

CENTRE FOR CRIMINAL JUSTICE STUDIES

SECOND ANNUAL REPORT

1989-90

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INTRODUCTION

The Centre for Criminal Justice Studies was provisionally established in 1987 and was formally approved by the University in March 1988. Its object, as set out in its Constitution (see [Appendix 1](#)), is the pursuit of research and study into all aspects of criminal justice systems. This remit, as undertaken by the Executive Committee (see [Appendix 2](#)), has in practice included the encouragement of postgraduate students and research projects, and the arrangement of seminars and conferences. The Centre's members comprise both lawyers and non-lawyers, and its work is generously assisted by an Advisory Committee, which consists of academics and practitioners in relevant fields of experience ([Appendix 2](#)).

- ***Professor Clive Walker***

**Director
Centre for Criminal Justice Studies
University of Leeds
Leeds LS2 9JT**

- Tel: +0044 (0)113 233 5033
- Fax: +0044 (0)113 233 5056
- [email: law6cw@Leeds.ac.uk](mailto:law6cw@Leeds.ac.uk)

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THE WORK OF THE CENTRE

A Research projects

The following research projects are currently in progress.

(a) Reporting of Crown Court proceedings and the Contempt of Court Act 1981.

This project is funded by the Leverhulme Trust and is directed by Dr. Clive Walker with the assistance of Debra Brogarth. The aim is to investigate the frequency and nature of orders under sections 4 and 11 of the Contempt of Court Act 1981 which in some way restrict or postpone the publication of Crown Court proceedings. A report has been prepared and arrangements are being made for publication.

(b) Research into the work of the Leeds Magistrates' Courts.

Imogen Brown is currently researching into various aspects of the work of the magistrates in Leeds in association with Dr. Roy Hullin (Dept of Biochemistry). Part of the work is to be published in the British Journal of Criminology.

(c) Leeds Young Adult Offenders Project.

Ian Brownlee has conducted an evaluation study of the above which is funded by the National Children's Home and the West Yorkshire Probation Service. A report of the results is available. A follow-up study is in preparation.

(d) Pre-trial reviews in the Magistrates' Courts.

The Home Office has agreed to fund research into the working of the above. It is hoped to commence work in the Bradford and Leeds Magistrates' Courts in October 1990. The grant holders are Peter Seago and Clive Walker.

(e) The administration of legal aid in the Magistrates' Courts.

This project, directed by Peter Seago and David Campbell (Leeds Polytechnic), is to be supported by E.S.R.C. funding and is centred on the Leeds Magistrates' Court and local Criminal Legal Aid Committee. The date for commencement is not yet fixed.

B Postgraduate study

(a) Postgraduate degree schemes.

The Centre wishes to encourage applications from anyone wishing to pursue research into the criminal justice system. This subject may be taken to include, for example, the judiciary, the prosecution system, the police, the prison and probation services, and police authorities. Any relevant research topic in these or related areas will be considered. A number of possible areas of research have been considered with our Advisers and can be suggested on request, but applicants are not precluded from devising their own proposals. Comparative studies are also welcome.

The relevant degree schemes on offer (all by research and thesis only) are as follows:

- Master of Arts (M.A. (Legal Studies)) - one year full-time or two years part-time;
- Master of Laws (LL.M.) - two years full-time or three years part-time;
- Doctor of Philosophy (Ph.D) - three years full-time or four years part-time.

The entrance requirements common to all three schemes are that applicants must normally possess a good honours degree, but those with professional qualifications or substantial professional experience will be considered. The detailed ordinances and regulations governing the above degree schemes are set out in the prospectus of the Faculty of Law which is available on request.

(b) Current postgraduate students

Lindy C. Ford, M.Sc, B.Sc. - Homelessness and persistent petty offenders (Ph.D., October 1988)

Christopher O'Gorman, LL.B. - Rights in police custody (Ph.D., October 1989)

Neena Acharya, LL.B. - the Police and Race Relations (M.A., January 1990, part-time).

Rachel Shanks, LL.B - Freedom of movement in the U.K. and France and the prevention of terrorism with special reference to European Community law (M.A., October 1990).

C. Relevant papers and publications by members of the Centre during 1989/90

Geoffrey Bennett - Exhibitionism, indecent exposure, voyeurism and frottage in Blueglass and Bowden (eds.), Principles and Practice of Forensic Psychiatry (1990) pp. 671-676.

- Assault - a harsh lesson (1990) 140 New Law Journal pp. 588-595.

- The Northern Ireland broadcasting ban: some reflections on judicial review (1990) 22 Vanderbilt Journal of Transnational Law pp.1119-1160.

Ian Brownlee - Compellability and contempt in domestic violence cases (1990) Journal of Social Welfare Law 107-115.

- Targeting the Young Offender (Criminal Law Review, forthcoming).

Brian Hogan - The Dadson Principle (1989) Criminal Law Review p.679.

Brian Hogan and Geoffrey Bennett - Criminal Law and Procedure (1989) All England Reports Review.

Brian Hogan (with J.C. Smith) - Criminal Law, Cases and Materials (4th ed., 1990).

Michael Macnair - The early development of the privilege against self-incrimination (1990) 10 Oxford Journal of Legal Studies 66-84.

Norma Martin Clement - Legislation and child sexual abuse - considerations and proposed changes in the law in H. Blagg, J.A. Hughes and C. Wattam (eds.), Child Sexual Abuse (1989).

Norma Martin Clement (with N. Parton) - Public inquiries, legalism and child care in England and Wales (1989) 3 International Journal of Law and the Family pp. 21-39.

Peter Seago - Criminal Law (3rd ed., 1989).

Clive Walker - Army special powers on parade (1989) 39 Northern Ireland Legal Quarterly 1-35.

Clive Walker and Debra Brogarth - Televising the courts (1989) 153 Justice of the Peace 637-640.

Clive Walker and Ian Cram - D.N.A. profiling and the law (1990) Criminal Law Review 479-493.

Clive Walker - Police and Community in Northern Ireland (Northern Ireland Legal Quarterly, forthcoming).

D. Seminars, Conferences and Continuing Education

STAFF, STUDENTS AND VISITING SPEAKERS

1. The following events were arranged by the Centre:

- Seminar on the Report of the Working Group on the Right to Silence, January 1990.
Speaker: Chris O'Gorman.

- Conference on Miscarriages of Justice, April 1990. Speakers: James Wood, Clive Walker, Keith Bottomley, Lee Bridges, Professor John Bell, Paddy O'Connor, Chris Willmore, Fiona McElree, John Jackson, Michael Mansfield, Brice Dickinson.

2. Members of the Centre participated in the following events:

Geoffrey Bennett - Paper delivered on the Broadcasting Ban at the conference on Law and Politics, Belfast (July 1989).

Ian Brownlee - Paper on information for sentencers, Newcastle University (November 1989).

Brian Hogan - Paper on developments in criminal law at the Crown Prosecution Service Conference in York (March 1990).

- Paper on general principles of criminal law at the conference of Senior Police Officers, Wakefield (March 1990).

- Paper on developments in criminal law for the Crown Court Seminar, Judicial Studies Board (April 1990).

Chris O'Gorman - Paper on self incrimination and the right to silence at the Crown Prosecution Service Conference in York (March 1990).

Peter Seago - Various work for the Judicial Studies Board including: the investigation, evaluation and appraisal of Magisterial Court Chairmen; guidance to Magistrates' Courts on effective training and ethnic awareness; handbook for new magistrates.

- Paper on general principles of criminal law for Crown Court Refresher Seminars, Judicial Studies Board (January 1990).

