METROPOLITAN POLICE

The Royal Commission on Criminal Procedure

Part II of the Written Evidence

of

The Commissioner of Police of the Metropolis

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THE ROYAL COMMISSION ON CRIMINAL PROCEDURE

PART II OF THE WRITTEN EVIDENCE

OF

THE COMMISSIONER OF POLICE OF THE METROPOLIS

COMPRISING

THE PROSECUTION SYSTEM, PREPARATION FOR

TRIAL AND THE TRIAL

I N D E X

Royal Commission on Criminal Procedure

Memorandum on Second Part of Evidence of the Commissioner of Police of the Metropolis

I set out in Chapters XI-XV my views on the questions raised by the terms of reference of the Royal Commission in relation to the criteria for prosecution, the decision to prosecute and the responsibility for the conduct of the prosecution, the Solicitor's Department of the Metropolitan Police, the role of the Attorney General and the Director of Public Prosecutions and the right of private prosecution.

Questions raised by the terms of reference relating to preparation for trial and matters arising at the trial bearing on the investigation stage concern in the main detailed legal matters of a type often referred to as "lawyers law". The evidence relating to these questions which is contained in chapters XVI and XVII is that of the Solicitor of the Metropolitan Police. I have read his evidence and agree with his recommendations.

The recommendations in this second part of my evidence are far fewer in number than in the first part. As will be seen I am generally in favour of retaining the status quo so far as the prosecution process is concerned. I emphasise that my evidence relates to the existing arrangements in my Force. In my view these avoid the expensive and wasteful reference of simple criminal cases to a prosecution lawyer

while providing that those cases which do merit such attention receive it.

It is Utopian fantasy to suggest that a perfect system of criminal procedure can be devised which would in every instance equally protect the innocent and ensure the certain conviction of the guilty. It is essential to fix the necessary balance between the need effectively to bring offenders to justice on the one hand and the rights and liberties of the citizens on the other. There are of course some faults with the present system of criminal procedure but it is interesting to find that when one reviews the authenticated cases of injustice in the criminal courts the faults are usually found to result from the mistakes or the incompetence of those who administer the system, not the system itself.

Resume of Part II of the Written Evidence of The Commissioner of Police of the Metropolis

CHAPTER XI — **The Criteria for Prosecution**

A description of the criteria used in the Metropolitan Police Force which are put forward as basic guidelines (paragraph 11.22).

CHAPTER XII — **The Decision to Prosecute and the Responsibility for the Conduct of the Prosecution**

The decision and responsibility for prosecution should not be entirely in police hands nor totally removed from police but should be based on a system which lies between the two and is examplified by that in use in the Metropolitan Police District (paragraph 12.1). The enormous cost of establishing and maintaining a system of public prosecution throughout England and Wales would produce a system which would have little if any advantage and indeed some disadvantage over the system which is in operation in the Metropolitan Police District (paragraph 12.54).

CHAPTER XIII — The Status Structure and Organisation of the Solicitor's Department of the Metropolitan Police

A descriptive chapter.

CHAPTER XIV — The Role of the Attorney-General and the Director of Public Prosecutions

No changes are recommended in the role of the Attorney-General (paragraph 14.4) or the Director of Public Prosecutions (paragraph 14.9).

CHAPTER XV — The Right of Private Prosecution

A recommendation that the right of private prosecution should be retained subject to the existing restrictions (paragraph 15.11).

CHAPTER XVI — Preparation for Trial
(Evidence of Solicitor, Metropolitan Police)

In general no alterations are suggested in the existing procedure and practice with the exception of the following recommendations:

(1) If at trial on indictment a defendant intends to raise a specific defence not previously disclosed, notice of it should be given to the prosecution in sufficient time and detail prior to trial so that

prosecution have an opportunity of investigating it (paragraph 16.13).

(2) In cases of trial on indictment the defence should notify the prosecution within twenty-one days of the end of the committal proceedings of any aspects of the evidence adduced by the prosecution which it is not intended to dispute at the trial, such notification to have a similar effect to an admission under section 10 Criminal Justice Act 1967 (paragraph 16.17).

(3) When a defendant who has pleaded guilty at a Magistrates' Court to an offence subsequently makes application to the Crown Court (dealing with case either for the purpose of sentence or by way of appeal) to change his plea the Crown Court's decision shall be binding on the Magistrates' Court. The only grounds on which the Crown Court should accede to the application are that it is satisfied on evidence adduced before it either (a) that the plea of guilty was equivocal or (b) if the plea of guilty was unequivocal, additional information

not available to the Magistrates' Court is revealed to the Crown Court which would have probably caused the Magistrates' Court to have entered a plea of not guilty (paragraph 16.58).

(4) No Court should be permitted to indicate to a defendant either directly or through his legal advisors prior to a defendant's plea, its view as to a possible sentence either in general or specific terms (paragraph 16.66).

CHAPTER XVII — The Trial
(Evidence of Solicitor, Metropolitan Police)

RECOMMENDATIONS

(1) The test for the admissibility or exclusion in evidence of an oral or written statement to police by a suspect or accused person should be as now based on the voluntary principle and not on an exclusionary rule or disciplinary principle (paragraph 17.12).

(2) Facts revealed by a statement subsequently ruled inadmissible, as now, if capable of proof by means other than the inadmissible statement, should be admissible. (paragraph 17.12).

(3) The rule as to the inadmissibility of a confession made as a result of a threat or inducement should be limited to threats or inducements of a kind likely, in the circumstances existing at the time, to produce from the accused an unreliable confession (paragraph 17.18).

(4) The retention of the Administrative Directions on Interrogation and the Taking of Statements contained in Appendix B to the Judges Rules, save for the modification necessary at paragraphs 2 and 6(a) to meet the recommendations in Part I of this evidence (paragraph 17.19).

(5) The principle (d) at present referred to in Appendix A of the Judges Rules be amended to recognise the fact that despite the possession by an officer of "enough evidence" to prefer a charge there may well be perfectly proper reasons why it is not appropriate to charge "without delay" (paragraph 17.33).

(6) The right of an accused person to make an unsworn statement at his trial instead of giving evidence as a witness should be abolished (paragraph 17.38).

(7) When a court accepts that the evidence adduced by the prosecution has established a prima facie case against an accused person it should warn him that if he fails to give evidence the court or jury will be entitled to draw such inferences from his failure as appear proper and that such failure can be treated as capable of amounting to corroboration (paragraph 17.42).

CHAPTER XI

THE CRITERIA FOR PROSECUTION

11.1. This subject can usefully be considered under four heads:

1. What are the basic essentials for a prosecution?
2. What discretion exists to prosecute or refrain from a prosecution?
3. What considerations are relevant to a decision to prosecute or refrain from a prosecution?
4. In what circumstances is it justified to caution rather than to prosecute?

1. What are the basic essentials for a prosecution?

11.2. There are, in my view, two basic essentials for a prosecution namely:

(a) evidence available to prove all the essential elements of an alleged offence and

(b) the need for that evidence to be credible.

11.3. The first essential is self-evident. As to the second essential, it is not sufficient in my view to consider the possibility of prosecution where there is available evidence to prove all the essential elements of an alleged offence unless it can be said that the available evidence is credible. These two essentials are reflected in a Practice Note issued by the Divisional Court (1962 1 ALL ER 448)

"... as a matter of practice justices should be guided by the following considerations. A submission of no case may properly be upheld (a) where there has been no evidence to prove an essential element in an alleged offence (OR) (b) where the evidence adduced by the prosecution has been so discredited as a result of cross-examination or is so manifestly unreliable that no reasonable tribunal could safely convict on it."

11.4. To consider a prosecution merely on the basis of available evidence to support the essential elements of an alleged offence without also giving consideration as far as possible to the credibility of that evidence would be quite wrong. I do not accept the alternative argument that it is usurping the functions of the Court for police or a prosecuting authority to concern themselves with the question of credibility of evidence on the basis that that is solely a question for the Court and that all the police or a prosecuting authority should consider is whether or not there is evidence available to prove all the essential elements of an offence. If this were the practice, the Courts would be inundated with cases in which defendants would be acquitted at the close of the prosecution case following a submission of no case to answer by the defence and such a practice would be rightly condemned both out of consideration for such defendants and as wasteful of public resources and the time of already overburdened Courts.

11.5. I do not pretend that a consideration before a prosecution is undertaken of both these essential elements can rule out the possibility of prosecutions which terminate at

the close of the prosecution evidence by a submission of no case to answer because (a) the law is not an exact science so that even the most learned lawyers can and do differ in their views (as is evident from many judgements delivered in the House of Lords!) and (b) witnesses in giving evidence do not always come up to proof either because of lack of memory or as a result of some fear or ulterior motive.

11.6. This need to consider, before any decision is taken, whether or not credible evidence exists illustrates again the necessity of allowing sufficient time for police to carry out their investigations between time of arrest and charging.

11.7. At the end of their investigation police may be satisfied that there exists credible evidence from potential prosecution witnesses to support a prosecution. I do not intend to imply by the use of the term credible that the evidence from potential prosecution witnesses must be entirely without conflict because in the nature of some evidence, particularly that provided by eye witnesses, there is often some conflict (e.g. eye witnesses to an assault) but that if there is conflict then it is not such as to throw doubt on the credibility of the evidence as a whole to prove all the essential elements of an alleged offence.

11.8. Side by side with that credible evidence from potential prosecution witnesses, the suspect or his advisers, if they have seen fit to do so under the present law, may have revealed evidence which is in direct conflict with that credible evidence of the potential prosecution witnesses.

Certainly, it is the duty of police, before satisfying themselves that the basic essentials for a prosecution are present, to investigate as far as possible any potential defence evidence of which they have been given details. Nevertheless, after those investigations, the conflict between potential prosecution and defence evidence may remain. If the conflict which does remain is not sufficient to give rise to a submission of no case to answer then it seems to me wholly wrong to argue that the basic essentials for a prosecution are not present. To argue otherwise would involve police or their legal advisors abrogating to themselves the function of the Court and indeed would mean that no case contested either on fact or law would ever be brought.

2. Given the basic essentials for a prosecution what discretion exists to refrain from a prosecution?

11.9. The need for a discretion is self-evident. Quite apart from an impossible financial burden which would be imposed by the need to prosecute every known offence where the basic essentials for a prosecution existed, the burden on the Courts, lawyers and police would be overwhelming. As Lord Denning said in R v Metropolitan Police Commissioner ex parte Blackburn 1968 1 ALL ER at page 769:

> "Although the chief officers of police are answerable to the law, there are many fields in which they have a discretion with which the law will not interfere. For instance, it is for the Commissioner of Police, or the chief constable, as the case may be, to decide in any particular case whether enquiries should be

pursued, or whether an arrest should be made, or a prosecution brought. It must be for him to decide on the disposition of his force and the concentration of his resources on any particular crime or area. No Court can or should give him direction on such a matter. He can also make policy decisions and give effect to them, as, for instance, was often done when prosecutions were not brought for attempted suicide; but there are some policy decisions with which, I think, the courts in a case can, if necessary, interfere. Suppose a chief constable were to issue a directive to his men that no person should be prosecuted for stealing any goods less than £100 in value I should have thought that the court could countermand it. He would be failing in his duty to enforce the law."

In the same case at page 770 Lord Salmon said, "The chief function of the police is to enforce the law . . . if . . . the chief police officer in any district were to issue an instruction that as a matter of policy the police would take no steps to prosecute any housebreaker, I have little doubt but that any householder in that district would be able to obtain an order of mandamus for the instruction to be withdrawn. Of course the police have a wide discretion whether or not they will prosecute in any particular case."

11.10. I fully accept the principle that the discretion whether or not to prosecute must be restricted to a consideration of the circumstances of a particular case and that immutable blanket decisions not to prosecute which would effectively change the law must not be made in relation to a particular type or types of criminal offence. At the same time it must be bourne in mind that despite the continual and rapid increase in crime the police force in my area is of a strength similar to that of almost sixty years ago, 21,009 officers in 1920, 22,239 officers in 1977. It follows that the strict adherence to this principle, however necessary, does not relieve the extreme pressure on police responsibility for law enforcement.

3. Given the presence of the basic essentials for a prosecution what considerations are relevant to a decision to prosecute or refrain from a prosecution?

11.11. Every case where the basic essentials for a prosecution exist must be considered individually. The considerations which I suggest below do not necessarily apply in every case; some considerations may override others; there may be considerations relevant to a particular case which are unique to that case. But I suggest the following are the more general considerations, first as to the offence, second as to the offender and third as to those affected by the offence.

11.12. (A) The Offence

(1) The seriousness or triviality of an offence is obviously relevant. Parliament, one assumes, did

not intend that every form of omission or commission which it decreed or which the Common Law decrees should be a criminal offence, should automatically result in a prosecution. Were it otherwise, Parliament would have provided sufficient Court accommodation and Court and police personnel to carry out such a mammoth task. Thus for example every person who on leaving a bus discards his used ticket on the pavement commits an offence contrary to the Litter Acts 1958 and 1971, but to mount a prosecution in the circumstances outlined would clearly not be justified without some very compelling reason. On the other hand, it would be difficult to find a compelling reason for not prosecuting an adult for an offence of robbery.

(ii) The prevalence of an offence in a particular area. There may be an outbreak of trivial offences of a particular kind committed over a period of time which considered individually would not merit a prosecution but in an attempt to reduce the nuisance of such offences deterrent prosecutions might be justified in the hope that the publicity of such prosecutions might have the effect of removing or lessening the problem in the future.

11.13. (B) <u>The Offender</u>

(i) The age of the offender. If a person under 17 commits an offence in the Metropolitan Police

District then unless it is imperative to charge him with that offence immediately so as to bring him before a Magistrates' Court the decision to prosecute or not will be delayed until a thorough investigation of his background has been carried out through the Metropolitan Police Juvenile Bureaux scheme which I described in Chapter VI.

At the other end of the scale, the advanced years of an offender may be relevant to a decision whether or not to prosecute but this is a decision which is more relevant to be considered under the topic of the health of the offender.

(ii) The health of the offender is a consideration particularly in cases which are not grave where there is information to indicate that a prosecution might have a serious detrimental effect upon the health of an offender. Even in cases of serious crime a decision whether or not to prosecute would obviously be affected if it was known that an offender was in the last stages of a fatal illness.

