PAPER ON THE MATTERS UNDER REVIEW BY

THE ROYAL COMMISSION ON CRIMINAL PROCEDURE

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Paper to Professor M. Banton on the matters under review by the Royal Commission on Criminal Procedure.

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1. This paper is intended as an operational Policeman's view on the matters under review by The Royal Commission on Criminal Procedure. Having discussed various aspects of published evidence presented to the Commission with Professor Banton in the latter stages of my secondment to Bristol University he invited me to prepare the paper. On graduation my then Chief Constable agreed to my responding to the invitation. The official Police representative bodies have submitted comprehensive reports to the Commission which this paper does not presume to emulate, it is rather a personal response formulated from experience of Police work in the area under review. My posting to the Division handling the highest number of arrested persons within my Force's area has facilitated discussion with officers widely experienced in charge and interview procedures. While some of their views have been incorporated, or have assisted the formulation of my own ideas, I must declare that, while acknowledging the assistance of others, the views expressed here are mine. I can make no claim as to the representativeness of these views although I have no reason to suppose them to be untypical of views held by fellow officers.

2. The original intention of the paper was to identify specific practical problems experienced under the present system and this was the aspect discussed with fellow officers. The consensus of opinion, if I may use the term without presenting statistics to support it, appears to be that there are, in fact, few specific problems encountered under the present system. This presupposing that the Judges Rules are adhered to from the earliest stage of the enquiry or detention. The Judges Rules have, after their many years of application, become recognised as a safeguard for investigated and investigator alike and the main concern expressed, and one I share, is that they may be replaced by measures which will move beyond the protection of the innocent or ignorant to the invulnerability of the guilty or calculating. This very real fear is potentially counter-productive in the present situation, where reports are

being submitted to The Commission. The evidence presented by libertarian and legalist groups frequently has the effect of restricting the capacity of the Police to detect crime. It is possible under these conditions for there to be an overstatement of Police requirements in an attempt to offset this effect. The perspectives and motives of those submitting evidence will inevitably influence the problems they each identify and their suggested solutions to those problems.

3. I will begin by explaining the potential problems at present known to me, accepting that there will be many I have omitted. I will then take this oportunity to respond to those questions, contained in the Commission's Consultative Paper, published in August this year, about which I believe I can usefully comment. My comments in this latter section will be made within the context of the existing adversary system of justice. I presume that the wider question as to whether an alternative, examining, system would be more effective would be outside the Commission's terms of reference.

PRACTICAL PROBLEMS

4. A most recently debated practical problem is that of Police 'powers' in relation to the searching of persons in custody and the retention of their property. The now traditional, often considered virtual common law, practice has been thrown into some degree of confusion by the decision in R. v. Angela Naylor. Most Policemen will contend that they cannot, with all due respect to legal precedent, be overly inhibited by the decision. The officer arresting, or supervisory officer receiving, a person knows that he or she is open to far greater criticism should there be any untoward incident as a result of a failure to search for and often remove property from prisoners. Experienced charge office staff are highly aware of the dangers which can be caused by the seemingly most inoffensive articles and, from their concern for both the safety of their charges and their own security, are likely to continue the traditional practice largely unaltered. The point which must be made, however, is that the situation should be regularised by statute in order that the responsibility for this type of decision may be lifted from individual officers.

5. This lack of legislative provision is also found in relation to pre-arrest powers to detain and question. These matters have been discussed at length by those submitting evidence to the Commission and I would limit my comments to the practical fact that the most successful catchers of those who break the law are those who stop and question persons found in all kinds of situations. It is inevitable that large numbers, perhaps a large proportion, of those questioned are about their lawful business. It is largely a matter of interpersonal relations as to whether the person questioned resents this contact and here the Policeman's attitude and approach are important but so is the responsiveness of the general public. More time and facility for leisure, greater personal mobility and increasing emphasis upon individual freedom have contributed to the complexity of what it is that justifiably arouses suspicion. The answer to Question 40 of the Consultative Paper, a single basis for a power to stop and search, has, thus, become extremely problematic. While the Commission may find an answer from the balance of evidence before it I feel that any individual response would be incomplete. The basis of suspicion is frequently intangible and what constitutes "reasonable suspicion" (Question 41) complex to define. I would comment, however, that if a statutory basis for a power to stop and search were to be formulated then "reasonable suspicion" would eventually, itself, become defined. If this were not done by statute then it would develope from legal precedent and in the gestation period the responsibility would again be carried by the Police, having their judgement on the street tested in the Courts. This process was classically demonstrated by the multitude of cases following the Road Safety Act, 1967. If the problem is to be met, and as a Policeman I hope that it is, then it must be done comprehensively. If statutory authority for search, and questioning, were available there would be less room for any resentment at the interpersonal level. The legitimate citizen would have nothing to fear and the Policeman would feel that his professionalism was acknowledged. Only the illegitimate character would stand to lose.