Clive Walker - Paper on new developments in the Prevention of Terrorism Act at the conference on Law and Politics, Belfast (July 1990).

APPENDIX 1

CONSTITUTION OF THE CENTRE

Object of the Centre

1. The object of the Centre shall be to develop, co-ordinate and pursue research and study into, and the dissemination of knowledge about, all aspects of criminal justice systems.

Membership of the Centre

2.1 Any members of the academic staff of the Department of Law may be a member of the Centre.

2.2 Other individuals may be appointed to membership of the Centre by the Council on the nomination of the Executive committee.

Membership of the University is not a prerequisite of appointment to membership of the Centre.

Administration of the Centre

3.1 The Centre shall be administered by a Director, a Deputy Director and an Executive Committee.

3.2 The Director and Deputy Director, who shall be appointed by the Council on the nomination of the Head of the Department of Law after consultation with members of the Centre, shall each normally hold office for a period of five years, and shall be eligible for immediate re-appointment.

3.3 The Director shall be responsible to the Executive Committee for the running of the Centre and the representation of its interests. The Director shall have regard to the views and recommendations of the Executive Committee and the Advisory Committee. The Director shall be assisted by a Deputy Director.

3.4 The Executive committee shall consist of the Director and the Deputy Director together with the Head of the Department of Law, and up to six others who shall be appointed by the Director, Deputy Director and head of the Department of Law and up to two of whom may be members of the teaching staff of the Department of Law.

3.5 The Executive Committee shall meet at least twice a year, with the Director acting as convenor. Special meetings may be held at the request of any member of the Executive Committee.

3.6 Minutes of the meetings of the Executive Committee shall be presented by the Director to the following meeting of the Department of Law.

3.7 There shall be an Advisory Committee appointed by the Executive Committee which shall formulate advice and recommendations and which shall consist of:

- (i) all members of the Executive Committee;
- (ii) up to three persons who shall be members of the teaching staff of the University of Leeds other than the Department of Law whose activities or interests have relevance to criminal justice studies;
- (iii) up to fifteen who shall be practitioners in criminal justice systems (or other appropriate persons).

3.8 The Advisory Committee shall meet once a year, with the Director acting as convenor. Special meetings may be held at the request of the Executive Committee.

Amendment to the constitution

4.1 This constitution may be amended by the Council (or any committee acting with authority delegated by the Council) on the recommendation of the Department of Law and the Executive Committee of the Centre.

APPENDIX 2 **MEMBERSHIP OF THE CENTRE FOR** **CRIMINAL JUSTICE STUDIES**

1. Executive Committee

Dr C.P. Walker (Director)
Mr I.D. Brownlee (Deputy Director)
Professor N. Jepson
Professor B. Hogan
Mr P.J. Seago (ex officio, Head of Department of Law)

2. Advisory Committee

His Honour Judge G. Baker
Councillor T. Brennan (W. Yorks Police Authority)
Sir L. Byford (ex-Chief Inspector of Constabulary)
Chief Spt. T. Davey (Commandant, W. Yorks Police Training School)
Mr I. Dobkin (Barrister)
Mr W. Driscoll (Prison Service)
Dr D. Duckworth (Leeds University)
His Honour Judge Herrod
E. Jenkins (Leeds University)
Mr Justice Kennedy
Mr G. Kenure (Probation Service)
Peter D.G. McCormick (Solicitor)

Mr P. Nobes (Chief Constable, West Yorkshire Police)
Mr R. Otley (Chief Crown Prosecutor)
Rt. Hon. M. Rees (M.P.)
Mr C. Sampson (H.M. Inspector of Constabulary)
Mr P. Whitehead (Clerk to Leeds Justices)

3. Research Assistants

Debra J. Brogarth (LL.B., LL.M)
Imogen F.B. Brown (B.A.)

4. Research Students

Neena Acharya (LL.B.)
Lindy L. Ford (M.Sc., B.Sc.)
Christopher O'Gorman (LL.B)
Rachel Shanks (LL.B)

APPENDIX 3

CENTRE PAPERS

COMPUTER MISUSE BILL - 1989-90

Comments on the Draft Bill

1. Introduction

1.1 The following comments have been mainly prepared by Professor Mike Wells, Computing Service, after consultation with colleagues in other University Computing Services. Some assistance was provided by Dr. Clive Walker, Centre for Criminal Justice Studies.

1.2 Our comments are based on the version of the Bill brought from the Commons (1989)-90 H.L. No.73)

2. The Concept of 'access'

2.1 Central to the bill is the concept of 'access' and clause 17 will be relied on to define exactly what is meant.

2.2. Clause 17(2) (a) is clear and needs no alteration To alter or erase a program or data it is necessary to have what computer specialists would classify as 'write permission' to the information, and we see no real prospect of dispute as to the meaning of this clause.

2.3 Clause 17(2) (b) is a portmanteau. It includes in a single clause TWO activities, one of 'copying' and one of 'moving'. As used by a computer specialist these two terms would be taken as differing in the sense that if information is copied then the original information is left in situ, while if information is moved the original

information is erased. The first of these can be done using only 'read permission' while the second requires 'write permission' to the original information. Of course both actions require 'write permission' to the storage medium in which the information is subsequently held. We would recommend that the acts of copying and of moving be treated separately. so as to reduce the scope for debate as to precisely what is meant If this is done, then any 'moving' is surely covered by clause (a) , since the 'erasing' of the information which differentiates moving from copying is therein mentioned.

2.4 Clause 17(2) (c) leads to clause 17(3) for explication. Within this clause 17(3) (a) has a quite specific meaning and we think no computer specialist would have problems. Clause 17(3) (b) when taken with its preamble reads:

A person uses a program if the function he causes the computer to perform is a function of the program

We do not know what this means. It contains a word, 'function', which computer specialists use in quite specific ways; unfortunately different specialists give it different meanings! We think that what it means is that if one uses any part of a program then one has used the program, and that one does not have to use ALL the parts of the program before one is deemed to have used it Whether this is the intended meaning or not, the clause should be clarified.

2.5 Clause 17(2) (d) and its associated explication at clause 17(4) may fall foul of a technical aspect. Clause 17(4) (b) makes it clear that the form of output is immaterial. However, in the case of programs it must be borne in mind that the same program often has several manifestations, especially in the case of a program in a so-called 'high-level' language, which may well exist as a high-level text, as one or more partially processed forms, and as an executable form. Clause 17(4) (a) refers to the 'instructions of which' a program consists, and might be argued as applying to only one or other of these forms, probably the executable form. We are sure that is not the intention. Clause 17(4) (b) refers to whether or not the form of the output is 'machine readable' or not, and does not quite cover the point we have in mind. We would propose some form such as:

a program is output if the original form of the program, the executable form, or any form intermediate between the original form and the executable form of the program is output

3. Search Warrants

3.1 Computer misuse is likely to occur in one of two forms:

a) where the person committing the offence is an employee, who, while at his normal place of work is acting in an unauthorised way, and misusing his employer's computer. In such cases there will be no requirement for any form of warrant, since permission to enter the premises can be obtained from the employer, who clearly has both the power to grant such permission and an interest in detecting or preventing the misuse;

b) where the person committing the offence is doing so from premises for which he, or some disinterested third party, has control over entry, and for which a warrant will be required. In the nature of things, of fences in this second category will frequently involve the use of some form of remote connection to the computer which is being misused, and much of the evidence will consist of a record of the transactions taking place over this remote connection.