(iii) The punishment likely to be imposed. To some extent this is corrolated to the question of the triviality of the offence. Thus in Hart v Bex 1957 Crim. LR 622 the Divisional Court, in considering an appeal by the prosecution against the dismissal of what in the circumstances of this particular case was a technical road traffic offence, regretted that a prosecution had been brought and advised justices

in similar cases if a prosecution was instituted and the justices convicted, to impose by way of penalty an absolute discharge.

(iv) Bearing in mind the circumstances surrounding an offence, is the use of a caution by police rather than a prosecution likely to operate as a sufficient deterrent to the offender? I shall deal with cautioning later in this Chapter.

11.14 (C) <u>Those affected by the offence</u>

The views of those affected by an offence, be they victims or more generally the public at large, are of relevance. This does not mean that a victim who demands a prosecution or a victim who abhors the idea of a prosecution has any kind of veto but such views and the reasons for them would be considered. In the same way, the likely general reaction of the public to a prosecution or lack of it is relevant. To some extent, the victim in cases of loss has an even greater interest in a prosecution than hitherto by virtue of the provisions of Section 35 Powers of Criminal Courts Act 1973 which enables a criminal court upon conviction, to order the offender to pay compensation for personal injury, loss or damage resulting from the offence or any other offence which is taken into consideration by a Court in determining sentence; additionally, a Court has power to make an order of restitution under Section 28 Theft Act 1968. I consider these

discretionary powers in the hands of the Courts to be incidents of a prosecution rather than the sole justification for a prosecution because the civil remedies of compensation and restitution remain available.

A victim aggrieved by the refusal of police to prosecute, whether the decision not to prosecute was made on the grounds of lack of credible evidence to support the essential elements of an offence or because, despite the presence of those essential elements it is not considered that a prosecution is justified, has the remedy of instituting a prosecution himself other than in those few cases where some special consent is required such as that of the Attorney General or Director of Public Prosecutions. I shall refer to this right of private prosecution in Chapter XV.

4. <u>In what circumstances is it justified to caution for a criminal offence rather than to prosecute</u>?

11.15. Before a caution as opposed to a prosecution can be considered, there must exist the same basic elements as are needed for a prosecution which I set out at paragraph 11.2 above namely, credible evidence to prove all the essential elements of an offence. To caution otherwise would be to caution for a set of circumstances which it was considered might or might not be an offence, which in my view would be an unjustifiable use of the caution.

11.16. There is no statutory or common law authority entitling police to caution any person for an offence. Although it is unlikely that any private individual would wish to caution anyone in respect of a criminal offence, save perhaps an employer cautioning rather than prosecuting an employee for theft, the ability of police to do so is no more or less than that of a private individual. However, a caution from police whose very task is to preserve law and order is likely to be more effective than a caution from a private individual. For the sake of clarity I mention that although Section 2 Street Offences Act 1959 provides a procedure whereby a woman cautioned by a constable for loitering or soliciting for prostitution is in certain circumstances entitled to have details of that cautioning expunged from police records, nevertheless, the administration of such a caution is itself non-statutory. The operation of that scheme of cautioning as used by the Metropolitan Police Force is described in the Home Office Circular 109/59.

11.17. The Royal Commission will be aware that the extent of the use of cautioning differs in various police forces as does the type of offence for which cautions are issued as may be seen from the annual Criminal Statistics for England and Wales, published by the Home Office.

11.18. I have already dealt with the cautioning of juveniles in Chapter VI, but for the sake of completeness I set out below the figures for cautioning in the Metropolitan Police District for 1977. These figures do not include the

informal verbal cautions administered at the scene (see below verbal cautioning) but do include the formal verbal cautioning of juveniles by a Chief Inspector or Superintendent at a police station as described in paragraph 6.13 as well as written cautions to both adults and juveniles.

Indictable Offences	9,575	persons cautioned for	13,423	offences
Non-indictable offences	3,935	persons cautioned for	4,965	offences
Traffic offences	14,314	persons cautioned for	19,683	offences
	27,824		38,071	

So far as the Metropolitan Police Force is concerned, the practice of cautioning adults is largely confined to cautioning for comparatively trivial offences. The cautioning used is either a verbal or written caution.

Verbal Cautioning

11.19. It is provided in Metropolitan Police General Orders at Section 34 paragraph 70, that trivial infringements of the law particularly those committed by children and those which involve no actual danger should be dealt with by the police officer at the scene, by a suitable word of warning. Examples of such cases are minor offences against road traffic lighting requirements, particularly if the fault was rectified immediately (General Orders Section 28, paragraph 3(1), or riding a pedal cycle without due care and attention contrary to Section 18 Road Traffic Act 1972, if the offence was really trivial and did not involve danger to other persons (General Orders Section 31 paragraph 48(3)).

Written cautions

11.20. Again, these are largely restricted to trivial infringements of the road traffic law. Guidelines are laid down in Metropolitan Police General Orders in respect of such offences indicating which type of offence usually merits prosecution and which type a written caution. These guidelines indicate that discretion must be used, that each case must be considered on its facts and that there is no firm distinction to be drawn. A case normally dealt with by written caution would merit criminal proceedings if the offence is in the particular circumstances serious or persistent and similarly, a case normally dealt with by criminal proceedings would merit only a written caution if there were mitigating factors (General Orders Section 34, paragraphs 17-26). Where a written caution is sent, it is authorised by an Inspector or Chief Inspector of the Administration Unit concerned, that officer being directly responsible to his Chief Superintendent.

11.21. I can see no justification for the wider use of the cautioning procedure in respect of adults than that I have outlined above which is operative within my Force. Cautioning is by its nature no more than a warning to a person that his behaviour as reported amounted to a criminal offence. Where there is clear evidence of other than a very trifling offence, then it seems to me that the use of the caution is not justified and that the only consideration should be whether to prosecute or not, bearing in mind the factors I have referred to at paragraphs 11.12 to 11.14 above. It is argued by some

that if as a result of a conviction the Court imposes only a minor penalty such as a small fine or a conditional discharge, that indicates that the offence would have been better dealt with by way of a caution. Apart from the very trivial type of offence, to which I have referred, I do not agree with that view because I see the benefits of a prosecution to be that:

(a) justice is seen to be done openly;

(b) the seriousness or triviality of an offence is a subject more fit for consideration by a Court rather than a non-judicial individual whether he be a police officer or an official prosecutor;

(c) the conviction will appear on the individual's criminal record so that on any subsequent conviction he cannot mislead a Court in pretending he is a person who has not committed a criminal offence or a criminal offence of that kind before;

(d) even if a Court imposes a conditional discharge, that penalty is by its very nature conditional upon future good behaviour so that a breach of it enables a Court to impose an appropriate penalty.

SUMMARY

11.22. I have dealt in this Chapter with what I see to be the criteria for decisions to prosecute or refrain from prosecution which are the criteria used in the Metropolitan Police Force. I have no specific recommendations beyond putting forward these criteria as basic guidelines. It would be impracticably idealistic to suppose that any system could be

devised which would result in the "right" decision being made in every case because it involves no exact science but the exercise of a discretion. Nor do I believe that it is possible to devise a system which could impose a uniformity in that exercise of such a discretion because eventually, the discretion would have to be exercised on a delegated basis. Indeed, to attempt to devise a system which imposed a uniformity in the exercise of such a discretion would be to ignore regional differences in the type and prevalence of particular offences.

CHAPTER XII

THE DECISION TO PROSECUTE AND THE RESPONSIBILITY FOR THE CONDUCT OF THE PROSECUTION

12.1. This topic raises an issue which has been advocated in some quarters namely that there should be a change in England and Wales to a system of a public prosecutor, possibly similar to the Scottish system, completely independent of the police, whose responsibility it would be to make a final decision as to whether or not to institute criminal proceedings and to be responsible for the whole conduct of all criminal proceedings. I am fortunate in having had considerable experience of the Scottish system and, since my appointment as Commissioner of the Metropolis, have gained some knowledge of the system in England and Wales. I favour neither a system where the decision and responsibility for prosecution is totally removed from police nor of a system where it is entirely in police hands but a system which lies between the two and is exemplified by that in use in the Metropolitan Police District. It may be of assistance to the Royal Commission if I describe first how the prosecution process (that is the decision to prosecute and the responsibility for the conduct of the prosecution) is dealt with in the Metropolitan Police District. I shall then discuss the arguments advanced by those who favour a system of a public prosecutor.

Legal advice

12.2. The Metropolitan Police Force has two sources to which it can turn to obtain legal advice namely the Director of Public Prosecutions and the Metropolitan Police Solicitor.

12.3. So far as the Director of Public Prosecutions is concerned, the Prosecution of Offences Regulations 1946 (at the time of the preparation of this evidence new Regulations have been laid before Parliament) require me, as respects offences alleged to have been committed within the Metropolitan Police area, to report to the Director every offence punishable with death; every offence in respect of which the prosecution has by statute to be undertaken by or requires by statute the consent of the Director; every indictable case in which the prosecution is wholly withdrawn or is not proceeded with within a reasonable time; every case in which a request for information is made by the Director and every case in which it appears to me that the advice or assistance of the Director is desirable. Additionally, the Regulations require me to report certain specific offences to the Director. Once a case has been reported to the Director in that way although I, and my officers, are free to and indeed encouraged to express our views, the decisions of the Director as to the appropriate action to take are his decisions and not those of myself or my officers. If proceedings have not been instituted, the Director's decision as to their commencement by police, or not, is final. In the same way, if proceedings have been commenced, as is more common, the Director's decision as to their continuance or otherwise by police is final. It does not follow

that because a case has been reported to the Director he will necessarily wish to retain it and conduct the prosecution. He may be content for it to be dealt with by the Metropolitan Police Solicitor in which case the latter will have the conduct of the prosecution.

12.4. In addition to those cases referred to the Metropolitan Police Solicitor on the instructions of the Director, the following cases are submitted for advice and representation to the Metropolitan Police Solicitor in accordance with the instructions contained in Section 25 paragraph 172 of the General Orders of the Metropolitan Police, namely:

(a) all cases where legal or evidential difficulties are likely to arise or the facts are of a complicated nature,

(b) in any case where the prosecution depends on the correctness of visual identification of the defendant which is likely to be disputed,

(c) where for any other reason the Chief Superintendent is of the opinion that legal advice and representation is necessary,

(d) where the Magistrate informs police that he considers it necessary.

12.5. Similarly, officers are obliged to obtain legal advice and representation from the Metropolitan Police Solicitor where it is known that a case will be committed for trial in cases of:

(e) conspiracy to commit any offence or to defraud,

(f) rape, buggery, procuration or abduction,

(g) sexual assaults involving children or young persons,

(h) unless the facts are straightforward in any other offence triable only on indictment or any offence involving forgery, criminal deception or false accounting, arson or where a large number of offences are involved.

12.6. In all cases committed for trial where police were not represented at the committal proceedings, a report and copies of statements etc. are forwarded immediately after committal to the Metropolitan Police Solicitor's Department, so that the Solicitor can then undertake the prosecution and instruct Counsel to prosecute at the trial at the Crown Court.

The Decision to Prosecute

12.7. The institution of proceedings in criminal cases by police will be by way of a charge preferred by police with or without legal advice or by an application to a justice of the peace by police with or without legal advice for a summons or warrant, the latter under the provisions of Section 1 Magistrates' Courts Act 1952.

12.8. To put the alternative procedures of proceeding by way of charge or summons into a proper prospective it will be seen from my annual report to the Home Secretary for the year 1977 at appendix 9, that of a total number of 359,092 persons proceeded against for criminal offences in the Metropolitan

Police District, 195,733 (54.51%) were proceeded against by way of summons. It will be appreciated that in an area such as the Metropolitan Police District with a large proportion of visitors (the British Tourist Board figures for overseas visitors to London in 1977 was 9,100,000 and the British visitors to London in 1976 was 10,600,000) and other persons with a temporary or less permanent address than would be the case in a more static or rural community, the need to charge in many instances rather than to proceed by summons is greater. The use of the summons procedure involves greater delay before a person can be brought before a Court because it entails an application to the Court for a summons and it is then necessary for the summons to be served on the accused. Although this service can initially be done by post, such service is not effective for the purpose of criminal proceedings other than for a purely summary offence unless it is proved that the summons came to the accused's notice. A second attempt to serve a summons frequently involves a great deal of police time in locating the accused (if he can by then be located) so as to effect personal service of the summons upon him. Even in the case of a purely summary offence, it is not really satisfactory to proceed in the absence of the accused because the accused can then (and rightly so) make use of the provisions of Section 24 Criminal Justice Act 1967 so that a fresh hearing has to take place involving further delay and waste of police time and inconvenience to private witnesses.

12.9. The choice between a summons or a charge is not affected only by the question of delay which is of necessity inherent in the summons procedure but also the frequent need (which can be achieved by way of charging but not by summons) of bringing an accused speedily before the Court so that the Court can decide whether to remand the accused in custody or on bail and if the latter can impose those requirements as to bail which cannot be imposed by a police officer (Section 3(6) Bail Act 1976).

In the Metropolitan Police District the decision to prosecute is made in one of three ways:

1. <u>The decision to prosecute is made by police without legal advice where the papers are not subsequently submitted to the Director of Public Prosecutions or the Metropolitan Police Solicitor at any time either before or after the decision to prosecute is made</u>.

12.10. These cases are not only restricted to those which are dealt with on summary trial (because all cases committed for trial are referred either before or immediately after committal to the Metropolitan Police Solicitor) but are further restricted so as to exclude those cases (a) to (d) listed in Metropolitan Police General Orders Section 25 paragraph 172 referred to at paragraph 12.4. above. Accordingly, it follows that those cases under this heading are those of the most straightforward nature in many of which the accused with or without legal representation pleads guilty. Whether or not the accused is represented, the facts have to be given to the Court so that the Court is satisfied that the

plea is properly made. Even in those cases where the accused pleads not guilty the fact that the decision to prosecute was taken by police and not by a lawyer is unlikely to produce a different result. As will be seen from appendix 9 of my annual report to the Home Secretary in 1977 of the total number of 359,092 persons proceeded against for criminal offences in the Metropolitan Police District, 94.55% were dealt with in the Magistrates' Courts. Of the 326,808 tried in the Magistrates' Courts, 94.81% were convicted. To use a lawyer to decide whether or not to prosecute for example a person found drunk in a public place or who was seen to be committing criminal damage of a small amount or who was caught red handed stealing a purse in a street or was seen to drive against a red traffic light if no legal or evidential difficulties are likely to arise, seems to me an unjustifiable waste of expensive legal manpower. If in the Metropolitan Police District every decision to prosecute had to be taken or even approved by a lawyer in the Metropolitan Solicitor's Department (let alone every case prosecuted by that Department) a very large increase in the staff of that Department would be necessary as I indicate later in this Chapter.