6. The question of vehicle searches, Question 42, can only be answered in the affirmative. Much modern day crime has a vehicular aspect at some stage in the chain of events, and it is frequently after the crime itself, and stolen items or weapons can be more effectively concealed in a vehicle than on the person.

7. There is evidently concern over the possible abuse of powers such as those discussed above but I would suggest that there is already a comprehensive safeguard provided by the Police Complaints procedure. The monitoring of success rates suggested would be dependent upon records kept by Policemen and would be of limited use because of their being actually or conjecturally incomplete. If this monitoring were to contain a possibility that a certain "success" level was expected then it would become so inhibiting as to make the provision largely useless. The issue of forms to those checked would be a useful safeguard. As I have said above, the circumstances of stop/check situations are frequently unspecific and full suspicion of criminal activity often formed subsequently, the "reasonable suspicion" and the basis of the power would have to be determined with this in view. Of such unspecific beginings are many "good arrests" made. At present if the officer proves to be correct in his suspicion he may be commended by the Court but if he is wrong he is open to formal complaint or legal action however unsubstantiated. It is a reflection of the tact and diplomacy of Policemen that these checks relatively seldom have these consequences while many crimes are detected in this way. It is possible that if present general attitudinal trends continue fewer crimes will be detected unless there is some element of compulsion to cooperate with investigators. The greater part of the population are, however reluctantly, cooperative in such matters but they are not often those whose cooperation is most necessary.

8. A different problem encountered is that refered to, in part, on page 13 of the Consultative Paper, the attendance of persons at Police Stations in connection with the interview or examination of certain categories of detainee. The attendance of solicitors I will discuss later in connection with that of the options contained on page 3 of the Paper. In the case of Juveniles the generally acknowledged reason for an adult's

attendance (Question 36) is that the juvenile is unfit to protect his own interest. In the light of this reasoning the Policeman must await such attendance, occasionally necessitating hours of delay, in order to ensure that he is not open to subsequent allegations that the young person was coerced into any admission. This latter allegation would not be prevented if the possibility of the juvenile waiving the right to adult attendance (Question 37) was introduced. It may be possible for the guardian to make such waiver but this too could present problems as juvenile criminality is not disassociated with a lack of parental interest, although it is sometimes accompanied by a later parental willingness to complain as to Police conduct. In the absence of the ability to obtain a guardian's attendance officers of welfare organisations are sometimes contacted but there appears to be a, perhaps understandable, reluctance for such officers to become involved in this area. One answer may be to specify some time limit upon attendance but the diversity of individual circumstances would make this problematic.

9. Another situation where attendance can present problems is in relation to detention under the provisions of the Mental Health Act. A Police Station is, probably, the most common initial place of safety but is not the most appropriate place. Delay in attendance of the requisite two Medical Practitioners can, however, mean a distressed person being held for some considerable time. This situation has further complications where the Doctors feel unable to commit the individual for treatment although the Police officer in charge feels unhappy about allowing the person to leave the Station. Although the officer could rest upon the fact that medical opinion had been given, it is still his decision to release the individual in physical terms, a decision which is not often easy.

THE CONSULTATIVE PAPER

10. The most extensive propositions contained in the Paper are, probably, those relating to the structure of the prosecution system. Of the three options set out on page 3, I consider Option A to have considerable merit while I would express doubts about the other two options. At present not all Police Forces

have Prosecuting Solicitors departments, in more widely dispersed geographical locations the system of ad-hoc consultation with, and engagement of, solicitors in private practice is probably more economically to advantage. The economics must, however, include the commitment of Police manpower. Although prosecuting officer duty has been considered to be valuable experience, assisting the officer responsible for making decisions as to whether cases reported have the necessary evidential ingredients, it is not an essential Police function. At a time when conditions are demanding the review of Police establishments this is one possible area in which a saving could be made, whether the saving would include an overall financial benefit is, perhaps, doubtful. The greater availability of a pool of legal advisers specialising in criminal law would certainly be of advantage. While it would not remove from the Policeman his need to know the law, as is at present necessary, it would assist where more complex charges were being considered.