3.2 The powers conferred under clause 14 seem to fall well short of those that are needed if there is to be any real chance of successful prevention or detection for the second kind of misuse, in that they seem to offer no powers to monitor or intercept the traffic on the network connection. Powers of entry and search will almost certainly be needed in the late stages of collecting evidence, but the ability to monitor network traffic will undoubtedly be needed, as will the ability to present as evidence some form of certified record of the contents of the traffic.

3.3 The monitoring of data traffic could fall within the Interception of Communications Act 1985 if there is transmission by means of a public telecommunications system. If that Act is applicable, then a warrant for interception could be obtained from the Secretary of State if a serious crime is suspected. However, reliance upon the 1985 Act is not appropriate to dealing with computer misuse. Oversight by the Secretary of State would be anomalous, and the Act does not apply to all data traffic.

3.4. It is therefore suggested that additional powers of interception should be inserted into the Bill. It should be possible for the police to apply to a circuit judge for a warrant of interception (subject to safeguards such as those in the 1985 Act) on proof of reasonable suspicion of an offence under clause 2 or 3. No power is suggested in relation to clause 1 as it is the least serious offence, though it may, of course, be possible to proceed by way of the consent of either the target data holder or the owner of the machinery being utilised for misuse.

REPORT OF THE WORKING GROUP ON
THE RIGHT TO SILENCE
SUBMISSION OF THE CENTRE FOR CRIMINAL
JUSTICE STUDIES - UNIVERSITY OF LEEDS

I. PREFACE

1.1 This submission arose out of seminar held at the Centre on the 29th January 1990. The seminar was attended by academic lawyers and practitioners concerned with criminal justice, including a judge policeman and Crown Prosecutors. The discussion was introduced by a paper from Chris O'Gorman, who is a barrister currently undertaking research at the Centre. The seminar was chaired by Dr. Clive Walker, to whom further enquiries may be addressed

1.2 There follows a copy of the paper from Chris O'Gorman and then a resume of the points arising from the ensuing debate

2. RESPONSE TO THE REPORT

2.1. History

The Home Office Working Group on the Right of Silence is the third official body to consider the right of silence in a little less than 20 years. Since there are many recurring themes in the present debate which have been drawn from earlier examinations of the right of silence it is worth noting the conclusions reached by the other two bodies to have considered the issue in depth

2.1.2 The first, the Criminal Law Revision Committee, recommended the restriction of the right of silence in its Eleventh Report in 1972.^[2] Amongst its controversial proposals were the abolition of the caution administered by the police when they have reasonable grounds for suspecting that a person has committed an offence and the proposal of a new caution adapted from the old one at the stage where the suspect is charged with the offence. The Committee also urged the empowering of the jury or magistrates to draw inferences in two instances - where the defendant failed when being interviewed or on being charged to mention a fact on which he later relied for his defence and where he failed to testify at trial. Both these omissions on the part of the accused were to be capable of corroborating other evidence in the prosecution case. In the face of extreme criticism the Committee's report was shelved.^[3] Much of the criticism aroused by the Committee's proposals is, it is submitted, equally applicable to the Report of the Working Group.

2.1.3 In 1981 the Royal Commission on Criminal Procedure made its recommendations which it was hoped would strike a balance between the interests of the State in detecting crime and the rights of the individual suspect.^[4] As an integral part of this balance, and in contrast to the Criminal Law Revision Committee, the Commission came down in favour of retention of the suspect's right of silence both during questioning after caution and at trial.^[5] The majority believed that any attempt to use a suspect's silence as evidence against him was inconsistent with a fundamental principle of our accusatorial system, that it is for the prosecution to prove the defendant's guilt at trial without any assistance from the accused.^[6] They considered that such a change would be acceptable only if, at the least, "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". In the majority's opinion this in turn could only be achieved if the present accusatorial system were to be replaced by an inquisitorial one not only at the police interrogation stage but throughout the whole criminal justice process.^[7] It will be seen that, by way of the proposed new caution,^[8] the Working Group has complied with the Commission's demands concerning the suspect's knowledge of the consequences of silence. The group has, however, signally failed to take account of the Commission's other demands. The result is that the Group proposes changes which would effectively create an inquisitorial system at the police station whilst retaining the overall accusatorial nature of the process

2.1.4 The concept of a "fundamental balance" promulgated by the Commission was accepted by the Government. Its major recommendations were embodied in the Police and Criminal Evidence Act 1984 (PACE) and the Codes of Practice appended thereto (COP). Whilst making no direct reference to it, many of the provisions in PACE and COP only make sense in the context of a right of silence for the suspect.

2.1.5 Since 1986 many senior police officers, including the Metropolitan Police Commissioner, Sir Peter Imbert,^[9] have continually expressed concern that the safeguards provided for suspects in PACE are significantly undermining the job of crime detection. In particular they have repeatedly claimed that the greater take-up rate of legal advice by suspects under s.58 of PACE has led to a sharp increase in the exercise of the right of silence in serious cases. Confirmation of the existence of such a link in reality, it is submitted, is fundamental to the Working Group's proposals.

2.1.6 On the basis of these mainly unsubstantiated claims the Secretary, Douglas Hurd, reopened the debate on the right of in a speech to the Police Foundation in July 1987. In so doing, he also resurrected the Eleventh report of the Criminal Law Revision then Home Committee to which reference has already been made. The calls for change gained momentum in the months following the Home Secretary's speech, reaching a climax in the speech of the Lord Chief Justice Lord Lane, in the Court of Appeal in *R. v. Alladice*. In this case, Lord Lane identified, and elaborated upon, the two major concerns troubling the police and senior judiciary, namely, the alleged increase in the use of the right of silence in police detention and the springing of the so-called "ambush defence".^[10] Six days after this, on the 18th May, the Home Secretary announced the setting up of the Working Group. Its restricted terms of reference are set out in the Report at paragraph 3. Significantly, as the Working Group accepts at paragraph 50, its purpose was to advise on how the law should be changed, not whether some form of change was justified in principle.

2.1.7 The Working Group's recommendations can be considered under two heads: the suspect's right of silence before charge and at trial and the provisions relating to the setting up of a system of pre-trial disclosure of the defence case which will be discussed first.

2.2 Advance disclosure of the defence case

2.2.1 The proposals advocating a system of pre-trial defence disclosure^[11] are in the main uncontroversial and are likely to be warmly received, especially by the legal profession. Few would argue with the Group's comment at paragraph 101 that "the administration of justice is likely to be substantially assisted if it can be made clear before the trial how the prosecution intends to put its case; what the defence is; and what the main points at issue between the parties are. It is to be regretted that the utility value of the proposed advance disclosure rules will at first be restricted to serious cases in the Crown Courts. This is understandable, however, when one bears in mind the absence of information presently at our disposal relating to the economic effects of widespread application of the rules, especially upon the criminal legal aid system.

2.2.2 With respect to the suggested sanctions in the event of failure by the defence to comply with advance information provisions, the course adopted by the

Working Group at paragraph 101 seems sensible. Professor Zuckerman has suggested that the ultimate sanction should be available where the defence fail in their duty to disclose, namely, disallowing a defence not previously disclosed (subject to the court's discretion to allow the defence in question on suitable terms).^[12] In practice it is submitted that this would not provide a very effective deterrent. Somewhat like the sanction for non-disclosure of an alibi defence one imagines that exercise of the discretion to exclude a defence would be the exception rather than the rule.