12.11. It does not follow in this class of case where police take the decision to prosecute and it is not intended by police before or after that decision is made to refer the case to the Metropolitan Police Solicitor's Department for advice that the case can never be referred for legal advice. Indeed, it is specifically provided in Metropolitan Police General Orders Section 25 paragraph 175 that should

circumstances arise during the hearing of a case in which police have not asked for legal representation which render it desirable that police should be legally represented or if there is reason to anticipate some form of attack on police for their action in any case the Solicitor's Department should be contacted requesting it to conduct the prosecution and, if necessary, police should request the Court to grant an adjournment so that this can be done.

12.12. In the Metropolitan Police Force the decision to charge even in a comparatively trivial and straightforward case is not taken lightly. Metropolitan Police General Orders provide:

(i) That no charge may be preferred unless it has first been investigated by an officer holding the substantive rank of at least Sergeant and in serious cases Inspector (Section 23 paragraph 6.)

(ii) Any case of an exceptional character or of an unusually contentious nature must be reported without delay by the Station Officer to his immediate superior (Section 23 paragraph 13(4)).

(iii) No charge is to be accepted unless the investigating officer is satisfied that the charge is supported by credible evidence and he is required to exercise an independent judgement (Section 23 paragraph 7).

2. <u>The decision to prosecute is made by police without legal advice but where the papers are subsequently submitted to the Director or the Metropolitan Police Solicitor so that the decision is reviewed and police are legally represented at subsequent proceedings</u>.

12.13. In this class of case, the initial decision to prosecute and the decision as to the offence or offences for which prosecution shall ensue is taken by police, the papers are then submitted either to the Director of Public Prosecutions because the case is one which falls within the Prosecution of Offences Regulations 1946 (at the time of the preparation of this evidence new Regulations have been laid before Parliament) or to the Metropolitan Police Solicitor because the case is one that falls within Section 25, paragraph 172 General Orders of the Metropolitan Police, referred to in paragraph 12.4 above. It follows therefore that the initial decision to prosecute and the decision as to the offence or offences for which the prosecution shall ensue is subject to review by the Director or the Metropolitan Police Solicitor. If legal advice is received that other charges or summonses additional to or in substitution for those preferred this will of course be done. If legal advice is received (and this is extremely rare) that the evidence available will support no criminal offence at all, then of course this advice is accepted and the Director or as the case may be the Metropolitan Police Solicitor will arrange for police to be legally represented at Court so that the Court can be informed why the

prosecution intend to offer no evidence. The Magistrates' Court has power in such a case to award costs to the accused to compensate him for expenses incurred in his defence (Sections 1 and 2 Costs in Criminal Cases Act 1973). If the accused considers that his arrest was unlawful or the prosecution was brought maliciously then it is open to him to institute civil proceedings against the officers involved and myself as Commissioner.

12.14. Even this type of case when it is known that in due course the papers will be submitted to the Director or the Metropolitan Police Solicitor for advice, it is frequently necessary for police to make the initial decision to prosecute so that the accused can be charged and brought before a Court as soon as is practical after arrest, to enable the Court to decide whether or not the accused be remanded in custody or on bail and if on bail on what conditions. The Court can of course impose requirements as to bail which cannot be imposed by police (Section 3(6) Bail Act 1976). Where police decide to charge an accused person for this reason, it is not practical in the time available, bearing in mind the provisions of Section 38(4) Magistrates' Courts Act 1952, for the officer in charge of the case to obtain written statements from potential witnesses and prepare the necessary police report for submission to his superior officers for onward transmission to the Director or the Metropolitan Police Solicitor.

3. The decision to prosecute is made on legal advice to police given by the Director or the Metropolitan Police Solicitor.

12.15. In many cases such as complex frauds, licensing, gaming, lotteries, child neglect, immigration, serious or difficult traffic cases where it is not thought essential for a defendant to be brought immediately before a court for the question of bail or custody to be considered police submit the papers to the Director or Metropolitan Police Solicitor so that advice can be obtained both as to the decision to prosecute and if a prosecution is to ensue, the appropriate offences to be charged or summonses to be applied for to the Court.

THE RESPONSIBILITY FOR THE CONDUCT OF THE PROSECUTION

1. Cases where the responsibility lies with Director of Public Prosecutions or Solicitor's Department.

12.16. The responsibility for the conduct of police prosecutions in respect of those cases covered by the Prosecution of Offences Regulations 1946 (at the time of the preparation of this evidence new Regulations have been laid before Parliament) lies with the Director of Public Prosecutions except for those Metropolitan Police cases which the Director instructs shall be dealt with by the Metropolitan Police Solicitor.

12.17. In addition to dealing with those last mentioned cases, the Metropolitan Police Solicitor is responsible for the conduct of all those cases which are referred to him by

police in accordance with Metropolitan Police General Orders Section 25, paragraph 172, referred to at paragraph 12.4 above.

12.18. In such cases where the responsibility for the conduct of the prosecution lies with the Director or the Metropolitan Police Solicitor, so far as police are concerned the responsibility is identical. In both cases although police are free to, and encouraged, to express their own views, all decisions taken are those of the Director or the Solicitor. Although those decisions are often referred to as "advice", there is no question but that police always comply with those decisions, whether of the Director or the Solicitor. It might be thought that the Client - Solicitor relationship which exists between me and the Solicitor places the "advice" my officers receive from the Solicitor in a different category to that received from the Director but as I indicated elsewhere in discussing my relationship with the Solicitor this is not the case. It is important that it is appreciated that in criminal prosecutions the Client - Solicitor relationship exists only between me and the Solicitor and not between my officers and the Solicitor.

12.19. The extent of the responsibility of the Director or the Solicitor for the conduct of the prosecution is all embracing. In those matters in which the initial decision to prosecute was taken by police without legal advice this responsibility includes the discontinuance of the proceedings if the Director or Solicitor saw fit by offering no evidence against the defendant. In those cases where the responsibility lay with the Solicitor and it was his decision that the

prosecution should be wholly withdrawn in the Magistrates' Court, the Solicitor consults with the Director to obtain his prior approval. At a trial on indictment the consent of the Crown Court judge is sufficient. Apart from this responsibility for discontinuing a prosecution, the extent of the responsibility for the conduct of the prosecution includes the following decisions:

(a) The preferment of charges additional to or in replacement of existing charges.

(b) The extent of further investigations by police to seek additional evidence or clarify existing evidence.

(c) What witnesses should be called to give evidence for the prosecution and whether those witnesses should be warned to attend court in person to give their evidence orally or whether, subject to the agreement of the court and to defence, their evidence could be tendered in writing under the provisions of Sections 1, 2 or 9 Criminal Justice Act 1967.

(d) In cases triable either way (Sections 19-24 Criminal Law Act 1977) what representation should be made to the Magistrates' Court by the prosecution as to mode of trial.

2. <u>Cases where the responsibility for the conduct of the prosecution lies with police</u>.

12.20. The cases where the responsibility lies with police are those not covered by the Prosecution of Offences Regulations 1946 (at present under review) and not included in those cases referred to in Section 25 paragraph 172(a) to (d)

of the General Orders of the Metropolitan Police referred to at paragraph 12.4 above. It does not follow that the responsibility for the conduct of those cases will remain throughout with police because (a) some difficulty which at first was not apparent may occur which will cause the case to be referred to the Metropolitan Police Solicitor for advice and representation and (b) the responsibility for all cases dealt with in the Crown Courts lies with the Director or Metropolitan Police Solicitor either before or after committal depending upon whether or not the case falls within Section 25 paragraph 172(e) to (h) Metropolitan Police General Orders.

12.21. With regard both to those straightforward cases which are not referred to the Metropolitan Police Solicitor until after committal for trial as well as those cases which are referred to the Metropolitan Police Solicitor prior to committal, it is relevant to remember that no defendant can be committed for trial unless a critical judgement is made of the evidence for the prosecution by someone independent of police. A Magistrates' Court can only commit a defendant for trial if it is of the "..... opinion on consideration of the evidence and of any statement of the accused that there is sufficient evidence to put the accused on trial ...." (Section 7 Magistrates' Courts Act 1952) OR, if the accused is legally represented, with the joint agreement of the Court, the prosecution and the accused's lawyer, the Court may commit the accused for trial without considering the evidence provided the Court is satisfied that the defendant's lawyer does not wish to submit that there is insufficient evidence to put the

accused on trial (Section 1 Criminal Justice Act 1967 and Rule 3 Magistrates' Courts Rules 1968).

12.22. As I have indicated, those cases where the responsibility for the conduct of the prosecution lies with police are the most straightforward of cases. The responsibility for the conduct of the prosecution of such cases lies in the hands of the officer in charge of that particular case. There is appointed to every Magistrates' Court within the Metropolitan Police District a Court Inspector whose duties include the supervision of police conduct in Court and ensuring that an application for an adjournment is made if it is a case where it is apparent that police should be legally represented. An individual officer is therefore not only in a position to seek advice and assistance from his superior officers from the inception of his enquiries but has available at Court the Court Inspector whose advice he can obtain immediately.

12.23. Subject to the exceptions mentioned below, there is no provision in the Metropolitan Police District for the appointment of a police officer engaged full time as a court prosecutor or in a similar appointment because, as I have indicated above, in those cases where police are not legally represented in Court, the responsibility for the prosecution lies with the officer in charge of that particular case. The exceptions to this rule which are aimed at reducing the number of police officers attending Court unnecessarily are as follows:

(1) In cases dealt with under the provisions of Section 1 Magistrates' Courts Act 1957 (i.e. in relation to certain summary offences the power of a court to accept a written plea of guilty from a defendant in his absence based on a written statement of facts) the officer in charge of the case will not attend Court but the statement of facts will be read by the Court Inspector.

(2) Subject to the general approval of a specific Magistrates' Court, unless particular circumstances of an individual case dictate otherwise (e.g. defendant living considerable distance from the Court), the officer in charge of the case does not attend Court at a defendant's initial appearance at Court in cases of:

(i) simple drunkenness,
(ii) drunkenness and disorderliness,
(iii) highway obstruction,
(iv) threatening, abusive or insulting words or behaviour if contrary to Section 54 (13) Metropolitan Police Act 1839.

In such cases, if the defendant on his initial appearance pleads guilty the facts of the prosecution case are given by the Court Inspector. If the defendant pleads not guilty the Court Inspector will apply for an adjournment so that the officer in charge of the case can attend Court (Metropolitan Police General Orders

Section 23, paragraph 177).

(3) Subject to the general approval of a specific Magistrates' Court there is appointed a Presenting Officer who will attend Court in place of the officer in charge of the case but only for the purpose of dealing with the following matters:

(i) to make applications for adjournments where it is known that no objection will be made by the defence and police are not applying for a remand in custody ;

(ii) to give the facts of the case where the defendant is pleading guilty;

(iii) to obtain a defendant's committal for trial where it is known that the defence do not require any oral evidence and do not intend to make a submission of no case to answer, so that the written statements of the prosecution witnesses are handed to the Court.

Is a public prosecutor system desirable in England and Wales?

12.24. I have outlined in the first part of this Chapter the system of prosecution that operates within the Metropolitan Police District which basically provides for straightforward cases to be dealt with by police, the remainder being dealt with by the Director of Public Prosecutions or the Metropolitan Police Solicitor. The system has the advantage that the time of expensive legal staff is not wastefully expended on such

cases, although if such seemingly straightforward cases give rise to evidential or other legal difficulties the conduct of them will be taken over by the Solicitor's Department. Moreover, the system of prosecution adopted by the Metropolitan Police avoids that criticism of police advocacy expressed at paragraph 381 of the Final Report of the 1962 Royal Commission on the Police, namely that police officers prosecute in other than minor cases.

12.25. It will be argued against the Metropolitan Police system that it is not appropriate that the initial decision to prosecute in most cases is made by police. When such cases are subsequently seen by the Director of Public Prosecutions or the Metropolitan Police Solicitor, it is very rarely that advice is received (and of course acted upon) that the available evidence discloses no grounds for a prosecution. In the latter case, the Court has power to award costs to the accused to compensate him for the expenses incurred in his defence (Sections 1 and 2 Costs in Criminal Cases Act 1973) and if the accused considers that his arrest was unlawful or the prosecution was brought maliciously then it is open to him to initiate civil proceedings against the officers involved and myself as Commissioner and, subject to his means, to obtain legal aid to do so.

12.26. When considering the arguments advanced for the institution of a public prosecutor it is relevant to remember that the institution of criminal proceedings by police is not as a result of some special power or privilege given to police

but arises from the general rule that in English law any person may bring criminal proceedings whether or not he has any special interest in a case (Duchesne v Finch 1912 28 TLR 440). There are, of course, exceptions in that some offences require a specific consent to prosecute e.g. that of the Attorney General or Director of Public Prosecutions although even in those cases the need to arrest and remand on bail or in custody without prior reference to the Attorney General or Director of Public Prosecutions is recognised by Section 12 Criminal Jurisdiction Act 1975. Other restrictions where consent is required are to be found for example in Section 28 Vehicles (Excise) Act 1971 and Section 42 Offences Against the Person Act 1861. It is this power which is enjoyed by all citizens and not a power which is special to police which those seeking a system of a public prosecutor presumably wish to extinguish. Indeed, it is this general right to bring criminal proceedings which is relied upon by a victim of an offence who might feel aggrieved by a refusal of police to institute such proceedings. As I indicated in Chapter IX, a police officer who has arrested a person may find himself summoned at the instance of that arrested person in a criminal court for assault while the arrested person himself is facing criminal proceedings arising from his arrest. Is it, I wonder, envisaged in such a case that the public prosecutor would be expected to prosecute both the officer (whom he would need to consult with regard to the case against the arrested person) and the arrested person (whom he would need to consult with regard to the case against the officer)?

12.27. It might be convenient if I comment here on some of the arguments which it is alleged support the desirability of a public prosecutor scheme. Three of such arguments were referred to at paragraph 379 of the Final Report of the 1962 Commission on the Police as follows. "A much more far-reaching suggestion concerned the responsibility which at present lies on chief officers of police in England and Wales, but not in Scotland, to decide whether or not to prosecute in a particular case. We were asked by the Inns of Court Conservative and Unionist Society, the Magistrates' Association, the Justices' Clerks' Society and other witnesses to recommend the introduction in England and Wales of a system of public prosecutions similar to that in Scotland. The advantages claimed for this were, first, that it would minister to good relations between the police and the public if the decision to prosecute were placed in other hands; secondly, that it would be in the public interest to relieve the police of their present unregulated discretion in this matter; and thirdly, that a system of independent public prosecution would make for greater uniformity in the enforcement of the criminal law. Such a major change in the machinery for the administration of justice in England and Wales lies doubtfully within our terms of reference, and we have not therefore received or sought the full and detailed evidence on this matter on which any recommendation would have to be based."

