where

[1]See para 2.17.
[2]*Op. cit.*, Table 6:1, p 85.
[3]*Op. cit.*, p 75 and Table 6:2, p 86; but in relation to those who are actually prosecuted in the Crown Court Baldwin and McConville, *op. cit.*, found the opposite (see p 24).
[4]*Op. cit.*, p 153.
[5]Vennard, *op. cit.*, Table 2:2, p 10.
[6]Baldwin and McConville, *op. cit.*, Table 3:1, pp 13 and 14.
[7]*Op. cit.*, respectively at chapter 3 and chapters 3 and 4.

the evidence implicating the defendant is circumstantial. Baldwin and McConville, examining the full range of cases heard in the Crown Court, point to the extremely high probability of conviction, whether by plea or by jury verdict, where the defendant had made a full written confession to the police. This is not to say, however, that a statement made to the police is necessarily crucial to the prosecution's case. It may amount to less than a full confession, it may only indirectly implicate the defendant if at all, or the other evidence may be so decisive as to point to the defendant's guilt. Vennard found that in fewer than one in five contested summary charges did the case against the accused contain a full confession; yet the majority ended in conviction. In the Baldwin and McConville study, the accused's statement (of whatever kind) was considered by independent assessors to have no real bearing on the strength of the prosecution's case in almost half the cases they examined. In about a fifth of cases the assessors considered that the prosecution case would have been fatally weakened if the accused's statement had not been available. Among this minority offences of burglary and robbery were strongly over-represented.

4.46. To summarise, the research indicates that the privilege not to incriminate oneself is not used by suspects in the great majority of cases and keeping silent altogether is very rare. Even in cases where the accused pleads not guilty he will in most cases have made some statement or other (of admission or denial) in the face of police questioning. The rarity of complete silence may not be altogether surprising in view of the psychological pressures that custody in the police station generates. In present circumstances the right of silence is not a right which the generality of suspects choose to exercise.

The Commission's proposals

The right of silence before arrest

4.47. We draw a distinction between the questioning of witnesses or other members of the public who are not under suspicion and the questioning of suspects. Witnesses, as we have made clear, should not be subject to any obligation to submit to police questioning or to answer questions.[1] For suspects we adhere to the decision in *Rice v Connolly*[2] that the duty to assist the police is a social one and not legally enforceable. Someone who is suspected of an offence upon reasonable grounds exercises his right not to answer reasonable police questions, as now, at his own risk. This does not imply a general duty to reply to police questions at this stage, even though questions put and any responses to them are admissible in evidence at any subsequent trial. The rule that actively hindering police investigations (by supplying false information for example) amounts to obstructing the police should be preserved.

The right of silence after arrest and before charge

4.48. Once the suspect has been arrested the position changes. He is not free to walk away; he must submit to being questioned. No one has suggested to us that refusal or failure to answer should be an offence nor has it been proposed that silence in the face of questioning should form the sole basis of

[1] See para 3.90.
[2] [1966] 2 QB 414.

the prosecution's case. What is suggested is that some inference might be drawn at the trial from the accused's lack of response to questions put to him by the police; this would have to be in addition to other evidence presented by the prosecutor. The present law is that no inference whether of guilt or anything else adverse to the accused may be drawn from the accused's silence in the face of police questioning under caution, but decisions of the Court of Appeal have clearly recognised that juries may well draw inferences from an apparently unjustified refusal to offer an explanation or answer questions.[1] For this reason it has been argued that changing the rule of evidence to allow some inference to be drawn would not in practice constitute a fundamental change, whatever the law on the matter now is. And since the proposal of the Criminal Law Revision Committee[2] and those who follow it is that inferences could be drawn against the accused only if he offers a defence at trial which he could reasonably have offered under questioning, the practical effect of this change would be minimal. For such inferences would be drawn only in that very small minority of cases in which the accused does not plead guilty, has not made a damaging admission or confession to the police, and attempts for the first time to offer a defence at trial which he could have offered earlier.

4.49. But although the possibility of drawing inferences from an accused person's silence at the investigative stage might arise in only a small proportion of cases, all persons who were being questioned by the police would need to be warned about it. The Criminal Law Revision Committee recognised this.[3] It proposed the abolition of the caution required by the Rule II of the Judges' Rules,[4] when an officer has evidence affording reasonable grounds for suspecting a person has committed an offence:

> "You are not obliged to say anything unless you wish to do so but what you say may be put into writing and given in evidence."

and suggested a modification of the Rule III caution on charge from:

> "Do you wish to say anything? You are not obliged to say anything unless you wish to do so but whatever you say will be taken down in writing and may be given in evidence."

to

> "If there is any fact on which you intend to rely in your defence in court, you are advised to mention it now. If you hold it back till you go to court, your evidence may be less likely to be believed and this may have a bad effect on your case in general. If you wish to mention any fact now and you would like it written down this will be done."