2.3. The suspect's right of silence

2.3.1. It is the comments and proposed changes addressed to the suspect's right of silence which will provoke most of the criticism directed towards the Report of the Working Group. Having stated at paragraph 57 that "the Criminal Law Revision Committee [in its Eleventh Report] identified a legitimate problem which time has not lessened", the Group went on to adopt the Committee's proposal to permit the drawing of inferences by the jury and magistrates from the accused's exercise of silence in the face of police questioning. It recommends at paragraph 63 that Parliament should provide guidelines to give assistance to the courts as to the circumstances in which the exercise of the right of silence should result in adverse inferences. These guidelines should, it is suggested, permit the trial judge, prosecution and defence to comment on the accused's failure to mention a fact on which he subsequently relies in his defence, the prosecution also being permitted to cross-examine the accused about the failure. The Group goes on to say at paragraph 65 that the judge in Summing-up should be required to guide the jury as to the factors which they should take into account in assessing the veracity of the defence put forward at the trial. Equally magistrates with the assistance of their clerk as necessary, should decide for themselves in accordance with the guidelines what inferences, if any, they can properly draw.

2.3.2. The primary adverse inference which the Group would allow to be drawn from the defendant's previous failure to answer questions or to mention a particular fact is that a subsequent line of defence is untrue. It may also have an adverse effect upon his general credibility. The Working Group insists that on no account should the defendant's silence or failure to mention a fact relevant to his defence be capable of amounting to corroboration or have probative value by itself or when aggregated with other prosecution evidence. Even this rare departure from the Criminal Law Revision Committee line contains a caveat to the effect that it may be subject to review once the Law Commission has completed its study of the law of evidence relating to corroboration.

2.3.3. Despite the Group's claims to be respecting the principle of the burden of proof, many will argue that the effect of these proposals does shift the burden of proof towards the defendant. Instead of providing safeguards for the accused in line with those envisaged by the Royal Commission on Criminal Procedure, the Group has left the accused facing the risk of making damaging or ambiguous statements in answer to police interrogation without knowing precisely what is the substance of, and evidence, for the accusations against him.

2.3.4. Furthermore, it is submitted that the Group's assertion that silence will not amount to positive evidence for the prosecution is quite unrealistic. Once the fact of the accused's silence has been put before the jury, the burden shifts to the defence to justify the exercise of silence. If its explanation is not believed by the jury the accused's silence can only serve to bolster the prosecution case undermining the defence case.^[13] Regardless of the Working Group's assurances to the contrary, the whole tenor of these proposals implies that there is only one reason for silence - that the suspect is guilty. As any practising lawyer will confirm, there are many other reasons, for example, lack of consultation time between the solicitor and his client, and the insufficiency of information by the police. What inferences, if any, may be drawn from a suspect exercising his right to silence on his solicitor's advice? This issue has not been addressed by the Working Group.^[14]

2.3.5. Clearly, one likely consequence of the foregoing proposals is an upsurge in requests for legal advice on the part of the suspect. So, at a time when it would appear that the right enshrined in section 58 of PACE will become even more valuable, the Working Group's proposals for the administration of the new caution are particularly alarming. The Report recognises the present caution would be considered insufficient warning to the defendant of the potential consequences of his remaining silent in interview. Accordingly, the Working Group recommended the adoption of a new caution at paragraph 71

"You do not have to say anything. A record will be made of anything you do say and it may be given in evidence So may your refusal to answer any question If there is any fact on which you intend to rely in your defence in court it would be best to mention it now. If you hold it back until you go to court you may be less likely to be believed."

The caution fairly reflects the implications of the new legal regime. However, it is the proposed time at which the caution is to be administered which causes most concern By a majority, the Working Group recommended that the caution should be administered both before every interview and upon the suspect being arrested prior to arrival at the police station. Their main reasons for this are to be found at paragraphs 73 and 74. Firstly the Report claims that many suspects feel a psychological compulsion to talk (though they provide no evidence of this assertion) The argument continues that if suspects were not warned of the full legal consequences of anything they said or did not say before they were formally interviewed, it might be ruled inadmissible. This result would undermine the Group's aim of encouraging the suspect to talk so as to increase the amount of information available to the court. Secondly, the Report claims that by the time the suspect had reached the police station and had been interviewed, he would have had a chance to concoct a plausible explanation and could then say that he had been cautioned against saying anything. These reasons are flimsy in the extreme for such a swinging change in procedure. This last recommendation is a clear attempt to circumvent the rights granted the suspect under PACE most of which are only activated on his arrival and processing at the police station, where he is also first made aware of the said rights by a custody officer. The concern felt on this score is echoed by the sole dissenting voice in the Group who argues that no inferences should be drawn from the suspect's silence upon arrest until he has had the opportunity to take legal advice and provided circumstances exist whereby either a contemporaneous note can be made which the suspect can verify or the interview can be tape-recorded.

2.3.6. A number of studies, notably those carried out by the Centre for Criminology and Criminal Justice of Hull University^[15] and Birmingham University^[16] have found evidence of a practice developing among some police officers of conducting informal or off-the-record interviews with suspects, including during the journey to the station after arrest. For example, asked how often they "clarify" a suspect's account before an interview starts, 53% of officers interviewed for the Hull Study said always or often. Such tactics are probably an attempt to bypass to the requirements of legal advice, tape-recording and so on which apply at the police station. In the light of such information the Working Group's proposal might well be seen to be officially rubber-stamping the practice of interrogating suspects prior to arrival at the police station. In spite of the Working Group's assertion that the right to legal advice is a key safeguard, the reality of these recommendations might well be to devalue that right by deterring the innocent or inexperienced (who are least aware of their rights) from insisting on waiting until they reach the police station before they make any statements. There is again an underlying presumption that silence equates to guilt when one turns to the Group's proposal concerning the right to silence at trial. Of course, there can be any number of wholly proper reasons for defending counsel to advise his client to refrain from entering the witness box. The accused may, for example, be slow-witted or inarticulate and hence fall easy prey to a competent cross-examination. In any event, the stronger the prosecution case is, the more likely the defendant will testify. Furthermore, the right of silence at trial is also affected by the preceding recommendations relating to the right in the face of police questioning. If the defendant's earlier silence is put before the jury, it is difficult to envisage a situation where the defendant would not feel compelled to provide an explanation from his own lips.

2.3.8. On the assumption that research studies should confirm or rebut allegations, the Working Group's empirical evidence is a failure. It consists of two studies carried out in the Metropolitan and West Yorkshire police areas together with a very short reference to a study carried out by the Home Office in March 1987.^[17] There was also a brief exercise in consultation conducted with a variety of pressure groups and interested parties. Since the majority of the respondents wished to address the issue of whether a change in the law was desirable at all, and since such an issue was outside the terms of reference of the Working Group, the consultation exercise is of limited worth. As for the empirical research carried out by the police, the two research papers were never published, nor was their methodology revealed. The sum total of data made available to the public is contained in Appendix C of the Report. Even on a cursory glance the findings of the studies do not lend support to the allegation of a link between the rate of take-up of legal advice and the exercise of the right of silence. The only conclusions which are firmly reached are that the success (as opposed to take-up) rate of section 58 PACE stands at 20-21% and that the incidence of suspects exercising their right of silence increases when they are legally represented. Even here, though, the use of the right of silence for those legally represented is confined to less than 1 in 10 in the Metropolitan study and slightly more in the West Yorkshire survey. The studies carried out by Hull and Birmingham Universities mentioned above confirm that silence is exercised in a small minority of cases. Furthermore the commonly accepted view that a majority of police officers are concerned over the effects of PACE is not left unshaken when read in the light of the findings by Hull and Birmingham. Hull found that 72% of the officers whom they interviewed reported that a

solicitor's presence did not affect the way in which interrogations were conducted. Although about three quarters of police officers in the Hull study predictably thought the right of silence should be restricted, 78% said that they considered PACE had not altered suspects' exercise of the right of silence. The Working Group appears to have made no effort to discover what exactly a solicitor advises. It is certainly not the case that they advise silence as a matter of course.^[18] Neither was any data provided in either study with regard to the exercise of the right of silence at trial.