(1) "That it would minister to good relations between the police and the public if the decision to prosecute were placed in other hands."

12.28. Even under a public prosecutor system it would still be necessary for police to detect and investigate offences and in the majority of cases to take the suspect into custody and charge him before the matter were reported to the public prosecutor for his decision as to prosecution as is the case in Scotland. It seems to me most unlikely that police would find themselves more popular with a suspect who has been arrested, questioned and charged by them merely because they were compelled to abdicate the final responsibility as to whether or not to proceed with the prosecution.

(2) "That it would be in the public interest to relieve the police of their present unregulated discretion in the matter."

12.29. To refer to it being in the public interest to relieve the police of their discretion is perhaps begging the question. The important point seems to be to consider how wide or restricted is that discretion and therefore whether or not it is unregulated. It is, in my view, and rightly so, a discretion which is in fact well regulated. Police officers are not unique in disliking criticism particularly so if that criticism is well founded and likely to affect their career. Hence any police officer of whatever rank in exercising a discretion whether or not to prosecute would have in mind the possible criticism which his decision may give rise to not

only from his superior officers but from the Courts. It must be remembered that quite apart from the very real sanctions that can be imposed on an officer by virtue of the Police Discipline Regulations, there is additionally his liability both in civil and criminal law for unlawful acts on his part.

12.30. Even under the Scottish system police have a right to arrest and charge a person without prior reference to the procurator fiscal. This was explained in the Second Report of Criminal Procedure in Scotland (Comnd 6218) published in October 1975 at paragraph 3.07 as follows:

> "At present the rule is that (apart from certain statutory exceptions) an arrest must be accompanied by a charge, (Chalmers v HM Advocate 1954 JC 66, 78) and that therefore a person may be arrested only when there is sufficient evidence to charge him. Evidence sufficient to charge means evidence sufficient to report to the procurator fiscal. The accused will be charged in Court on a writ at the instance of the procurator fiscal and not on the police 'charge', but this latter does represent a vital step in pre-trial procedure. A person can, of course, be 'charged' by the police without being arrested, but the converse is not true."

12.31. I set out below the methods by which the decision of police to prosecute <u>is</u> in fact regulated:

(a) The Prosecution of Offences Regulations 1946 (at present under review) require the Chief Officer of Police to report to the Director every offence punishable by death; every offence in respect of which the prosecution has by statute to be undertaken by or requires by statute the consent of the Director; every indictable case in which the prosecution is wholly withdrawn or not proceeded with within a reasonable time; every case in which a request for information is made by the Director; every case in which it appears to the chief officer of police that the advice or assistance of the Director is desirable. Additionally, the Regulations require certain specified offences to be reported to the Director.

(b) Circulars of guidance or direction issued by the Home Office to Chief Officers of Police (e.g. Home Office letter of 7 December 1970 under ref. TRA 66 108/3/21 on the question of prosecuting in cases of death by dangerous (now reckless) driving where the deceased is a relative of the accused).

(c) Guidance issued by the Law Officers (e.g. Attorney General's recommended guidelines on identification cases (Hansard 287-289 27 May 1976).

(d) Metropolitan Police General Orders which provide

(i) That no charge may be preferred unless it has first been investigated by an officer holding the substantive rank of at least Sergeant and

in serious cases Inspector (Section 23, paragraph 6).

(ii) No charge is to be accepted unless the investigating officer is satisfied the charge is supported by credible evidence and must exercise an independent judgement (Section 23, paragraph 7).

(iii) Any case of an exceptional character or of an unusually contentious nature must be reported without delay by the Station Officer to his immediate superior (Section 23, paragraph 13(4)).

(iv) Additionally, the following types of cases must be submitted to my Solicitor's Department for advice and representation:

(a) all cases where legal or evidential difficulties are likely to arise or the facts are of a complicated nature

(b) any case where the prosecution depends on the correctness of visual identification of the defendant which is likely to be disputed

(c) where for any other reason the Chief Superintendent is of the opinion that legal advice and representation is necessary

(d) where the Magistrate informs police that he considers it necessary.

Similary, legal advice and representation has to be obtained by officers from my Solicitor's Department where it is known that a case will be committed for trial in cases of:

(e) conspiracy to commit any offence or to defraud

(f) rape, buggery, procuration or abduction

(g) sexual assaults involving children or young persons

(h) unless the facts are entirely straightforward - any other offence triable only on indictment or any offence involving forgery, criminal deception or false accounting, arson or where a large number of offences are involved (Section 25, paragraph 172).

(v) Additionally, the work of all officers is carefully supervised by their superior officers to whom they can always turn for advice.

(vi) The discretion to prosecute is further regulated from outside the force by the knowledge not only that Courts can criticise

the actions and decisions of police officers but by the knowledge of officers that they can find themselves proceeded against in the criminal and civil Courts by accused persons who consider that they have been unlawfully treated.

(vii) The Courts themselves have power to intervene on the application of any person who considers that police are misusing their decision to prosecute or to refrain from prosecution (R v Metropolitan Police Commissioner ex parte Blackburn 1968 2 QB 118 and R v Metropolitan Police Commissioner ex parte Blackburn (No. 3) 1973 1 QB 241)).

(3) "That a system of independent public prosecution would make for greater uniformity in the enforcement of criminal law."

12.32. I do not consider that countrywide uniformity in the enforcement of criminal law is necessarily desirable but in any event it is certainly not attainable. It is a fact that offence patterns differ from area to area as does Courts' attitude to certain offences and police manpower to prevent and detect offences. It is therefore a natural consequence that prosecution policies should vary so that, for example, an area which suffers a high rate of vandalism demands a high rate of police activity in respect of such offences and a consequential higher rate of prosecution than an area with a

lower incidence. Discretion itself of course gives a liberty limited in a greater or less degree of deciding as one thinks fit and any discretion is always open to charges of partiality, malice, lack of uniformity and oppression. One thing is certain and that is that the exercise of a discretion cannot please all the people all the time. It is difficult to see how the transfer of the decision to prosecute from police to a national public prosecutor would result in any greater uniformity than at present. It is obvious that there would have to be a considerable deal of delegation to junior prosecutors throughout the country and they would be bound to be affected and correctly so by local conditions in their area. Other arguments have been put forward elsewhere which it is alleged support the desirability of a public prosecution scheme and I shall mention them and my view on them now.

12.33. (4) A Report by Justice "The Prosecution Process in England and Wales" published in 1970 suggested that investigators cannot achieve the necessary detachment and are ill-equipped by outlook and training to weigh up the factors in a decision to prosecute or not. Most police officers investigating a case who are faced with a decision whether or not to prosecute will have had wide experience in the courts. They are in any event continually supervised in their work by senior officers who have extensive knowledge of the practical application of criminal law, local conditions and other factors which have a bearing on a decision to prosecute. Police officers are trained not to allow personal feelings of sympathy or dislike

to sway their decision but to base their decision on the evidence available which can be put before a Court. Under our present system police officers are directly responsible for a decision to prosecute. As a result not only are their decisions open to criticism by the Courts but they are subject to the very real sanctions of civil and disciplinary proceedings. As I indicated at paragraph 9.10 where a complaint is made against a police officer there is now superimposed on the investigation the completely independent review of the Police Complaints Board.

12.34. An extensive programme of training in legal and operational matters is provided for Metropolitan Police officers by way of initial training and subsequently in preparation for promotion examinations and also by way of updating courses. In addition to courses provided at Bramshill Police College, the Metropolitan Police training school at Peel Centre provides courses throughout the year for uniform and C.I.D. Metropolitan Police officers as well as officers from provincial and foreign police forces. An indication of the extent of such courses and the number of officers attending them is provided in my Annual Report to the Home Secretary for 1977.

12.35. Each month the Solicitor's Department of the Metropolitan Police produces a digest of the recent and more important law reports affecting police work which is distributed to appropriate headquarters staff. Every three months a further digest of such law reports of particular

interest to all police officers is distributed throughout the Metropolitan Police Force on a divisional basis.

12.36. (5) A further argument put forward in favour of a public prosecutor scheme is that if a trained legal mind had considered the evidence on which a decision to prosecute had been made there would be less acquittals and the instances where cases were stopped by judges at the end of the prosecution evidence would be far less. Indeed, a former Minister of State at the Home Office, Mr Alexander Lyon, in advocating a change to a national system of public prosecution said that when cases which have been through the Court were reviewed by the Home Office he was repeatedly struck by the feeling that new evidence which was not considered by the Court could have been available at an earlier stage if some critical independent judgement had been applied to the statements. In answer to this it must be realised that no trained legal mind can in any particular case rule out the possibility of an acquittal, but at best can give the opinion whether or not there is a prima facie case to answer.

12.37. Cases on indictment are sometimes stopped by a judge at the end of the evidence presented by the prosecution on the basis of there being insufficient evidence but that has seldom anything to do with the initial decision to prosecute but usually because of the absence or disappearance of a witness or witnesses or because a witness or witnesses are not prepared (either through genuine loss of memory or through fear or other reasons) to repeat verbally what is

contained in their written statements. No critical judgement by an independent prosecutor can avoid that situation. Moreover, it must not be forgotten that in every case which is to be committed for trial a critical independent judgement is made of the evidence for the prosecution because no defendant can be committed for trial unless either the Magistrates' Court is of the "opinion on consideration of the evidence and of a statement of the accused himself that there is sufficient evidence to put the accused on trial" (Section 7 Magistrates' Courts Act 1952) or if the accused is legally represented, with the agreement of the Court, the prosecution and the accused's lawyer, the Court may commit an accused for trial without considering the evidence providing (inter alia) the Court is satisfied that the defendant's lawyer does not wish to submit that there is insufficient evidence to put the accused on trial (Section 1 Criminal Justice Act 1967 and Rule 3 Magistrates' Courts Rules 1968).

12.38. I certainly fail to understand Mr Lyon's contention that further evidence may be disclosed at an earlier stage if some critical independent judgement had been applied to the statements of witnesses at a time when the decision to prosecute had been made. Under our present system the prosecutor has to make his decision as to prosecution on the evidence available to him at the time of that decision. By the time the trial has ended the defence has, of course, been made public. Apart from the requirement (which can be and is frequently waived by the Court) on the defence to disclose alibi evidence within seven days of the

committal the defence can and in fact does make use of its freedom of silence. Moreover, if an accused's legal representatives who have had an opportunity and should, if they are conscientious, make a critical judgement of the prosecution evidence before or at the committal proceedings prefer to advise their client to shield behind a shelter of silence it is difficult to see how a prosecuting lawyer would be in any stronger position than a police officer.

12.39. It is pertinent to reflect that in very many cases where it is alleged that a conviction has resulted in a miscarriage of justice the evidence had been considered by a trained legal mind before trial on behalf of both the prosecution and the defence and that had such legal expertise available to the prosecution considered it justified it would have been a simple matter albeit that the initial decision to prosecute had been taken by police to offer no evidence either at committal or at trial. Indeed, it is very rare in any case of alleged miscarriage of justice where the trial is on indictment to find that the evidence had not been considered both by a prosecution and defence lawyer prior to committal.

12.40. The argument which suggests that a public prosecutor system would reduce the number of acquittals is not borne out by a comparison between the overall figures for prosecutions in England and Wales and those in Scotland. The figures used are taken from the Home Office Criminal Statistics for England and Wales 1976 and the Scottish Home and Health Department Criminal Statistics 1976 respectively

with the appropriate page numbers quoted. The total number of defendants proceeded against in England and Wales (including those committed for trial) was:

Indictable offences	456,693	(p.106)
Non-indictable offences	1,753,246	(p.116)
	2,209,939	

The total number of defendants found guilty at Magistrates' Courts was:

Indictable offences	359,267	(p.219)
Non-indictable offences	1,636,446	
and at Crown Court	56,236	(p.297)
	2,051,949	

giving a conviction rate for all courts in England and Wales of 92.84%.

The Scottish criminal courts dealt with a total of 224,246 persons, against whom a charge was proved in 207,403 cases (p.6) giving a conviction rate for all courts in Scotland of 92.49%.

Even if one takes figures for the more serious offences for both countries dealt with in the higher criminal courts there is only a marginal difference in the conviction rate. Thus the total number of defendants for trial at the Crown Court in England and Wales was 67,975 of whom 56,236 were found guilty (p.230) giving a conviction rate of 82.72%. The total number of persons for trial at the higher criminal courts in Scotland was 3,761 against whom a charge was proved in 3,167 cases

(p.32) giving a conviction rate of 84.21%.

In Scotland, except for those few instances where the right of private prosecution still exists (Chapter 31 Criminal Procedure in Scotland (Second Report) Comnd 6218), no prosecution takes place without the prior approval of the Procurator Fiscal. It has been suggested in some quarters that such a system lessens or even removes the possibility of cases of alleged miscarriage of justice. Such cases have occurred in Scotland in the past and no doubt will occur in the future; I have seen no evidence to suggest that the proportionate number of such cases is any less in Scotland than in England and Wales.

12.41. Although I do not suggest that this is necessarily the case in Scotland, in any system where the decision to prosecute is removed from police hands, there is the danger that police officers may tend to arrest more readily without sufficient consideration of the circumstances, knowing that the decision for a subsequent prosecution is not in their hands. In England and Wales this danger is lessened because of the greater accountability of police officers. In Scotland if an arrest by a police officer is challenged in the civil courts as wrongful, it must be shown not merely that it is unlawful but that the officer was actuated by a malicious motive. In England and Wales, however, the fact that the officer was acting in good faith or without malice is no answer to a civil action for damages for an unlawful arrest.