11. In all of the options it appears to be accepted that the Police must hold the initiative up until the time of charging. Under Options B and C this would, presumably, be subject to review by the Local or National Prosecutor's Office. This I see as having two possible detramental effects. Firstly the charging officer will, over time , grow less confident that what he decides to charge will be supported, particularly where different policy criteria develop between Police and Prosecutor's Office. This latter point is possible where the two elements are at differing distances from the situation and from the consequences of decisions. The second effect is that, expecting a review of their actions, charging officers may opt for the most readily proven charge, leaving the legal experts to follow up with whatever more leisurely deliberations can formulate. This could lead to a less than certain situation for those accused than is at present commonly applicable. In connection with this there is the complication of bail. While present personnel remain unchanged these decisions will probably not become problematic but in time their successors could adopt the attitudes I have described. If this occurs there will be delays in bail, more frequent amendment or addition of charges and increased use of the provision of release as under Section 38(2), Magistrates

12. The further that decisions are removed from the operational Police Station situation the less advantage there is to the Police and, I feel, to the majority of accused persons. There are advantages under Options B and C to the offender who wishes to delay his Court appearance and for Law Graduates who would see a considerable growth in their oportunities for employment. It seems unlikely, however, that the relatively fixed incomes provided by such a public Office would attract the best of those qualified. The more limited numbers required under Option A may, however, permit a continuation of those positively deciding upon public service being recruited. Even if I am being overly pessemistic about the quality of recruiting under Options B and C it is still inevitable that the Offices will be, or become, bureaucratically structured with the more able moving to the higher posts or moving out into private practice. In either case it could result in the least experienced or less able who are those actually engaged in providing advice or advocacy.

13. Before I leave this aspect of the Commission's deliberations I would also comment that few of the decisions as to prosecution, or the formulation of charges, are problematic because of the law involved. They are, rather, decisions of a social, or even compassionate, nature which lawyers , with their legalistic training, are no more well equiped to deal than are Policemen with experience of people in all sorts and conditions of social environment. The juvenile or senile first offenders at present cautioned at an early stage will not be advantaged if the decision process is lengthened.

14. The question of uniformity and consistancy appears to be considered an important goal by some witnesses before the Commission. If this goal is valid, and variations in localised conditions lead me to doubt that it is, then I can see no more efficient means of effecting it than through the disciplined structure of the Police Service, with the Association of Chief Police Officers as the national link. That this Association has avoided any rigid imposition of uniformity perhaps indicates its appreciation of the inadvisability of such a course of action. Conditions, and therefore priorities, vary between areas and, in areas, between times, a lack of flexibility as to discretion would do nothing to enhance justice and this must be the primary objective of any proposed changes. If consistency is a legitimate goal then

how is it to be achieved, short of rigid and exhaustive bureaucratic controls? It is not always achieved by even the present Director of Public Prosecutions Office and I cannot see how a vastly enlarged organisation could improve upon that situation.

15. To refer briefly to the matter of minority groups, broached by Question 47, this matter is frequently, if not invariably, overstressed. I do not intend to imply that no problems exist but to contend that the emphasis it receives does a disservice to both the Police and the bulk of those who are members of those minorities. The law, the legal system and, more specifically in this context, criminal procedure must hold a status of equality of application. Provisions already exist for many minority groups to obtain redress for discrimination and those not yet catered for should, perhaps, be provided with similar support. I do not think that it would enhance legal procedure reforms if provision for specific minorities was created in this context.

16. The matter of exclusionary rules, page 16 of the Paper, must, I feel, be placed in perspective within the system of policing adopted in Britain, with its very real checks upon illegitimate methods. Evidence is such only on the basis of its admisibility and acceptability before the Courts, otherwise it cannot be classed as evidence. If, as is the situation in some countries where an exclusionary rule is applied, evidence which is absolutely valid, but for its circumstance of discovery, is barred then only the guilty benefit. There is little justice evident where crime becomes unprosecutable simply because the evidence was found accidentally while a different enquiry was being pursued.