2.4. Summary

2.4.1 In summary, whilst the recommendations for a scheme of advance disclosure by the defence are to be welcomed, the findings and conclusions of the Working Group on the right of silence give the impression of being a knee-jerk reaction to a problem which is exaggerated by politicians without any objective foundation. It is difficult to avoid the conclusion reached by the Bull University study about the Working Group's empirical evidence that the function of the research in West Yorkshire is apparently to justify a policy decision which has already been taken on the basis of anecdote and long-standing prejudice.^[19]

3. RESUME OF DISCUSSION

3.1 The right of silence during police questioning

3.1.1 As predicted, this topic generated the most interest and disagreement.

3.1.2 It was pointed out that the exercise of silence was inherently difficult to research, since the reasons for a suspect remaining silent and the advice given by solicitors are privileged and sensitive information. Thus, further research should be directed not at police records but at the working practices and files of solicitors.

3.1.3 The effective exercise of the right of silence by suspects in police detention was said to be relatively rare. However, it was pointed out that many such cases involved experienced, professional criminals whom the police suspected to be guilty of very serious crimes. There was some discussion as to how the criminal justice system should deal with this category of suspect. Two approaches seemed to emerge.

3.1.4 First, there was minority support for amendments to the right to silence along the lines suggested by the Working Group. The allied point was made that the present police caution seems anomalous: the police have a duty to investigate crime but are obliged to tell suspects not to assist them. In response, most of the participants rejected the Working Group's proposals as changing fundamentally the balance which had been set by the Royal Commission on Criminal Procedure and the Police and Criminal Evidence Act. Consequently, amendments to the right to silence would only be acceptable in the context of an inquisitorial system. However, it would be unsatisfactory and unsafe to incorporate some consequences of an inquisitorial system without taking others. Other points raised against the change to the right to silence included the view that the importance of confession evidence was overrated, that it would lead to a danger of arrest on "fishing expeditions" (historically, one of the main reasons behind the right to silence) and that

juries do seem to draw adverse inferences from silence even under current laws.

3.1.5 An alternative strategy to deal with serious, professional criminals was to change the rules affecting the investigation of their activities aside from the right to silence. Relevant rules could be modified, for example, the grounds for arrest and period of detention after arrest. Such changes have, of course, been made in relation to terrorist suspects under the Prevention of Terrorism (Temporary Provisions) Act 1989. Obvious difficulties would arise in defining "serious crime", "serious criminal" and the special powers which should arise, and these issues were not fully explored.

3.2 Advance disclosure of the defence case

3.2.1 The "ambush defence" was said to be a common problem which seemed increasingly unsupportable now that pre-trial disclosure by the prosecution has been established.

3.2.2 It was also noted that the principle of pre-trial disclosure by the defence had been established in serious fraud cases (Criminal Justice Act 1987)

3.2.3 In conclusion, there was broad acceptance that advance disclosure would be worthwhile reform.

3.3. The right of silence at trial

3.3.1 This matter was briefly discussed. The Working Group's proposal at para 114. was criticised on the grounds that comments from the prosecution as well as the judge could create great confusion in the minds of the jury

POLICE AND CRIMINAL EVIDENCE ACT 1984 **CODES OF PRACTICE - PROPOSED CHANGES.** **SUBMISSION BY THE CENTRE FOR CRIMINAL** **JUSTICE STUDIES, UNIVERSITY OF LEEDS**

1. Introduction

1.1 We have confined our comments mainly to the proposed changes in the Codes in the expectation that, at this late stage of the consultation process, fundamental amendments will be neither acceptable nor feasible.

1.2 We have not sought to react to every proposal. The absence of comment may be taken to mean either tacit approval or at least the absence of strong hostility.

2. Code of Practice for the Exercise by Police Officers of Statutory Powers of Stop and Search

2.1 Annex B (the definition of reasonable suspicion) has been reformulated into proposed paras. 1.5 to 1.7. However, the alleged simplification and clarification leaves out the important advice in Annex B para. 4 that the degree of suspicion required to establish reasonable grounds for stops and searches should be no less than for an arrest without warrant. Given that the "success" rate for searches of this kind has been about 17% (a much lower rate than for arrests), will the removal of this reminder not encourage yet more speculative and ill-founded stops and searches?

2.2 The proposed para. 1B to some extent encourages "encounters" with the consent of the person concerned. It is to be made clear that the policeman is seeking the cooperation of the person concerned (though not necessarily that the person can refuse to cooperate) (para. 10). However, as resort to voluntary encounters will obviate many of the safeguards in this Code, it is suggested that actual searches at least should always be conducted by way of a formal exercise of statutory powers.

3 Code of Practice for the Searching of Premises by Police Officers and the Seizure of Property Found by Police Officers or Persons on Premises

3.1 A general issue to be raised at the outset is why no reference is made to the powers under the Drug Trafficking Offences Act 1986 s.27 or the Criminal Justice Act 1987 s.2. Many of the safeguards in the Code would be valuable in these contexts, especially in regard to the 1987 Act, which envisages searches under warrant as well as mere orders for production of materials.

3.2 Further guidance would also be welcomed in regard to Schedule 7 para. 7 of the Prevention of Terrorism (Temporary Provisions) Act 1989. This allows a police superintendent to issue orders equivalent to search warrants or explanation orders if "the case is one of great emergency and ... in the interests of the State immediate action is necessary . . .". These criteria could hardly be broader and cry out for limitation by a code of practice.

4. Code of Practice for the Detention, Treatment and Questioning of Persons by Police Officers

4.1 We have a number of comments concerning the reformulation of the guidance relating to access to legal advice pursuant to section s.58 of the Police and Criminal Evidence Act 1984.

4.1.1 First, the attempt in Annex B para. B4 to catch the flavour of *R v Samuel* ([1988] 2 W.L.R. 920) leaves much to be desired. It should be specified that the chances of a solicitor passing on a message inadvertently are believed by the Court of Appeal to be small.

4.1.2 Second, could a standard form not be suggested to serve as the written notice of rights required under para. 3.2? To leave this matter to the police alone may result in forbidding or legalistic documents which fail to convey effectively the required message.

4.1.3 Third, it would be good practice to report in all cases enforced removals of solicitors from interviews under para. 6.8. Reporting will serve the purposes of

allowing statistics to be kept and of enabling a proper investigation to be made into the antics of allegedly bad solicitors. It is in the interests of neither the police nor the Law Society to allow such allegations to pass untested

4.1.4 Para. 60 provides that "misconduct" by solicitors can include "answering questions on the client's behalf, or providing written replies for the client to quote". This represents a substantial abridgement of the right to legal advice and is one which is being introduced in a disgracefully underhand manner (it is not even amongst the highlights mentioned in the covering letter) Why should a suspect be expected to have instant recall of all the legal advice he has been given? Why is it improper for stupid, inarticulate detainees to ask a spokesperson to convey their views more clearly and forcefully than they could themselves? At least until the changes to the privilege against self-incrimination recommended by the Home Office Working Group have been accepted by Parliament, the proposals in pars. 60 should be rejected as wholly inconsistent in principle with fundamental rights.