12.42. One of the clear conclusions drawn by the Metropolitan Police Solicitor and the Assistant Commissioner (Crime) when studying the District Attorney system during their visit to the United States this year was that police officers there, knowing that the decision as to prosecution was in the hands of the District Attorney, were not exercising that care and responsibility in making arrests or their enquiries leading to arrests that one would expect had they themselves had the task of making the decision whether or not to prosecute. In addition it was noted that many police officers considered that cases for which they had produced sound evidence were either not prosecuted by the sometimes inexperienced staff of the District Attorney on the grounds that the cases lacked "prosecutorial quality" or if the District Attorney's staff did prosecute it was often for an offence of a minor nature compared with the evidence. This lack of correlation between those engaged in obtaining evidence and those making the decision to commence proceedings undoubtedly had a dangerous demoralising effect on police officers who felt that work on their part was so often without purpose.

<u>What would be the cost of introducing a system of a public prosecutor so far as the Metropolitan Police District is concerned</u>?

12.43. With inflation continuing it would, I feel, be an extremely difficult exercise to attempt such an estimate in financial terms. However, some estimates can be made in

legal manpower terms. Because of the difference between the English and Scottish systems it follows that any estimate must be very rough but sufficient to give some guide. In 1977 the establishment of the Procurator Fiscal's office for the Glasgow and Strathkelvin area consisted of 41 professional members and 140 non-professional members. During that year a total of 61,009 reports were received by the Procurator for that area. These figures give an average report load for each professional member of 1488 or an average of 436 for each non-professional member. In 1977 the number of persons proceeded against in the Metropolitan Police District was 359,092 and the number of persons cautioned was 27,824 giving a total of 386,916. That total only represents those cases where action was taken against persons whether by way of prosecution or caution and does not include those cases as does the report figure for Glasgow and Strathkelvin, where the Procurator considered the possibility of proceedings but decided against proceedings. However, even using those figures, if the same legal staff ratios used in Glasgow and Strathkelvin were used for the 1977 Metropolitan Police District figures a total of 260 professional staff and 887 non-professional staff would be required as against legal staff in post in the Metropolitan Police Solicitor's Department for 1977 namely, 49 professionals and 137 non-professionals, a total staff increase of 961.

12.44. Looking at staff figures from another angle the 49 professionals and 137 non-professionals of the Metropolitan Police Solicitor's Department handled a total of 35,055 cases in 1977 giving an average load for each professional member

of 716 cases or for each non-professional member of 256 cases. If every case for 1977 in which proceedings were taken in the Metropolitan Police District (359,092) and persons cautioned (27,824), a total of 386,916, had been handled by the Metropolitan Police Solicitor's Department then on the same ratio a total of 540 professional staff and 1511 non-professional staff would have been required for the Metropolitan Police District alone, a total staff increase of 1,865. Again, these figures only take account of those cases where some action by way of prosecution or cautioning took place.

12.45. A further estimation can be made on population. The estimated population of Glasgow and Strathkelvin is 887,455, that of the Metropolitan Police District (ignoring the nine million tourists who visit London annually) 7,446,000. If the Procurator requires a professional staff of 41 and non-professional staff of 140, the Metropolitan Police District would require a professional staff of 344 and a non-professional staff of 1,174.

12.46. To summarize these three alternative estimates as against the Metropolitan Police Solicitor's staff in post in 1977 of 49 professionals and 137 non-professionals there would be required:

	Professional Staff	Non-professional Staff
Based on work load of Procurator Fiscal for Glasgow and Strathkelvin	260	887
Based on Metropolitan Police case load 1977	540	1511
Based on population	344	1174

I cannot put forward those figures as necessarily representing an accurate estimation of the number of legal staff required but they are a sufficient guide to indicate that an enormous increase in legal staff would be necessary. That increase would be reflected not only in the actual salaries paid to such additional staff but in the cost of pension provisions, office equipment including law libraries and increased office accommodation.

12.47. In these estimates I have not taken into account those cases referred to the Director of Public Prosecutions for advice on prosecution but since the total number of such cases (excluding complaints against police and miscellaneous matters) was in 1977 for the whole of England and Wales only 7,877, those figures are comparatively insubstantial (those figures are taken from Hansard 7th February 1978 Written Answers).

12.48. The substantial increase which would would be required in legal manpower would not simply be a question of greatly increased financial expenditure but of being able to obtain such staff in sufficient numbers and most importantly of sufficient ability and experience to meet the requirement.

12.49. It might be argued by some that the vast expenditure involved in providing such an increase in legal manpower would be in part off-set by the saving in police manpower and time. In my view, there would be very little, if any, such saving because the paperwork, i.e. police reports and witnesses statements on which the decisions were to be

made by a public prosecutor would still have to be compiled by police and all that would be taken from the police workload would be the actual decision whether or not to prosecute. It is true that in some instances police attendance at Court would be lessened but only to be replaced by the more expensive lawyer.

12.50. It might be argued by some that the vast expenditure involved would be off-set by the more effective preparation of cases or a reduction in the number of miscarriages of justice. The suggestion that cases might be more effectively prepared is not borne out by a comparison between the conviction rates in England and Wales on the one hand and Scotland on the other which I refer to in paragraph 12.40 above.

<u>What apart from cost would be the effect of introducing a system of a public prosecutor in England and Wales</u>?

12.51. It is relevant to remember that in the vast majority of cases the decision to arrest is made by an officer on the spot who sees an offence being committed and the subsequent decision by police in such straightforward cases to carry that arrest through to prosecution gives no rise to difficulty.

12.52. Even an examination of those more complex cases where it is alleged that a miscarriage of justice has occurred it will be seen that in most of those cases either the initial decision to prosecute was taken not by police but by a lawyer or where the initial decision to prosecute was taken by police,

the decision to continue the prosecution was taken by a lawyer usually before committal proceedings. Thus for example in the now well documented cases of Mr Dougherty and Mr Virag (Devlin Report on Evidence of Identification in Criminal Cases) in the former case a police prosecuting solicitor and in the latter case the Director of Public Prosecutions was responsible for the conduct of the case prior to the committal proceedings. In a recent civil case against the Metropolitan Police where damages of £37,000 were awarded to a defendant who was acquitted at his trial the initial decision to prosecute was taken not by police but by the Director of Public Prosecutions. In Scotland of course every decision to prosecute is taken by a lawyer but alleged miscarriages of justice still occur. I am not suggesting that in those or any other case of alleged miscarriage of justice the fault can be said to be that of a lawyer but that, because other factors are so often at play, it can be seen from past experience that the involvement of a lawyer in the decision to prosecute at an early stage in a case is unlikely to have any appreciable effect on a future possible miscarriage of justice.

12.53. Perhaps one of the most important advantages of a system where the initial decision to prosecute largely lies with police is that such a system provides an independence free from political pressure. I do not suggest for one moment that a desire to exert political pressure whether from left or right of the political spectrum exists now but the possibility of such pressure in the future cannot be ignored. Such political pressure would be more easily wielded if the

initial decision to prosecute was removed from police. The discontinuance of criminal proceedings for improper political motives where those proceedings had been properly and with justification instituted by police is more difficult to disguise because reasons for the discontinuance have to be made public in Court. If the decision to prosecute was taken from police the existence of improper political motives could more easily be stifled because there would be no proceedings to discontinue.

SUMMARY

12.54. I am of the view that the enormous cost of establishing and maintaining a system of public prosecution throughout England and Wales would produce a system of prosecution which would have little if any advantage and indeed some disadvantage over the system of prosecution which, as I have described in this Chapter, is in operation within the Metropolitan Police District.

CHAPTER XIII

THE STATUS, STRUCTURE AND ORGANISATION OF THE SOLICITOR'S DEPARTMENT OF THE METROPOLITAN POLICE

13.1. The status, structure and organisation of the Prosecuting Solicitor's Departments of police forces, where such departments exist, vary widely. My experience is confined to the Solicitor's Department of the Metropolitan Police and accordingly I shall restrict my comments to that Department. The Solicitor's Department of the Metropolitan Police is not, as are the Prosecuting Solicitor's Departments of some provincial forces, solely a prosecution department; as I shall indicate later the work undertaken by the Department is of much greater scope.

History

13.2. From the formation of the Metropolitan Police in 1829 until 1935 the legal work of the Metropolitan Police was undertaken by private firms of solicitors, with the exception of those prosecutions which fell to be dealt with by the Director of Public Prosecutions. (The post of the Director of Public Prosecutions was established by the Prosecution of Offences Act 1879, although it was not until 1908 that the Treasury Solicitor, who had acted as Director since 1884, transferred such prosecution work to the newly established office of the Director of Public Prosecutions). From 1870 the private firm of solicitors who handled the Metropolitan

Police legal work were Messrs. Wontners. On 15 April 1935 the then Commissioner of Police, Lord Trenchard, established the Solicitor's Department of the Metropolitan Police which took over the legal work, until then undertaken by Messrs. Wontners. The Department was headed by Mr. T. MacDonald Baker, previously a solicitor in the Inland Revenue Department, with an initial establishment of seven other solicitors and sixteen clerks. The purpose of the establishment of the Solicitor's Department was stated to be:

(i) To undertake prosecutions on behalf of the Commissioner (other than those handled by the Director of Public Prosecutions).

(ii) To defend police officers involved in civil actions arising out of the performance or purported performance of their duties (e.g. actions alleging wrongful arrest, malicious prosecutions etc.).

(iii) To advise the Commissioner and his officers on any police matters requiring legal advice.

Since the initial formation of the Solicitor's Department both the size of the staff of the Department and the quantity of work has increased enormously. What follows is a description of the Solicitor's Department as at the present time.

13.3. Establishment and Salaries of the Department

(as at 1st April 1978 unless otherwise stated subject to notes below)

Professional staff (all qualified solicitors)

1	Solicitor	£14,991	(with effect from 1.1.78 rising by two further stages to £18,509)
1	Deputy Solicitor	£13,429	(with effect from 1.1.78 rising by two further stages to £16,000)
10	Assistant Solicitors	£10,462 - 12,273.	
37	Senior Legal Assistants/Legal Assistants	£4,296 - £10,152	
49			

Non-professional staff

1	Senior Principal Legal Executive	£9,057 - £10,809
3	Principal Legal Executives	£6,791 - £8,729
8	Senior Legal Executives	£5,937 - £7,032
17	Higher Legal Executives	£4,842 - £5,718
84	Legal Executive/Law Clerks	£2,549 - £4,579
2	Legal Executives/Executives	
4	Clerical Officers	£1,698 - £3,280
25	Clerical Assistants	£1,543 - £2,608
5	Personal Secretaries	£2,708 - £4,045
12	Shorthand/Audio Typists	£2,335 - £2,790
2	Paperkeepers	£2,482 - £2,889
163		

Note 1. To all salaries should be added London Weighting of £465 p.a. which figure is under review.

2. Authorisation was received on 28 April 1978 for the increase in the establishment figure of Senior Legal Assistants/Legal Assistants from 37 to 47.

3. Non-professional staff in post are 26 under establishment.

13.4. The gradings used for the professional staff tend to be misleading but are the same gradings used for lawyers in the Civil Service, so that all the professional staff whether termed Deputy, Assistant, Senior Legal Assistant or Legal Assistant are all fully qualified solicitors and as such officers of the Supreme Court of Judicature. Not being employees of a Government Department they are not civil servants but their terms and conditions of service are identical with those of civil servants with the exception that, unlike civil servants, they are not subject to transfer to other departments.

13.5. The non-professional staff are so named because they are not qualified as solicitors. It would, however, be totally incorrect to describe them as not qualified. The more senior of the non-professional staff are without exception persons of great experience who possess an outstanding knowledge of criminal law. Their expertise is held in high regard by both Senior Counsel and Judges. Their knowledge is in the main derived from a great many years experience; additionally, some hold law degrees, one has been called to the Bar although being a member of the Solicitor's Department does not practice as a barrister, and many are qualified either from experience or examination as legal executives.

Status of the Solicitor

13.6. The Solicitor and the staff of his Department are employed by me. In the same way as a client-solicitor relationship exists between a client and solicitor in private practice, so also am I, as the Commissioner, the client of the Solicitor. In a police prosecution I am the sole client of the Solicitor, not the investigating officer. It is to me as Commissioner and not the investigating officer that the Solicitor has a duty. Accordingly, if acting in a criminal prosecution the Solicitor came across matters tending to indicate that the investigating officer had himself committed some criminal offence the Solicitor would, without hesitation and without any breach of professional duty to the investigating officer, since none exists, report that matter at once to me. I have heard the argument advanced that this client-solicitor relationship in a prosecuting authority could mean that the Solicitor is not a free agent and would allow a chief officer of police to dictate how the Solicitor acts. I can only speak of my experience as Commissioner and add to it the experience of my present Solicitor of over thirty years in the Department and say that I have never placed any restraint nor has my present Solicitor or to his knowledge his predecessors ever experienced any restraint placed upon the independence of the Solicitor and have never known any advice tendered either to prosecute or to offer no evidence, or with regard to particular charges to be preferred or witnesses to be called for the prosecution, to be rejected. Although the Solicitor and his staff give

investigating officers every opportunity to express their view nevertheless the final decision on the matters I have mentioned is always that of the Department and not mine or that of the individual officer. If a prosecuting solicitor outside the Metropolitan Police District has ever found it difficult to adopt an independent line it is not a difficulty which has ever been experienced in the Solicitor's Department of this Force.

Scope of work of the Solicitor's Department

13.7. This can conveniently be broadly divided into five topics:

(A) Criminal prosecution.

(B) Criminal defence.

(C) Civil proceedings.

(D) Advice.

(E) Miscellaneous matters.

(A) Criminal Prosecution

13.8. The Metropolitan Police Solicitor undertakes all police prosecutions in the Metropolitan Police District in Magistrates' Courts, Crown Courts and Appeal Courts including the House of Lords with two exceptions:

(i) those prosecutions undertaken by the Director and

(ii) those straightforward cases which police prosecute without legal assistance in the Magistrates' Courts.

(i) Those undertaken by the Director are those referred to in the Prosecution of Offences Regulations 1946 (at present under review). As I have indicated elsewhere, it does not

follow that because I am required to report an alleged offence by those Regulations to the Director that it automatically follows that the Director will assume responsibility for the ensuing prosecution because the Director may request that that prosecution should be undertaken by the Metropolitan Police Solicitor.

(ii) Those straightforward cases which police prosecute without legal assistance. Those cases are those excluded from the list set out at Section 25 paragraph 172(i) Metropolitan Police General Orders. That list comprises:

"(a) in all cases where legal or evidential difficulties are likely to arise or the facts are of a complicated nature;

(b) in any case where the prosecution depends on the correctness of visual identification of the defendant which is likely to be disputed;

(c) where for any other reason the Chief Superintendent is of the opinion that such aid is necessary; or

(d) where the Magistrate informs police that he considers it necessary.

