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THE ROYAL COMMISSION ON CRIMINAL PROCEDURE

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O R A L E V I D E N C E

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CONSULTATIVE PAPER

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August 1979

8 Cleveland Row

LONDON SW1A 1DH

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THE ROYAL COMMISSION ON CRIMINAL PROCEDURE

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.* 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.

*For ease of reference, questions are numbered sequentially in the right-hand margin.

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 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 on the following page. 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 ACPD consultative machinery | Responsibility 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 3 or 4, 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 |
| 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? And also, should the lawyer's role in the prosecution decision be regarded as of paramount importance? Q. 6

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. 7

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 B and C), would this create any practical difficulties in defining the areas of responsibility of the police and the prosecutor? Q. 9

- 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 (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? Q.10

- iii) Option B assumes that responsibility for prosecution can be left with the police for minor

offences. On what criteria could those offences be selected? Q.11

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:

- i) Who should be the responsible Minister, for what reasons, and what should his responsibilities be? Q.12

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.

- ii) To what extent and how could local accountability be achieved under each of the Options? Q.13
- 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,
c) or notionally local with substantial central assistance by way of a specific rate support grant?

Q.15

- 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? In a national agency would there be Q.18

merit in having a cadre of barristers who alone Q.19
may prosecute in the higher courts - on the
analogy of the Scottish Advocates Depute?

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

iii) In cases to be tried on indictment could a guilty plea be ascertained earlier than at present?

Q.22

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),

what is the potential of the development of a system of "narrative charging"? By this is

Q.23

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

- 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.24
- ii) Are these issues important to magistrates' courts? Q.25

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 E. R. 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, e.g. 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, e.g. 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:

- i) Is the advice to be given of the sort that requires a solicitor to give it? Q.33
- ii) How would a solicitor perform the task of validating the product of police questioning? Q.34
- iii) Will the performance of the third function (as an independent witness) give rise to any difficulties over the performance of the first and second (on behalf of a client) or vice versa? Q.35

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:

What is the purpose of such adult presence? Q.36

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).

Is there any case for allowing a juvenile to waive the present rule in certain circumstances? If there is, what might those be? Q.37

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.

Is there any solution to this dilemma?

Q.38

b) Powers outside the police station

Arrest

23. On arrest the Commission wishes to examine one issue.

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? Q.39

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, e.g. a reasonable suspicion that the person concerned is in possession of a "prohibited, stolen or dangerous article or substance"? Would it be desirable and practicable to attempt to define "reasonable suspicion"? Q.40 Q.41
- 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?
- 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.45

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

- 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 adoption of this proposal in England and Wales. What are the views of witnesses upon it? Q.50

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 there for notifying the citizen of his rights, which are workable in practice and can be economically provided?

Q.51

Q.52

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.

END