4.2 Moving to a closely related matter, there appears to be an inconsistency between para. 1F and 11.3. On the one hand, a solicitor may act as the "appropriate adult" in the case of juveniles or the mentally ill but only as a last resort. On the other hand, the appropriate adult is urged to act not simply as an observer but also as an adviser. Given this job description, solicitors would appear to be preeminently suitable

4.3 The scope of the rights under para. 7 to contact diplomatic officials remains surprisingly wide. It is unclear why in principle these rights should exceed those to legal advice in para. 6, especially in regard to terrorist suspects from countries with a history of involvement by their diplomats in terrorism.

4.4 Para. 15C states that the only review under section 40 of the Police and Criminal Evidence Act 1984 which must be conducted in person by a police superintendent is that at 24 hours. The institution of guidance of this kind will inevitably make it less likely that other reviews will be conducted in person. Therefore, it would be desirable to ensure that the police review after 72 hours should likewise be done in person.

4.5 The safeguards in the Code in many respects assume that the suspect will be questioned in a police station. To avoid the difficulties which arise when interviews are conducted elsewhere (see, for example: *R v Fogah* (1989) Crim. L.R. 141; *R v Parchment* (1989) Crim. L.R. 290; *R v M* (1989) *The Times* 23 August), guidance should be given that "interviews" (as defined by para. 11A) should not be commenced or encouraged by the police until arrival at a police station, unless there is an exceptional need for urgency.

4.6 Finally, we support the designation of provisions in the codes as paragraphs". References to sections in pars. 3 should be corrected

5. Code of Practice or the Identification of Persons by Police Officers

Some reference should be made in para. 3.4 to section 148 of the Criminal Justice Act 1988, which requires that computerized records be made inaccessible.

SUBMISSIONS TO VISCOUNT COLVILLE OF CULROSS Q.C. ON THE NORTHERN IRELAND (EMERGENCY PROVISIONS) ACTS 1978-87

1 Structure

1.1 The most satisfactory solution to the present confusion between the Emergency Provisions Acts and the Prevention of Terrorism (Temporary Provisions) Act 1989 would be to replace both with a single permanent, comprehensive code. This would solve the current overlap, as well as having various other advantages.

1.2 At the same time, permanent legislation carries with it the substantial danger of overuse. Therefore, it is important to incorporate three types of safeguards. The absence of these in the Prevention of Terrorism Act is a major source of criticism.

1.3 The first safeguard is the formulation of explicit criteria by which to test the necessity for, and proportionality of, each special measure. Invocation and continuance would be a matter for Parliament, as at present, but the application of the legislation in any given case should be subject to some form of judicial scrutiny so far as possible. Measures could be applied by statutory orders for a specified duration and to specified geographical areas.

1.4 The second safeguard is an effective system of oversight. Instead of a periodical survey by a sole individual acting on an extra-statutory basis there should be an independent standing committee which would undertake a more permanent review. The Standing Advisory Commission for Human Rights is the obvious candidate for this task in Northern Ireland. It should in any event have its statutory remit widened, as it has often requested.^[20] To ensure that the reports and recommendations of the proposed committee are taken seriously, the precedent of sections 3 and 4 of the Parliamentary Constituencies Act 1986 might be followed. The Act requires reports of the Boundary Commission to be laid before Parliament and reasons to be given for any differences between its reports and implementing Orders in Council.

1.5 It is not recommended that the proposed Committee should be a Parliamentary Select Committee. A group of Parliamentarians would face special problems in terms of changes in membership, pressures to disclose information and partisanship.^[21] Therefore, a committee of experts might be preferable. However, there should be a firm parliamentary link with the proposed committee. This could be provided by the Home Affairs Select Committee, which might be encouraged to consider the reviews of the special legislation, just as it has recently begun to consider the reports of the Police Complaints Authority.

1.6 The third safeguard is that each group of special measures (such as special courts, police powers and so on) should be invoked and/or continued by distinct

statutory orders. This would allow closer Parliamentary scrutiny of necessity in each case.

1.7 Even if a single, consolidated Act is felt to be too ambitious, it should still be possible to separate the special measures applicable to Northern Ireland from those applicable to Britain. This reform would be desirable since the legal position would become clearer, though without the concomitant safeguards outlined above, not much fairer. The Prevention of Terrorism Act can be categorised in three ways for this purpose.

- First, it contains some measures which have no relevance to Northern Ireland- Sections 1 to 3, section 5, section 15(1), section 15(10) and Part I of Schedule 7 fall within this category.

- Second, there are some measures which only have relevance to Northern Ireland. These should be transferred to the Emergency Provisions legislation and then repealed within the Prevention of Terrorism Act. The relevant measures in the Prevention of Terrorism Act are sections 6, 21 to 24, Part III of Schedule 4, paragraph 2(3) of Schedule 5, and paragraphs 7 and 8 of Schedule 7.^[22]

- Third, all remaining parts of the Prevention of Terrorism Act have relevance to Northern Ireland and so would have to be reenacted as part of the Emergency Provisions legislation, whilst the Prevention of Terrorism Act was confined in its jurisdiction to Britain.

1.8 The titles of both the Prevention of Terrorism and Emergency Provisions Acts are inappropriate. The former is not solely concerned with prevention, while the latter deals with a problem which it is increasingly difficult to characterise as an "emergency". Alternative titles include the "Counter-Terrorism Act", the "Anti-Terrorism Act", the "Terrorism Act" the "Prevention of Paramilitary Violence Act" or the "Prevention of Violence Act."

2 Special policing powers

2.1 It would appear that section 14 of Prevention of Terrorism Act falls beyond the remit of the review, even though it is by far the most important special power. As a result, no submissions are made concerning section 14, save to note the strong case for its repeal in the light of the Police and Criminal Evidence (Northern Ireland) Order 1989.

2.2. Section 13 of the Emergency Provisions Act has not been utilised in recent times. In a way, this is regrettable, since section 13 is more acceptable than section 14 of the Prevention of Terrorism Act. However, given the Government's clear desire for the latter's retention in the light of *Brogan and others v U.K.*,^[23] there seems little point in reviving section 13. Indeed, the time for its repeal has probably now arrived in view of the fact that the detention period in the Police and Criminal Evidence Order outstrips that in section 13. In these circumstances, it is most unlikely that section 13 would ever be invoked again, even if it had remained available.

2.3 Recourse to section 14 by soldiers has also declined dramatically. In view of the primary role of the police, it should now be possible to limit section 14 to scheduled offences.

2.4 Two forms of abuse have arisen in connection with special arrest powers, regardless of the particular section involved. The first concerns the use of successive arrests over a period of time. Though the courts have turned a blind eye this dubious practice,^[24] one of your previous reports expresses concern.^[25] Sections 41(9), 42(11) and 43(19) of the Police and Criminal Evidence Act 1984 to some extent prevent this abuse and should be followed. The other problem arises from arrests on superior orders. Though the courts have accepted that instructions from a superior can ground the requisite degree of suspicion,^[26] this chain of evidence creates the danger of arrests being motivated by the malice of the superior.^[27] The solution lies in a requirement that the inferior be made aware of the evidence founding the instruction to arrest.

2.5 As for treatment in police custody following an arrest, two reforms are suggested. First, section 15 of the Emergency Provisions Act 1987 should be brought into line with the corresponding rights to access in the Police and Criminal Evidence legislation. This would mean that

- access should be allowed on request after 48 hours and not just at 48 hour periods;
- detainees should be reminded of their rights as soon as the reasons for refusing access end.

The second issue is that video-recording would seem to be both feasible and appropriate. It would be helpful to have such a record not only if the suspect is prosecuted (in which case it should be disclosed to him) but even if he is not. If there is no prosecution, the film should not be disclosed to the suspect but would be available to investigators if a complaint had been made. The knowledge that the interrogation was being recorded would in any event be a major disincentive to abuse. The same arguments apply mutatis mutandis, to tape-recording.