Furthermore, where it is known that a case will be committed for trial, officers should seek legal aid for such committal instead of submitting a "soup" report after committal in the following cases:

(e) conspiracy to commit any offence or to defraud;

(f) rape, buggery, procuration or abduction;

(g) sexual assaults involving children or young persons;

(h) unless the facts are entirely straightforward -

(i) any other offence triable only on indictment;

(ii) any offence involving forgery, criminal deception or false accounting;

(iii) arson;

(iv) where a large number of offences are involved."

13.9. All remaining police prosecutions are undertaken by the Metropolitan Police Solicitor. The papers in respect of the prosecution which are undertaken by the Solicitor will reach him either before any decision to prosecute has been taken or after that initial decision has been taken. In many cases such as complex frauds, licensing, gaming, lotteries, child neglect, immigration, serious or difficult traffic cases where it is not thought that there is an urgent need to charge a person to enable a Court to decide whether or not the accused be remanded in custody or on bail and if so on what conditions police submit the papers to the Solicitor. The Solicitor can then advise on the desirability or otherwise of instituting criminal proceedings, the sufficiency of the evidence, the scope of further police enquiries, and if proceedings are appropriate what charges or summons should be preferred.

13.10. More usually, cases will be submitted to the Solicitor's Department after a defendant has already been summoned or charged with an offence on police initiative without prior submission of the papers to the Solicitor's

Department. In such cases the papers are submitted to the Solicitor's Department with a report giving details of the defendant, the court at which he is to appear, with the date of the hearing and a resume of the facts which will include any anticipated difficulties as to facts or law including details of previous convictions recorded against the defendant and prosecution witnesses. Attached to the report will be copies of the statements of the witnesses obtained by police. Depending on the gravity or complexity of the case it will be allocated by a senior solicitor either to himself or to a junior solicitor working under him. The solicitor to whom the case is allocated will read the papers and will be concerned to consider a number of points, including the following:-

(1) to ensure that the existing charge or charges or summonses are correct both in substance and detail,

(2) to consider whether the evidence which it is intended to adduce on behalf of the prosecution will support the charges or summonses already preferred, or whether attempts should be made to obtain further evidence,

(3) to consider whether or not in the light of the evidence and in the circumstances of the case charges additional to or in substitution of the original charges should be preferred or whether, either because of lack of sufficient evidence or some special reason, it is a case in which the prosecution should offer no evidence on any charge or summons against the defendant. This

is a decision which would be taken by a senior solicitor, but the Director of Public Prosecutions would be consulted if the case is before the Magistrates' Court to obtain his prior approval to the intended course, so that the Magistrates' Court can be so informed in view of the duty of the justices clerk or the Court to send the Director a report of the case in accordance with Regulation 9 Prosecution of Offences Regulations 1946 (at present subject to review);

(4) to consider what witnesses to call and whether those witnesses should be warned to attend court in person to give their evidence orally or whether, subject to the approval of the court and the defence, their evidence could be tendered in writing under the provisions of Section 1, 2 or 9 of the Criminal Justice Act 1967. In the latter case whether the witnesses' statements are in a suitable form for service or whether fresh or additional statements should be obtained from them,

(5) to consider, if the case is one which is triable either way, what representations should be made to the Magistrates' Court as to mode of trial, particularly bearing in mind (a) the gravity or otherwise of the offence, (b) the defendant's previous convictions and (c) the power of punishment of the Magistrates' Court.

13.11. In considering all these matters the officer in charge of the case is given every opportunity to express his views but the ultimate decision is that of the Solicitor acting on my behalf as Commissioner and not that of the individual officer. In cases of difficulty the solicitor preparing the case is always able to consult the more senior and experienced solicitor under whom he works and, if necessary, the case will be referred to the Deputy Solicitor or the Solicitor himself.

Criminal Prosecution in Magistrates' Court

13.12. When the solicitor to whom the case was allocated has considered all the matters I have referred to and given instructions to the officer accordingly, that solicitor will then prepare instructions for the advocate who will conduct the case at the Magistrates' Court. Those instructions will cover all the matters referred to above and in particular will draw the advocate's attention to any difficulties of fact and law and refer the advocate to the relevant statutory and case law. The advocate at Court may be a solicitor from the Solicitor's Department or Counsel instructed on a fee basis. I deal with the topic of advocates at Magistrates' Courts at paragraph 13.26. It is only rarely that an advocate from the Solicitor's Department will attend Court to prosecute a case which he has prepared himself. The reason for this is that the size of the Solicitor's Department and the volume of work which it handles would not permit this method of operation. However, it has the advantage that a case coming into the Solicitor's Department, even one of a comparatively straight-

forward nature, is considered twice over by two legally qualified people, that is by the solicitor who has prepared the case and by the advocate, be he a solicitor from the Department or Counsel.

Criminal Prosecution in Crown Courts

13.13. These cases reach the Solicitor's Department in two ways. Either they will be cases in which that Department represented police in the Magistrates' Court or they will be cases in which the police themselves obtained a committal at the Magistrates' Court without being represented by that Department. These latter cases are for an historical reason termed 'Soup' committals. The intention is that police should only deal with the most straightforward committals at Magistrates' Courts as indicated by Section 25 paragraph 172(1) Metropolitan Police General Orders referred to at paragraph 13.8 above. The total number of cases dealt with by the Solicitor's Department at the Crown Courts in 1977 was 15,350, an increase of 862 from the previous year. It is necessary for this purpose for the Department to maintain branch offices at the Central Criminal Court and other locations of the Crown Court at Newington Causeway, Knightsbridge, Middlesex Guildhall, Willesden, Snaresbrook, Woodford, Kingston, Croydon and Foresters Hall. In addition from Snaresbrook staff are sent to attend the Crown Court at Chingford and Chelmsford; from Kingston staff are sent to attend the Crown Court at Surbiton and Guildhall; and finally, staff are constantly attending the Crown Court at St. Albans,

Reading, Newbury and Bow, but with regard to these last eight courts permanent branch offices are not maintained. Some of these locations are outside the Metropolitan Police District but Metropolitan Police cases are dealt with there to relieve the burden of work in the Courts within the Metropolitan Police District. The offices at these Crown Courts are staffed by 96 of the non-professional staff of the Solicitor's Department who are employed on duties in connection with the preparation and hearing of cases which have been committed for trial or sentence at the Crown Courts. Those offices at the Central Criminal Court, the Newington Causeway Crown Court and the Knightsbridge Crown Court are each under the control of a Principal Legal Executive with a Senior Legal Executive Officer as his deputy, while the offices at Middlesex, Snaresbrook, Kingston and Croydon Crown Courts are each under the control of a Senior Legal Executive Officer. The head of the non-professional staff is a Senior Principal Legal Executive who is responsible to the Solicitor for the management and direction of those 96 non-professional officers and the remaining non-professional staff to whom I shall refer later. The Deputy Solicitor has overall responsibility to the Solicitor for his staff at the Crown Courts and as such is available to and does give daily advice to the senior non-professional officers at those courts.

13.14. When a case has been committed for trial there is still much work to be done, and this includes:

(i) drafting of the indictment;

(ii) consideration of further police reports and additional evidence received and service of notice of additional evidence if appropriate;

(iii) giving directions to police as to investigation of alibis submitted by the defence;

(iv) attending pre-trial reviews where these are held;

(v) liaising with Listing Officer as to suitable dates for trial bearing in mind witnesses' commitments;

(vi) notifying police of date of trial so that they can, in their turn, instruct witnesses;

(vii) instructing and booking Counsel to prosecute at the trial;

(viii) generally conferring with Counsel on any matters of difficulty throughout;

(ix) attending with Counsel at the trial.

Criminal Appeals

13.15. In addition to the prosecution of those cases referred to above, the Solicitor's Department handles all appeals from those cases to the appeal Courts of the Crown Courts, the Divisional Court, the Court of Appeal and the House of Lords. Such appeals would also include appeals from any cases in the Magistrates' Court in which the Solicitor was not

originally instructed. The 1977 figures for such appeals are:

Crown Court	2,874
Court of Appeal and House of Lords	95
Divisional Court (commenced)	30

(B) Criminal Defence in Magistrates' Courts and Crown Courts

13.16. If a police officer is prosecuted by a private individual for an alleged criminal offence arising out of the performance or purported performance of his duty, it is open to that officer, as in the case of any other defendant, to represent himself or to be represented by a lawyer of his own choosing. It is open to the officer to request that he be represented by the Metropolitan Police Solicitor and this request is usually granted. If on the other hand the officer was being prosecuted not by a private individual but by police or if the officer was suspended under the police discipline code then the Metropolitan Police Solicitor would not act for him. Where the Metropolitan Police Solicitor is acting for the officer in his defence he is acting for him in the officer's individual capacity and not for me as Commissioner. There is almost always, in such a situation, a criminal prosecution by police arising from the same circumstances against a private individual in which the Metropolitan Police Solicitor is instructed and so far as that prosecution is concerned the Metropolitan Police Solicitor is acting for me as Commissioner and not the individual officer.

(C) Civil Proceedings

13.17. As Commissioner I am vicariously liable under Section 48 Police Act 1964 for alleged torts committed by my officers in the performance or purported performance of their duty. Plaintiffs alleging such torts by police officers sometimes commence civil actions against me as Commissioner alone, sometimes against the individual officers and myself jointly and sometimes against the individual officers alone. In such proceedings where I am sued, the Metropolitan Police Solicitor acts for me and it is almost always the invariable practice for the Metropolitan Police Solicitor to act for the officer as well, although it is always open to the officer to be represented by any solicitor of his own choice. The Metropolitan Police Solicitor would not, however, act for the officer if he had been suspended from duty. If the Metropolitan Police Solicitor is acting both for me and the officer in such civil proceedings, then unlike the case with criminal prosecutions in which the Solicitor is acting for me alone the Solicitor is acting both for me and the officer as his separate clients. Accordingly, any information given to the Solicitor by the officer would be confidential and could not be given to me without the officer's consent. If, as a result of such information, it became apparent to the Solicitor that there was a conflict of interest between me and the officer which could not be resolved then like any solicitor in private practice, the Metropolitan Police Solicitor could not continue to act for both of us. In such circumstances arrangements would be made for the officer to be represented by another

solicitor of his own choice, not a member of the Solicitor's Department and the Metropolitan Police Solicitor would continue to act for me.

13.18. The Metropolitan Police Solicitor does not act for police in respect of civil claims arising from alleged negligence with regard to traffic accidents, personal injury or damage to property. But he does act in respect of civil claims alleging false imprisonment, malicious prosecution, assault, trespass, libel, detinue and conspiracy.

13.19. The number of new civil actions commenced against police of the type in respect of which the Metropolitan Police Solicitor does act for the last five years were as follows:

1973	27
1974	30
1975	34
1976	53
1977	73

13.20. The total amounts (excluding legal costs) paid out in respect of such actions for the last five years were:

1973	3	£200
1974	2	£725
1975	9	£2668
1976	7	£7521
1977	4	£8082

These figures could, of course, fluctuate widely even as a result of one case. Thus in 1978 in one case alone damages of £37,000 were awarded to the plaintiff.

13.21. It is worthy of note that the number of civil claims in respect of which payments were made are very low when compared with the enormous number of persons whether arrested or not with whom police officers have dealings in any one year. However, this remedy to take civil proceedings against police provides a useful safeguard to any person who alleges that police have acted in breach of their powers.

(D) Advice

13.22. In addition to advice given to police in connection with criminal prosecutions, the Metropolitan Police Solicitor tenders advice to me, to the Receiver, to my officers and to my civil staff on a great variety of topics concerning police work. It is not possible to give an exhaustive list but such topics include:

(a) policy matters

(b) proposed new legislation

(c) complaints against police

(d) disciplinary proceedings and appeals arising therefrom against police officers

(e) conflicting claims on property coming into police possession where ownership is in dispute

(f) police charities.

(E) Miscellaneous matters

13.23. The Metropolitan Police Solicitor provides advice and legal representation to police in connection with judicial or quasi-judicial proceedings not already mentioned (e.g. Red Lion Square Inquiry, Confait Inquiry) applications for

injunctions for the return of property in police possession, industrial tribunals, inquests into deaths where it is anticipated that police action may be criticised or misunderstood, applications to the Divisional Court for orders of habeas corpus, mandamus prohibition and certiorari.

Legal work not undertaken by the Solicitor's Department

13.24. Some legal work affecting police is not handled by the Solicitor's Department but has continued to be dealt with by Solicitors in private practice, partly because it requires no specialised knowledge of police methods and procedure and partly because it would entail retaining specialists in that work in the Solicitor's Department who could not so easily assimilate other legal work in the Department. The work I refer to here is conveyancing, leasing and planning applications which arise from the vast amount of freehold and leasehold property in police possession such as police stations, section houses, married quarters etc. owned by the Receiver in his corporate capacity and civil claims against police arising from the use of police transport and personal injury to police employees arising from their employment.

Structure and Organization of the Solicitor's Department

(i) Professional staff

13.25. The Department is headed by the Solicitor who is directly responsible to me for the professional and non-professional staff of his Department. The Solicitor is particularly concerned in tendering advice both on law and policy to me and the Deputy and Assistant Commissioners.

The Deputy Solicitor is responsible for the running of the Department in the absence of the Solicitor. He is responsible for all work undertaken by the Department at the Crown Courts including the Appeal Courts and all 'C' Department cases.

The remaining professional staff are engaged as follows:

'A' Department (i.e. licensing, gaming, certain offences against morals (e.g. living on immoral earnings, brothels) child care cases and public order).

1 Assistant Solicitor, 2 Senior Legal Assistants, 1 Legal Assistant.

'B' Department (Road Traffic Offences)

2 Assistant Solicitors, 1 Senior Legal Assistant, 1 Legal Assistant.

'C' Department (CID cases)

5 Assistant Solicitors, 4 Senior Legal Assistants, 1 Legal Assistant.

Civil Section

2 Assistant Solicitors, 2 Senior Legal Assistants.

Court of Appeal (Criminal Division)

1 Senior Legal Assistant.

The remaining Senior Legal Assistants and Legal Assistants are available for work in any of the five sections referred to above on a temporary basis as pressure of work or the absence of personnel in those sections through sickness or leave dictates.