4.50. Two main difficulties would arise if the right of silence during the investigation were to be modified in this way. The modified caution proposed by the Criminal Law Revision Committee would have been required to be given only when the suspect was charged or told that he might be prosecuted, that is when there is notionally, at least, sufficient admissible evidence available to the police to enable a prosecution to be mounted. But it is difficult to see

[1]See the *Law and Procedure Volume*, para 83.
[2]*Op. cit.*, paras 28–52.
[3]*Op. cit.*, paras 43 and 44.
[4]See the *Law and Procedure Volume*, paras 68 ff.

how the fact that silence at the point of charge would lead to damaging consequences for the suspect would not in practice affect the attitude of the police in their conduct of interviews prior to charge and the way that suspects would respond to questioning. It might put strong (and additional) psychological pressure upon some suspects to answer questions without knowing precisely what was the substance of and evidence for the accusations against them; and in consequence what they needed to tell the police in order to allay the suspicion against them. This, in our view, might well increase the risk of innocent people, particularly those under suspicion for the first time, making damaging statements. The risk may be small, but these things do occasionally occur. On the other hand, the guilty person who knew the system would be inclined to sit it out. If his arrest had been on reasonable suspicion only and this were not enough to make a *prima facie* case, he would lose nothing and gain everything by keeping silent, since he would not be prosecuted if no other evidence emerged. If the police had got sufficient evidence to mount a case without a statement from him, it would still be to the guilty suspect's advantage to keep to himself as long as possible a false defence which was capable of being shown to be such by investigation. It might just be believed by the jury despite the fact that the prosecution and the judge would be able, under the Criminal Law Revision Committee's proposals, to comment.

4.51. The second difficulty is that any attempt, whether as proposed by the Criminal Law Revision Committee or otherwise, to use a suspect's silence as evidence against him seems to run counter to a central element in the accusatorial system at trial. There is an inconsistency of principle in requiring the onus of proof at trial to be upon the prosecution and to be discharged without any assistance from the accused and yet in enabling the prosecution to use the accused's silence in the face of police questioning under caution as any part of their case against him at trial. A minority of us considers that that inconsistency is more apparent than real since it is at present possible in certain circumstances to use an accused's silence as part of the prosecution's case if he was silent in the face of questions put to him by anyone before he was cautioned. And they think that it is right for a person to be expected to answer reasonable questions during an investigation, that is before charge, and that the caution in its present form introduces an artificial barrier into the investigatory process, which can be tolerated by a system which stresses the importance of police questioning only because the right of silence is so rarely exercised. In their view any provision to protect the suspect and ensure the reliability of any statement should be more firmly based than informing the suspect of a right which research suggests is virtually impossible for him to exercise. What is required to protect the suspect at this stage are the various safeguards to ensure the reliability of the suspect's statements which will be developed later in this chapter. They do not accept that the right to refuse to answer questions needs any additional protection apart from that provided by the current law as to questioning before caution.[1] They think that this would not unfairly prejudice the accused nor affect the nature of the trial and they do not therefore accept the theoretical argument set out in paragraph 4.37.

[1]See the *Law and Procedure Volume*, paras 77 ff.

4.52. The majority of us does not accept that this would not unfairly prejudice the suspect. Quite apart from the psychological pressures that such a change would place upon some suspects it would, in their view, amount to requiring a person during investigation to answer questions based upon possibly unsubstantiated and unspecific allegations or suspicion, even though he is not required to do that at the trial. Such a change could be regarded as acceptable only if, at a minimum, the suspect were to be provided at all stages of the investigation with full knowledge of his rights, complete information about the evidence available to the police at the time, and an exact understanding of the consequences of silence. But that could be done only if the critical phase of investigation, that is the phase at which silence could be used adversely to the accused, was to become more structured and formal than it is now; in effect responsibility for and conduct of this phase of the investigation, close to charge, would have to become a quasi-judicial rather than a police function.[1] That would seem to those of us who take this view to have radical consequences for the trial. If an investigation were to be conducted in what would, in effect, be an inquisitorial mode, they do not think that the present accusatorial system could remain. And there are further difficulties. They relate to the problem of proving at a subsequent trial that a defence relied on at trial had not been mentioned to the police, or that a person had not in fact answered questions. This would place upon the police the burden of proving a negative. Even if it were possible to tape-record all exchanges between the police and the suspect (and this, in our view, is impracticable), it would still be necessary to prove that there were no other exchanges. Secondly, if silence had to be proved to the satisfaction of the court, then the record of whole interviews (admissible and inadmissible material alike) might have to go to the magistrates and the jury. In the Crown Court it might be made a matter for the judge to decide whether the accused had failed to mention his defence earlier, but we are looking for ways of shortening not prolonging trials, and this would not solve the problem for the magistrates.

4.53. We recognise the strength of feeling behind the call for a modification to the right of silence during investigation. And some of us are sympathetic towards the position taken by the Criminal Law Revision Committee. Nonetheless in the light of the preceding arguments the majority of us has concluded that the present law on the right of silence in the face of police questioning after cautioning should not be altered.

The caution

4.54. The caution at present required by Rule II of the Judges' Rules[2] tells a suspect that he has a right not to speak and explains what may happen if he chooses not to exercise it. If such a right exists, then, in our view, it is only proper that the suspect should be made aware of it. Our research indicates that this caution is freely administered but that, by and large, suspects do not exercise their right to remain silent.[3] We believe nevertheless that the procedure for cautioning could be improved in certain respects.

[1]See for example the discussion by Lord Devlin in *The Judge*, OUP 1979, chapter 3.
[2]See para 4.49.
[3]See para 4.43, and also Softley, *op. cit.*, chapter 4.