Two further arguments in favour of some form of recording are as follows.

- First, the tape-recording of the interrogations of "ordinary" offenders will commence shortly under the Police and Criminal Evidence (Northern Ireland) Order. The refusal to record the interviews of suspected terrorists will then appear anomalous and indeed perverse, as that category of detainee is at greatest risk of abusive treatment.
- Second, a full record of the interview may provide evidence from which to draw inferences under the Criminal Evidence (Northern Ireland) Order 1988.

2.6 The detention powers in section 18 of the Emergency Provisions Act should be confined to the three situations in which they are most likely to be productive. These are in the vicinity of the border, at the scene of a crime or in designated areas such as city centres.

2.7 The special search powers in sections 15 and 17 should be amended so as to require reasonable search in all cases. This will affect bodily searches under section 15 and searches of dwellings under section 17.

2.8 In view of the comprehensive measure in the Public Order (Northern Ireland) Order 1987, the power to make further orders under section 27 of the Emergency Provisions Act should be abolished. Existing regulations which have not lapsed should be put in the body of the Act. Those which have lapsed are redundant and should be repealed.

2.9 A number of very controversial powers to take bodily samples were enacted by Schedule 14 of the Criminal Justice Act 1988 (now in the Police and Criminal Evidence Order). If it is still felt that such powers are still desirable they should form part of the Emergency Provisions Act and so be subject to annual review and renewal.

3. Executive powers

3.1 The main issue likely to be raised concerning internment (detention without trial) is whether or not it should be retained on the statute book, albeit in its lapsed state. The correct answer to this controversy depends on what model of special legislation is desired. If the foregoing proposals about structure are accepted, then it would be consistent to retain an internment power. Its continuance would be a lesser evil to the possibility of panic legislation at a future date.

3.2 Assuming the case for retention, two reforms should be considered.

- First, the executive model in Schedule 1 should be replaced by an inquisitorial system conducted by independent judicial officers. Precedents may be found, for example, in Israel.^[28]

- Second, a wider range of executive powers should be made available, so as to minimise the use of internment, which should be a weapon of last resort as it involves the most serious curtailment of liberty. Alternatives might include, for example, registration with the police.

4. Special criminal procedures

4.1 The favoured alternatives to the current system of "Diplock" courts would seem to be either a return to juries or three-judge courts. Both should be rejected.

4.2 As regards juries, there is continuing evidence of willingness on the part of paramilitary organisations to interfere with the administration of justice. For example, suspected informers have been murdered, and their relatives kidnapped and threatened. Though this evidence relates to witnesses rather than jurors, it would be naive to believe that the gunmen would not treat as potential targets anyone furthering the State's system of justice. Having rejected a general return to jury trials, there is still merit in the contingent jury trial, an idea put forward in the Baker Report.^[29] Scheduled offences are not all serious, nor are they all terrorist-related.

4.3 A three-judge court would at least bring Northern Ireland into line with the Special Criminal Court in Dublin. However, it is not clear what improvements to the quality of justice would be gained from such a change. Aside from personnel and procedural problems, three judges are as likely to confirm as to dispel each other's prejudices, and so any problem of case-hardening could be exacerbated

4.4 A preferable model would be a single judge sitting with three lay assessors. The task of the judge would be to decide the legal issues in the usual way. However, he would take no part in the final verdict. The lay assessors would provide the essence of a jury, in other words, trial by representative laymen. The assessors would be chosen at random on a Province-wide basis, with no possibility of challenge by Crown or defence except for cause. An assessor system would risk two dangers, but there is reason to think neither would be insuperable.

- First, would not assessors, like jurors, be threatened or intimidated? This possibility must be conceded, but physical protection from the police would be feasible with only three, rather than twelve, persons to protect per trial. Protection should also be provided by attempting to ensure their anonymity and by allowing majority verdicts.

- Second, would not assessors reach perverse verdicts because of sectarian bias? The evidence that this defect occurred in 1972 is weak,^[30] and assessors would be drawn from a wider area. Furthermore, the impact of the trial process should not be underestimated. For a period of time, the assessors would be isolated from their community influences by reason of their physical presence in court and the impact of hearing evidence at first hand and being subjected to directions by a judge.

4.5 Whether or not the composition of "Diplock" Courts is altered, the following procedural reforms should be considered.

- First, scheduled offences should be certified in not out. Such a switch is now feasible, given the number of cases before the "Diplock" courts. The workload could also be shared between Attorney-General and Director of Public Prosecutions. The possible constitutional objection raised in your last annual review that certifying in is inconsistent with the Attorney-General acting always to protect defendants is misconceived. The correct view of the Attorney-General's role is that he acts in the public interest, which may or may not coincide with the defendant's interests. For example, a number of statutes empower him to give or withhold his consent to a prosecution.^[31]

- Second, in order to avoid a trial judge coming into contact with inadmissible evidence, there has developed an informal system of pre-trial review of the committal papers by another judge. This system should be a statutory requirement.

- Similarly, when a trial judge decides to exclude self-incriminatory statements, he should be obliged, rather than merely empowered, to direct continuance before a new judge. Such an eventuality is rare.

- Next, the time-limits on remand periods envisaged by section 5A of the Emergency Provisions Act 1978 have not yet been set. A statutory deadline should be set.

- Next, section 1 of the Emergency provisions Act 1978 should only be invoked if the defendant refuses to answer whether he objects to a preliminary enquiry or not.

- Finally, in the light of changes made in 1987, remaining differences between section 2 of the Emergency Provisions Act 1978 and the English Bail Act 1976 are very slight and should be removed, save that the decision should still reside with a judge.

4.6 The most important substantive rule associated with special trials concerns the admissibility of statements under section 8 of the Emergency Provisions Act 1978. The argument given by the Diplock Report^[32] for section 8 was based on the restrictive interpretation taken by Northern Ireland courts of the meaning at common law of "oppression". Yet, this difficulty has been removed in two ways.

- First, the courts themselves have modified their views, particularly in regard to the impact of interrogation centres ^[33]

- Second, the Police and Criminal Evidence Order has substituted a new and more restrictive definition of oppression. ^[34]

In consequence, section 8 should now be repealed, for the "ordinary" law now complies with the design envisaged by the Diplock Report.

4.7 Although no longer a pressing problem, the admissibility of evidence from informers - "supergrasses" - has also excited much attention. It is submitted that the Northern Ireland Court of Appeal has developed two special rules governing admissibility:

- first, that the judge should direct himself that it is highly dangerous (not just dangerous) to convict in the absence of corroboration unless the witness is exceptionally credible (not just credible);

- second, that if any part of the witness evidence is discredited, no other uncorroborated testimony should be accepted unless his possible reasons for mendacity cannot apply.

The time has come for these extra safeguards to be put into statute so as to demonstrate that Parliament also has taken note of the dangers of supergrasses and accepts that they are normally an undesirable basis for a prosecution.

5. Special Offences

5.1 As has been argued in previous submissions the model of proscription found in the Republic's Offences against the State Act 1939 is rather more satisfactory than that in UK legislation. The safeguard of judicial appeal could be an important procedure for expressing legitimate grievances. The litigation concerning the 1988 broadcast ban illustrates the point. ^[35]

5.2 No doubt, submissions will be made that Sinn Fein and for the Ulster Defence Association should be proscribed. However, it has not been shown that these organisations are direct parties to violence, though they clearly have close links with groups that are Nevertheless, it should be part of the State's counter-terrorist policy to encourage political activities. In so far as the I.R.A. decides to spend its ill-gotten gains on the electoral efforts of Sinn Fein rather than munitions from Libya, this is a cause for satisfaction rather than repression.