Advocates in Magistrates' Courts

13.26. There are a total of 54 Magistrates' and Juvenile Courts in the Metropolitan Police District with an average of 3 separate courts in each, giving approximately 162 separate venues for courts of summary jurisdiction in the Metropolitan Police District. It follows that if police were to be legally represented in every case a vast number of advocates would be required. As some guide to the present system, in 1977 the total number of attendances by advocates on behalf of police at Magistrates' Courts in the Metropolitan Police District was 24,545, an increase of 3,242 over the previous year. Those figures represent attendances on individual cases although one advocate may, and usually does have several cases allocated to him on one day. It is quite impossible to cover that number of attendances by advocates from the Solicitor's Department and accordingly, Counsel are also instructed on a daily basis. Those Senior Legal Assistants and Legal Assistants not engaged in the work of the five sections referred to above, attend Magistrates' Courts as advocates. Of the 24,545 attendances by advocates on behalf of police at Magistrates' Courts in 1977, 14,110 were by Counsel instructed by the Solicitor's Department and 10,435 were by Solicitors from within the Department. It was felt that this was an excessive use of Counsel for attendances at Magistrates' Court, a more acceptable basis being for two thirds of those attendances to be covered by Solicitors from the Department and one third by Counsel. For this reason an increase of 10 was obtained in

the establishment of Solicitors in the Department of the rank Legal Assistant/Senior Legal Assistant with effect from 28th April 1978. But as I indicate in the summary to this Chapter it is not an easy task to find staff of sufficient quality to fill available vacancies in the Solicitor's Department.

(ii) Non-professional staff

13.27. As I indicated earlier, 96 of the non-professional staff are based at the various Crown Court locations in the Metropolitan Police District and are employed on duties in connection with the preparation and hearing of cases which have been committed for trial or sentence at the Crown Court. They are directly responsible to the head of the non-professional staff, that is the Senior Principal Legal Executive who is himself responsible to the Deputy Solicitor for the management and direction of the non-professional staff. The remaining 40 non-professional staff in post are employed in sections dealing with appeals, civil litigation, 'A', 'B' and 'C' departmental cases, the general office and departmental registry, library and file store.

Summary

13.28. Such is the present status structure and organisation of the Metropolitan Police Solicitor's Department. I referred, in my Annual Report for 1977 to the Home Secretary, to the fact that members of that Department were subjected to extreme pressure of work. In 1977 the Metropolitan Police Solicitor's Department with a professional staff of 49 handled

a total of 35,055 cases. In that year the Director's Department with a professional staff of 63 handled 17,705 cases. Comparisons are not always exact but it seems inevitable that even without any change in the system of prosecution there will need to be a considerable increase in the size of the Metropolitan Police Solicitor's Department if present trends continue. When vacancies occur in posts in the Solicitor's Department through retirement, resignation or an increase in establishment, despite the number of applications which may be received, there remains a difficulty in filling those posts because of the shortage of people of sufficient quality who are prepared to come into the public service.

CHAPTER XIV

THE ROLE OF THE ATTORNEY-GENERAL AND THE DIRECTOR OF PUBLIC PROSECUTIONS

The Attorney-General

14.1. The constitutional position of the Attorney-General as described in the Home Office evidence to the Royal Commission is now well established.

14.2. By virtue of the Prosecution of Offences Act 1879 the Director is subject to the superintendence of the Attorney-General and as I understand it frequently consults him on matters of importance or difficulty. Otherwise with the exception of those cases the prosecution of which statutorily require the fiat or consent of the Attorney-General and those in which the Attorney-General enters a nolle prosequi, the latter is not usually involved in decisions made by the Director.

14.3. I consider the unique role of the Attorney-General as an important and useful ingredient in the constitution. It serves to keep the general administration of the criminal law in England and Wales independent of politics while exercising a proper supervision to prevent injustice in exceptional cases.

14.4. I do not make any recommendations for any changes in his role.

The Director of Public Prosecutions

14.5. It is I believe generally accepted that the revocation of the Prosecution of Offences Regulations 1946 and their replacement by the Prosecution of Offences Regulations 1978 (which at the time of the preparation of this evidence have been laid before Parliament) and which specify amongst other matters those offences which have to be reported by chief officers of police to the Director is long overdue because it is sensible that the Director should be concerned only with cases of importance and sensitivity which merit his attention and that he should not be burdened with cases which do not warrant his attention.

14.6. As I indicated at paragraph 12.3, the fact that a case has been reported to the Director does not mean that he will retain it and conduct any resultant prosecution because he may, if it is a Metropolitan Police case, be content for it to be dealt with by the Metropolitan Police Solicitor or in the provinces by a prosecuting solicitor.

14.7. In so far as the present Regulations allow, there has been recently a change in emphasis, certainly so far as this Force is concerned, in that many types of cases which were formerly prosecuted by the Director are now with his approval conducted by the Metropolitan Police Solicitor. This has thrown a heavy additional burden on my Solicitor's Department but it is obviously sensible since it has enabled the Director and his staff to concentrate more fully on cases of importance and sensitivity.

14.8. It has been suggested that the Director should be in overall charge of some form of national prosecuting agency and so directly responsible through local offices for every or the majority of police prosecutions. Whatever might be the benefits or disadvantages of such a system it would undoubtedly be seen as placing the Director in a closer relationship with police particularly at a local level. As a result the valuable independent role which the Director now fulfils, in connection with his decisions as to whether or not criminal proceedings should be instituted against police officers following receipt of a report from a chief officer of police under Section 49(3) Police Act 1964, would give the appearance in theory if not in practice of being considerably reduced.

14.9. Beyond the agreed need for the replacement of The Prosecution of Offences Regulations 1946 I do not recommend any changes in the role of the Director of Public Prosecutions.

CHAPTER XV

THE RIGHT OF PRIVATE PROSECUTION

15.1. The view is sometimes expressed that the number of private prosecutions undertaken is very small. If by the term private prosecutions is meant all non-police prosecutions, this is certainly not the case because there are a great many prosecutions in which police are in no way involved but which are instigated by various bodies, e.g. local authorities, post office, nationalised boards, inland revenue, NSPCC and so on. Even if one uses the term private prosecution to mean prosecutions instigated by private individuals or private (albeit publicly quoted) companies, the numbers of such prosecutions are not so small as is sometimes thought. Prosecutions by private individuals for common assault and (certainly in the Metropolitan Police District) private prosecutions for shoplifting are very large as I indicate later in this Chapter.

15.2. It is sometimes suggested that the right of a private individual to institute criminal proceedings is too wide and should be further restricted or completely abolished. It is my view that the right of a private individual to prosecute, subject to the existing restrictions on such a right, should be retained for the reasons I express below.

15.3. It is not always appreciated that there already exist (in my view rightly so) considerable restrictions on the

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1 OF 2

right of private prosecution both direct and indirect. I set out below examples of those direct and indirect restrictions.

Direct Restrictions

15.4. (1) A magistrate before whom is laid an information which alleges the existence of evidence to support criminal proceedings is not compelled to grant a summons but in the exercise of his judicial discretion can refuse to do so. This is apparent from the use of the word "may" in Section 1 Magistrates' Courts Act 1952. In R v Bros 1901 18 TLR 39 the then Lord Chief Justice said that it was clear ".... that justices might in the exercise of their discretion refuse to issue a summons, even if there was evidence before them, if they considered to do so could be vexatious." In R v Metropolitan Magistrate ex parte Bennion 1971 135 JPN 491 the Divisional Court refused to grant an order of mandamus in a case where a Magistrate had refused to grant summonses against Mr Peter Hain because it could not be shown that in exercising his discretion the Magistrate had taken extraneous or irregular matters into account. This restriction applies of course whoever the potential prosecutor may be but it is a useful check on attempts to mount vexatious or frivilous prosecutions by private individuals.

15.5. (2) Criminal proceedings for certain offences can only be undertaken in some instances by order of a judge and in other instances by or by the direction of or with the consent of the Attorney General, the Solicitor General, the Director of Public Prosecutions or some other official person

or body. This is subject to the provisions of Section 12 Criminal Jurisdiction Act 1975 which provide that where any enactment prohibits the initiation or carrying on of proceedings for any offence except with the consent of by or on behalf of the Attorney General, Solicitor General or Director of Public Prosecutions, this does not prevent the arrest without warrant or the issue or execution of a warrant for the arrest of a person for any offence or the remand in custody or on bail of a person charged with any offence

15.6. The offences where the consent to or the initiation of proceedings is required from or by some official person or body whether it be for example the Attorney General or some lesser official, are more numerous than is sometimes appreciated.

15.7. I set out below some of the more common of such offences although the list is far from exhaustive.

(a) Judge

(i) Criminal libel against any person responsible for the publication of a newspaper (Section 8 Law of Libel Amendment Act 1888).

(ii) Proceedings in respect of any act purported to have been done in pursuance of the Mental Health Act 1959 except where the consent of the Director of Public Prosecutions is required (Section 141 Mental Health Act 1959).

(b) Attorney General and in some instances alternatively the Solicitor General

(i) Offences contrary to the Explosive Substances Act 1883 (Section 7 of that Act).

(ii) Offences contrary to the Public Bodies Corrupt Practices Act 1889 (Section 4 of that Act).

(iii) Offences contrary to the Corruption Act 1906 (Section 2 of that Act).

(iv) Offences contrary to the Official Secrets Act 1911 (Section 8 of that Act).

(v) Uttering defaced coinage (Section 4(3) Coinage Act 1936).

(vi) Offences concerning the wearing of uniforms in connection with political objects, the prohibition of quasi-military organisations and incitement to racial hatred (Contrary to Sections 1(2), 2(2) and 5A Public Order Act 1936).

(vii) Offences contrary to the Public Health Act 1936 unless proceedings are undertaken by the party aggrieved or a body whose function it is to enforce the provisions of the Act (Section 298 of the Act).

(viii) Offences contrary to the Prevention of Terrorism (Temporary Provisions) Act 1976 (Section 14 and paragraph 3 Schedule 3 of the Act).

(ix) Trespassing on the premises of foreign missions etc. (Section 9(6) Criminal Law Act 1977).

(c) Director of Public Prosecutions

(i) Offences contrary to the Incitement to Disaffection Act 1934 (Section 3(2) of the Act).

(ii) Publication of obscene matter where the article is a moving film of width of not less than sixteen millimetres (Section 2(3A) Obscene Publications Act 1959).

(iii) Ill-treatment of mental patients by hospital staff and sexual intercourse with a female patient by a man of the hospital staff or who has custody of the patient (Sections 126(4) and 128(4) Mental Health Act 1959).

(iv) Aiding, abetting, counselling or procuring the suicide of another or an attempt by another to commit suicide (Section 2(4) Suicide Act 1961).

(v) Offences on board British-controlled aircraft while in flight other than in or over the United Kingdom (Section 1(2) Tokyo Convention Act 1967).

(vi) Assisting a person who has committed an arrestable offence with intent to impede his apprehension or prosecution (Section 4(4) Criminal Law Act 1967).

(vii) Concealing information relating to an arrestable offence for reward and wasteful employment of police time (Section 5(3) Criminal Law Act 1967).

(viii) Offences by a man of buggery or gross indecency with another man or attempting to commit or aiding, abetting, counselling, procuring or commanding the commission of such an offence when either of the men were at the time of the commission of the offence under 21 (Section 8 Sexual Offences Act 1967).

(ix) Summary proceedings for offences under the Firearms Act 1968 (other than under Section 22(3) or an offence relating specifically to air weapons) when proceedings not instituted within 6 months of the offence (Section 51 of the Act).

(x) Theft or criminal damage by a spouse of the property of the other spouse or an attempt, incitement or conspiracy to commit such offence (Section 30(4) Theft Act 1968).

(xi) Agreeing to indemnify sureties in criminal proceedings (Section 9(5) Bail Act 1976).

(xii) Offences relating to indecent photographs of children (Section 1(3) Protection of Children Act 1978).

(xiii) Conspiracy contrary to Section 1 Criminal Law Act 1977 to commit a summary offence (Contrary to Section 4 of that Act).

(d) Other bodies or persons

(i) The Commissioners of Customs and Excise in respect of offences contrary to the Customs and Excise Acts (Section 281(1) Customs and Excise Act 1952).

(ii) Director of Public Prosecutions, or person authorised by the Traffic Commissioners or a Chief Officer of Police or the Council of a county or county district in respect of offences relating to public service vehicles under Part III Road Traffic Act 1960 (Section 161 of that Act).

(iii) The Secretary of State or a police constable with his authority in respect of offences of using or keeping vehicles without an excise licence or at a lower rate than applicable and misuse of trade licences (Section 28(2) Vehicles (Excise) Act 1971.

(iv) The party aggrieved or person on his behalf in respect of the offence of common assault (Section 42 Offences Against the Person Act 1861).

15.8. (3) Even if a prosecution has been commenced by a private individual the Director of Public Prosecutions is empowered (as in any prosecution) to take over the prosecution (Section 2(3) Prosecution of Offences Act 1908). The Director would then be entitled, if he saw fit, to discontinue those proceedings by offering no evidence against the defendant (Turner v D.P.P. Times Law Report 7th August 1978). Additionally, the Attorney General can terminate proceedings on indictment by entry of a nolle prosequi without any control by the Court.

Indirect restrictions

15.9. (4) The defendant in a private prosecution has the same remedies open to him in civil proceedings as any other defendant who considers he has been improperly arrested or maliciously prosecuted, namely, to institute civil proceedings for damages against the prosecutor, for which civil proceedings (subject to means) legal aid is available to him.

15.10. (5) Financial assistance from legal aid funds is not available to a private prosecutor but like any other prosecutor, if the defendant is acquitted, the private prosecutor is liable to have an order for the costs of the defence made against him whether on summary trial or on indictment. Of course, there exists the same power to make an order for costs in favour of the private prosecutor as in the case of a prosecution instituted by police or any other authority (Sections 2, 3 & 4 Costs in Criminal Cases Act 1973).

15.11. I RECOMMEND that subject to the existing restrictions on private prosecution the right should be retained. Many of the arguments in support of the abolition of that right are less forceful when the extent of the existing restrictions are appreciated. I can perhaps support that recommendation by considering what would be the position if that right were abolished.

15.12. (a) There are cases where police decline to prosecute, sometimes on the basis that in the particular circumstances the offence is of a trivial nature or the party aggrieved is as blameworthy as the offender, or it is considered that the more appropriate remedy lies in civil proceedings, or the possibility of a conviction is too remote to justify the use of public time and money on a police prosecution. Nevertheless, this decision on the part of police not to prosecute can give rise to a very real sense of grievance by the party aggrieved. In such cases, which are usually confined to cases of minor assault or road traffic accidents, the present position is that it is open to the party aggrieved to institute criminal proceedings subject to the restrictions I have referred to above. If the defendant in such proceedings feels aggrieved that although police have declined to prosecute a private individual has seen fit to do so he

has in particular the remedies provided by those indirect restrictions I refer to above. To remove this safety valve of the right of private prosecution would undoubtedly place greater pressure on police to undertake as police prosecutions those prosecutions which are not considered justified in the public interest.