CONCLUSION

17. I do not propose to conclude with a summing up of my comments, for they have been necessarily disconnected responses to various aspects of the Commission's field of enquiry. I would rather make some comment upon an aspect specifically excluded from the Consultative Paper, at page 11, the question of the monitoring of interviews. There appear to be three main methods advocated, the personal attendance of a legal adviser, audio or video tape recording. The first of these would require large numbers of such advisors, whether structured on the present system of independent practitioners backed by state legal aid finances or on a completely new system of Public Defenders. I have already refered to the present difficulty

experienced at times regarding the attendance of legal advisors. I would add that, were attendance to be an imposed requirement, it is likely that junior members of staff would be allocated this duty. The result could well be that clients are invariably advised to simply say nothing. Inexperience and pressure from the knowledge that a more senior partner will eventually take over the case could equally lead to this becoming the favoured course to adopt. Although, in an ideal World perhaps, evidence would always be available in such a conclusive form as to make interview unecessary, in reality this is often not the situation. The evidence which is available is often fragmented and even incomplete and frequently needs to be tested against the explanation offered, or obtained by fair and legitimate interview. These interviews can, not infrequently do, have the effect of eliminating persons, at a relatively early stage, from an investigation in which other factors pointed to their strong implication. Two significant questions arrise. At what stage of an enquiry is an advisor to be required and under what circumstances, if any, will it be legitimate to proceed with an interview without such attendance despite attempts to obtain it by the Police.

18. In dealing with tape recording there are factors common to both audio and video systems, those of technical failure and tampering. The intentional " malfunction " could no doubt be arranged by any officer not wanting to tape his interview and this possibility will no doubt occur to defence advocates where a defect has prevented taping. Such assertions would be difficult to refute, especially where, having had advice or second thoughts on the matter, a defendant decides to deny an earlier statement of admission. Both types of recording, but especially audio, are open to the criticism of editing. I would expect in all but the most elementary of cases that there would be a need to edit, unless transcripts or replays are to be extremely time consuming to receive in evidence. In the course of most interviews there are unrecorded exchanges between the parties to the interview which are not directly, perhaps not even indirectly, relevant to the matter in hand and which are not admissible in evidence. The exclusion of these exchanges, whether done at the time or later is open to abuses by unscrupulous interviewers and exploitation by desperate defenders. If the length of interviews is reduced

to avoid this criticism then the success rate for crime detection will drop. One possible means of mitigating this effect could be the introduction of measures which require defendants to provide cross examinable explanations for their actions or activities. If no editing is permitted then both interviewer and interviewed will be inhibited, if it is permitted the interviewer and editor will frequently find themselves being challenged before the Courts.

19. One aspect of audio tape recording which will, no doubt, soon occur to many interviewees is the obvious absence of visual record and consequent importance of all sound reproduced. What, I wonder, would be the reaction of Courts and defence advocates where an interviewee sees fit to make urgent exclamations indicating non-verbal intimidation? Much of this problem would be avoided by video recording but even then interviewers will have to be cautious about their gestures and expressions, and operators of their camera angles, to be sure of avoiding alegations and criticism. I was concerned to see, on a television programme, an example of an interview conducted by a Police officer in the United States of America, evidently intended to convince the viewing public of the benefits of video recording. In the space of minutes, indicated by a clock intended to prevent editing, a man was introduced, interviewed and made a full confession to murder. I can only conclude that, if this was not a complete fabrication, the subject had been selected very carefully for his unusual dispossition to respond favourably to any question put to him. It would be a total misconception if anyone were to believe that the video tape to which I refer was in any way representative of the discourse undertaken in such interviews. Few suspected of serious crime make unsolicited confessions of their guilt and this recording gave little credit to the patience, persistance and experience required in the interview situation.

20. My final point is to express concern at the apparent lack, on the part of some witnesses who have made known their submissions to the Commission, of a sense of justice in other than unilateral terms. Justice must not only mean that the innocent are protected from wrongful conviction but also that there is a reasonable expectation that the guilty will be declared thus before the Courts. Increased controls and reduced flexibility in relation to criminal procedures have not, except in minor specific areas, been compensated by revision of Police powers. The application of the Judges Rules, a safeguard acknowledged by Police, defenders and Courts, has become

not thus recorded or witnessed. Whatever revisions are made to the criminal procedure they must be designed with the need to facilitate criminal detection as one of their central purposes.