5.3 The Baker Report^[36] put forward the rather fanciful idea of civil claims against paramilitary groups. Proof of ownership and agency make this an unworkable proposition.

5.4 The following suggestions relate to special offences other than proscription.

- Sections 23 and 26 of the Emergency Provisions Act 1978 - these offences should be permanent and are not really "special" laws at all.

- Section 24 is now redundant in view of the Public Order (Northern Ireland) Order 1987.

- Section 22 might be expanded to include members of the Independent Commission for Police Complaints and the Civilian Search Unit. Furthermore, the odd discrepancies between (a) and (b) in section 22(1) should be removed.

- The offences of withholding information contrary to section 18 of the Prevention of Terrorism Act has been threatened against journalists on a number of occasions. Given the more satisfactory procedures in Schedule 1 of the Police and Criminal Evidence Order, section 18 should not apply against the media.

6. Other Matters

6.1 Both the rules and procedures governing fatal shootings are in need of reform. To ignore this major aspect of security law (as did the Baker Report) would be a serious omission.

The rules in section 3 of the Criminal Law Act (Northern Ireland) 1967 could be reformed in two ways:

- by greater precision - an example of clearer rules is given at H.C. Debs. Vol. 114 Col. 344, 8 April 1987;

- by the greater use of manslaughter charges, perhaps encouraged by the doctrine in R. v. McKay.^[37]

The differences between section 3 and the law relating to self defence should also be considered.

As for procedures, the subsequent investigations into fatal shootings should be made more effective. For example, the I.C.P.C. should be able to conduct an investigation on its own initiative. disciplinary offences should be proven on balance

and it should be a disciplinary offence to obstruct or fail to help investigations. Coroners in Northern Ireland rightly operate under a very narrow remit. Their function should be a medical inquiry into the cause of death and not legal liability for that death. However, if the circumstances of a death give rise to public interest, there should be an additional inquiry. The Fatal and Sudden Deaths Inquiry (Scotland) Act 1976 might be adopted.

6.2 Despite the moves towards police primacy in 1975, there are still more soldiers than policemen in Northern Ireland. There should be some recognition of the Army's substantial role in terms of statutory structures. In particular, consideration should be given to enactment of the recently revised complaints procedures and to the encouragement of liaison committees and lay visitors.

6.3 The sentencing powers in relation to terrorists were the subject of sections 22 and 23 of the Prevention of Terrorism Act 1989. A query arises in connection with section 23. It states that the second offence need only be a "scheduled offence". However, this takes no account of the possibility that such an offence may be certified out.

6.4 The media restrictions announced in October 1988 have been fully debated, and there seems little point in making further representations. However the extraordinary nature of this form of censorship should at least be recognised by placing the ban in the context of the Emergency Provisions Acts. The ban would then be finite in time and could be kept under review.

6.5 Munitions controls could be tighter. There is evidence that Loyalist groups obtain some of their weapons from within Northern Ireland. Therefore consideration should be given to the abolition of firearms clubs or even all private licences.

6.6 Private security measure should be encouraged. The withdrawal of grants in 1986 is regrettable. At the same time, the controls on private security firms in Part III of the Emergency Provisions Act 1987 is to be welcome, though there should be the possibility of an interview with an adviser and guilt by association should be dropped.

6.7 Finally, the confiscation of paramilitary funds to be made possible by Part III of the Prevention of Terrorism Act 1989. However, these measures are predicated upon someone being prosecuted or convicted of an offence under the Act. It is submitted that an action in rem would be justifiable where the suspect has died or absconded or where ownership cannot be established. ^[39]

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1. C4 Division, Home Office, 13 July 1989

2. Criminal Law Revision Committee - Eleventh Report: Evidence (Cmnd 4991, 1972).
3. See eg B. McKenna - The Criminal Law Revision Committee's Eleventh Report: Some Comments (1972) Crim LR 604; C.J. Miller - Silence and Confessions - What are they worth? (1973) Crim LR 343.
4. The Royal Commission on Criminal Procedure Report (Cmnd 8092, 1981)
5. Ibid at paras. 4.53, 4.66.
6. Ibid at para 4.51
7. Ibid at para 4.52.
8. Loc. cit. para. 71.
9. See eg Wood & Crawford. The Right of Silence (The Civil Liberties Trust 1989) at p.22.
- 10 [1988] The Times 11 May.
- 11 Loc. Cit. para. 92 et seq.
13. See ibid. at p.860 for elaboration of this point
- 14 For suggestions as to the appropriate approach to be taken by solicitors in the context of the Criminal Evidence (Northern Ireland) Order 1988 see J.D. Jackson - Recent Developments in Criminal Evidence (1989) 40 NILQ 105. It is submitted that such tactics on the part of the defence solicitor would be equally apposite in the present situation envisaged by the Working Group. See Walchover - The End of the Right of Silence? - (1989) NLJ 501.
15. Bottomley, Coleman, Dixon, Gill and Wall - Safeguarding the Rights of Suspects in Police Custody - paper presented to the British Criminology Conference, Bristol, 17-20 July 1989.
16. Sanders, Bridges, Mulvaney, Crozier (University of Birmingham School of Law) - Advice and Assistance at Police Stations and the 24 Hour Duty Solicitor Scheme (Lord Chancellor's Department, November 1989).
17. Home Office Research Study 104 - Detention at the Police Station under the Police and Criminal Evidence Act 1984.
18. The Birmingham study found that in only 2.4% of the cases in their research did absolute silence result from the suspect being advised by a solicitor whereas over half (54.1%) of suspects legally advised made admissions. Loc. cit. at p.136.
19. Loc. cit. at p.17

20. See: Northern Ireland Constitution Act 1973 s.20; Fifth Report (1979-80 H.C. 433) para.6.
21. The debates in Canada and Australia concerning parliamentary oversight of their respective security services are instructive. See: Canadian Security Intelligence Organisation Amendment Act 1986; Australian Security Intelligence Organisations Amendment Act 1986.
22. This list is far from comprehensive, as minor and ancillary matters have not been included.
23. (1988) Judgment of Court, Vol. 145-B.
24. R. v. Officer in Charge of Police Office, Castlereagh, Belfast, ex p. Lynch [1980] N.I. 126. See: Walker - Arrest and rearrest (1984) 35 N.I.L.Q.145.
25. Annual Report for 1987 para.3.6.
26. McKee v. Chief Constable for N.I. [1984] 1 W.L.R. 1358; Stratford v. Chief Constable, R.U.C.[1988] 5 N.I.J.B. 11; Moore v. Chief Constable, R.U.C. (1989) 3 B.N.I.L. n. 123.
27. See Walker - Emergency arrest powers (1985) 36 N.I.L.Q. 145
28. See: Emergency Powers (Detention) Law 1979 (No. 33, as amended).
29. (Cmnd. 9222, 11984) para.159.
30. See: S.C. Greer and A. White - Abolishing the Diplock Courts (1986).
31. See recently the Official Secrets Act 1989. See also Prevention of Terrorism (Temporary Provisions) Act 1989 s.19
32. (Cmnd. 4901, 1972) para.26
33. See R. v. McBrien and Harman [1984] N.I. 280.
34. See especially R. v. Fulling [1987] 2 W.L.R. 923.
35. R. v. Secretary of State for Home Department ex p. Brind (1989).
36. Loc. cit. pars.464.
37. [1957] V.R. 560.
38. Compare: Offences Against the State (Amendment) Act 1985.