15.13. (b) Quite apart from those cases I refer to at (a) above, circumstances might arise when it was alleged that the failure of police or a failure of some other official body to prosecute in a particular case was due not to a reasonably formed decision but to some capricious corrupt or biased failure or refusal to prosecute an offender. The removal of the right of private prosecution would remove what Lord Diplock described in Gouriet v Union of Post Office Workers 1977 3 All ER at 97d as "a useful constitutional safeguard" against a refusal to prosecute for such reasons.

15.14. (c) As I mentioned at paragraph 9.7 of the first part of my written evidence, it is no longer uncommon for a defendant prosecuted by police to apply for and obtain summonses against police officers alleging assault arising from the circumstances of the arrest. The removal of the right of private prosecution would remove

this right by such a defendant to bring criminal proceedings against a police officer. Circumstances could arise where the evidence for a prosecution by police was overwhelming yet an officer had honestly but without authority exercised a power of arrest which he did not possess so that a technical assault had been committed by the officer, or alternatively that the power of arrest exercised was with proper authority but that there was a direct conflict of evidence between the arrested person and the officers concerned as to whether or not excessive force had been used. Without a right of private prosecution it would mean that the same prosecuting authority would have to conduct the prosecution against the defendant arrested by police and the prosecution against the officers concerned in the arrest.

15.15. (d) It is well known that the offence of theft from supermarkets and large stores by shoppers (in my view unfortunately but perhaps understandably termed shoplifting to distinguish it from theft by other means) is an offence of very frequent occurrence in London particularly so in the more popular shopping areas. The number of offences of 'shoplifting' that are reported provides little indication of the prevalence of such

offences since they normally only come to notice when an offender is apprehended. The number of 'shoplifting' offences reported in the Metropolitan Police District during 1977 was 27,348 an increase for that year of 11 per cent. The number of arrests for 'shoplifting' was 24,815 of which total 21,676 arrests resulted from a suspect being given into the custody of the Force by a member of the public. Although this Force is invariably involved in 'shoplifting' prosecutions by virtue of the charging of an alleged offender being carried out by police when the offender is given into custody, unless the case is of one of an unusual nature or involves additional charges unconnected with 'shoplifting', it is the practice in this Force, unlike some provincial Forces, to encourage supermarkets and other large stores to undertake their own prosecutions and most are prepared to do so. The reason for this policy is to reduce to some extent the vast number of 'shoplifting' prosecutions which the Force would otherwise have to undertake. It seems to me that this policy of leaving such prosecutions in the hands of large stores so that the time and cost burden of such prosecutions falls on them rather than, through the police, on the public purse, is not

unreasonable. Some of those companies have chosen, presumably from a wish to reduce staff costs and for the more effective sale of their goods, to display them openly in such a way that provides a high degree of temptation and which facilititates theft. To remove the right of private prosecution would throw a considerable additional burden in such cases on the Metropolitan Police, particularly in view of the large number of such offences occurring in London.

SUMMARY

15.16. It is for these reasons that I RECOMMEND the retention of the right of private prosecution subject to the existing restrictions.

CHAPTER XVI

(The evidence in this and the following Chapter, being concerned with detailed legal matters is that of the Metropolitan Police Solicitor)

PREPARATION FOR TRIAL

Disclosure of information prior to trial

16.1. At the time of the preparation of this evidence a Working Party consisting of representatives from the Home Office, the Law Officers' Department, the Director of Public Prosecutions' Office, the Solicitor's Department at New Scotland Yard and the Association of Chief Police Officers is preparing a report for submission to the Home Secretary and the Attorney General relating to the disclosure of information by the prosecution to the defence. At the same time a Home Office Committee is considering proposals for the making of rules as to the furnishing of information by the prosecution under the provisions of Section 48 Criminal Law Act 1977. I express my views on disclosure of information prior to trial in this Chapter mindful that the Royal Commission will doubtless have before it in due course the detailed proposals of the Working Party and Committee referred to above.

16.2. In dealing with this topic I shall as far as possible deal with both summary trial and trial on indictment together because many of the considerations apply equally to both forms of trial. It might be argued that the same

considerations should always apply irrespective of the mode of trial but I do not agree. The English system of criminal justice recognises that there are some offences sufficiently grave as to permit only of trial on indictment before a judge and jury following committal proceedings, whereas other less grave offences can be tried without any preliminary hearing in a Magistrates' Court.

16.3. Summary trial is clearly intended to be what its name implies, a trial conducted with greater despatch and less formality than in the case of a trial on indictment. It therefore seems to me to be perfectly consistent with the dispensing of justice that in some respects different and less formal rules of practice should be applicable to the disclosure of information prior to trial in summary cases than in trials on indictment in exactly the same way and for the same reasons as different rules and practice apply in other respects to the two different modes of trial.

Duty of Defence to disclose information prior to summary trial

16.4. There is no duty on the defence to disclose any information to the prosecution prior to summary trial subject only to one exception of a very limited nature.

16.5. This exception was suggested by the Divisional Court in Puglsey v Hunter 1973 2 All ER 10 where the Lord Chief Justice referring to road traffic offences where the defence intend to call evidence in support of special reasons for imposing by way of sentence no period of disqualification or a lesser period of disqualification than would otherwise

be mandatory under Section 93 Road Traffic Act 1972 said "... it may well be desirable to accept as the practice in these cases that where the defence intend to call evidence to prove facts or medical opinion in support of a plea of special reasons, notice of the nature of the evidence to be called ought to be given to the prosecution at a sufficient interval before the hearing to enable the prosecution to be prepared to deal with it. It is not possible to require under sanctions that such notice be given, but the desirability of it being given speaks for itself, because if it is not given and the prosecution find themselves faced with issues of fact arising out of special reasons which they are not prepared for, the result inevitably will be an adjournment, possibly at the expense of the defendant who fails to notify. Accordingly I endorse counsel's suggestion that as a matter of practice in cases of this kind where evidence is to be called by the defence on this issue, notice of the nature of the evidence ought to be given in good time before the hearing".

16.6. Apart from that one very limited exception referred to in Pugsley v Hunter there is no obligation on the defence to disclose any information to the prosecution prior to summary trial.

16.7. If the defence raises a wholly unexpected issue in a summary trial which the prosecution is unable to rebut then and there but suspect that if time were allowed to investigate it, it might be revealed to be spurious and without foundation (e.g. a previously unmentioned alibi

defence, section 11 Criminal Justice Act 1967 requiring notice of alibi to be given applying only to trial on indictment) the prosecution can apply for an adjournment under Section 14 Magistrates' Courts Act 1952. The Court can at its discretion grant such an adjournment so as to enable the prosecution to carry out further enquiries in exactly the same way as it can if the defence make an application if it wished to investigate some unexpected evidence adduced by the prosecution. As a general rule Magistrates' Courts tend to grant such applications for adjournments made on such grounds whether by the prosecution or the defence.

16.8. Bearing in mind the desirability to keep the provisions for summary trial simple and uncomplicated I do not recommend that any duty of disclosure should be placed on the defence with regard to summary trial other than the existing exception referred to in Pugsley v Hunter which I have referred to, preferring to place reliance on an application under section 14 Magistrates' Court Act 1952 for an adjournment to meet an unexpected line of defence requiring further investigation.

16.9. Section 48 Criminal Law Act 1977 extends the provisions of section 15 Justices of the Peace Act 1949 so as to give power to make rules as to the furnishing of information by the prosecution to the defence. I shall discuss that provision below when dealing with the duty of the prosecution to disclose information to the defence. I shall confine myself here to only one aspect of that section. If

it is thought that the provisions of that section are necessary, as Parliament by enacting it clearly did, then in logic it might be argued that in order to keep a proper balance between the prosecution and the defence any rules made under that section requiring information to be given by the prosecution to the defence should be matched by rules under a similar section requiring disclosure of information by the defence to the prosecution. However, I do not recommend such a matching provision in relation to summary trials preferring as I have already indicated for the sake of simplicity in summary trials to place reliance on an application under section 14 Magistrates' Courts Act 1952 for an adjournment to meet an unexpected line of defence requiring further investigation.

Duty of defence to disclose information in respect of cases tried on indictment.

16.10. So far as trial on indictment is concerned the only obligation on the defence is that contained in section 11 Criminal Justice Act 1967 relating to an alibi which prohibits a defendant without leave of the court adducing evidence in support of an alibi unless he has given notice of particulars of the alibi before the end of the prescribed period. It is extremely rare for a court to refuse a defendant leave to adduce evidence in support of an alibi in cases where the defendant did not supply particulars of his alibi within the prescribed period (R v Sullivan 1971 54 Cr. App. R 389).

16.11. If the defence raise a wholly unexpected issue in a trial on indictment which the prosecution is unable to rebut then and there but suspect that if time were given to investigate it, it might be revealed to be spurious and without foundation, the prosecution is probably in an even more difficult position than in similar circumstances in a summary trial. It is true that a Crown Court has an inherent discretion to adjourn a trial (R v Castro 1874 9 Q.B.D. 350) similar to the statutory power of a Magistrates' Court in Section 14 Magistrates' Courts Act 1952 but the inconvenience which arises if it becomes necessary to consider an adjournment of a trial on indictment is likely and rightly so to weigh heavily in the balance against an application for an adjournment. It is true that a long trial has sometimes to be unavoidably adjourned for a day or half a day to enable the Judge or Counsel to attend to some other urgent court engagement. But considerable inconvenience is caused to members of a jury and resultant delays in other cases if an adjournment for any longer period is granted to enable the prosecution to investigate an unexpected defence. The problem therefore seems to be as far as possible to remove the need for such an application at a trial on indictment but at the same time to avoid in the public interest the possibility that justice should not be done by the raising of wholly unexpected issues by the defence without any proper time being allowed for their investigation.

16.12. It is of interest to note that this problem is to a certain extent recognised and dealt with under the criminal justice system in Scotland and indeed it has been suggested that the existing provisions in Scotland be further extended. Thus section 82 Criminal Procedure (Scotland) Act 1975 which replaced section 36 of the 1887 Act of the same title provides "It shall not be competent for the accused to state any special defence unless a plea of special defence shall be tendered and recorded at the first diet, or unless cause be shown to the satisfaction of the court for a special defence not having been lodged till a later day which must in any case not be less than two clear days before the second diet". As indicated at paragraph 37.01 of Criminal Procedure in Scotland (Second Report) Comnd 6218 those special defences certainly include alibis, insanity, responsibility of another named person for the offence, self-defence and that the crime was committed while asleep. It is of interest to note that the Committee responsible for that Second Report say at paragraph 37.11 "... it is clear that the only purpose of a special defence is to give fair notice to the Crown. Our view is that the element of surprise in criminal trials should be reduced as far as possible and that the main points at issue should be clarified before any trial begins. This means that notice should be given to the Crown of defences such as coercion, necessity, provocation, diminished responsibility and others, which are not currently recognised as 'special defences'." The Committee went on to recommend

that the term 'substantive defence' should replace 'special defence' and that 'substantive defence' of which notice should be given to the Crown at or before the first diet, should be defined as any defence relevant either to exulpate the accused or to reduce the quality of the offence charged".

16.13. The recommendations of the Committee in that respect seem to me to be eminently sensible and ones which in the interests of justice should be incorporated in the English legal system. Accordingly I RECOMMEND that if at trial on indictment the defence intend to raise a specific defence not previously disclosed notice of that defence should be given to the prosecution in sufficient time and detail prior to the trial so that the prosecution have an opportunity of investigating it. Such a provision would have little effect unless there was some sanction to support it and I suggest a similar sanction to that contained in Section 82 Criminal Procedure (Scotland) Act 1975 by a further RECOMMENDATION that it should not be competent for the defence to adduce evidence relating to such a specific defence unless notice had been given as set out above or unless satisfactory cause be shown to the Court for a specific defence not having been lodged.

16.14. At paragraph 37.13 of its Report the Committee said it had considered whether similar notice of substantive defences should be given in summary cases but thought it "unnecessary and inadviseable to complicate summary procedure by the introduction of technical requirements". As I have

already indicated at paragraph 16.8, I agree that summary trial should remain what its name implies and that its procedure should not be complicated. It was for this reason that I do not recommend any similar provisions with regard to notice of defences on summary trial, but instead place reliance on the power of a summary court to grant an adjournment under section 14 Magistrates' Courts Act 1952.

16.15. Quite apart from any question of notice being given by the defence to the prosecution of the defence which a defendant intends to raise at his trial, I should like to mention the question of disclosure by the defence to the prosecution in respect of trials on indictment of matters NOT disputed by the defence. Criticism is frequently made by judges of the Court of Appeal (Criminal Division) and by others of the length of time taken by some trials on indictment. Any reduction in such time compatible with justice is of course of benefit not only in the saving of cost and of time to all persons concerned in a trial but also expedites the hearing of other cases awaiting trial. It happens not infrequently that the prosecution go to considerable trouble to prove some aspect of a case often involving the calling of numerous witnesses only to find at the trial itself that the defence do not dispute that particular aspect.

16.16. Some attempt to ascertain what matters will not be disputed at trial has been made by some of the provisions of the experimental scheme of Practice Rules in operation at

the Central Criminal Court since October 1974. The current Practice Rules in operation at that Court since November 1977 are set out at paragraph 361b in the fifth supplement to the 39th Edition of Archbold.

16.17. Whether or not that experimental scheme is retained or extended to other Crown Courts I RECOMMEND that statutory provision should be made requiring the defence in cases of trial on indictment to notify the prosecution within 21 days of the end of committal proceedings of any aspects of the evidence of the prosecution adduced orally or by written statements at the committal proceedings which are not disputed by the defence, such notification to have similar effect to an admission made under the provisions of section 10 Criminal Justice Act 1967. (That section provides that subject to the provisions of the section any fact of which oral evidence may be given in any criminal proceedings may be admitted by or on behalf of the prosecutor or defendant and the admission by any party of any such fact shall as against that party be conclusive evidence in those proceedings of the fact admitted. The section includes a provision that any admission so made may with leave of the judge be withdrawn). I suggest that failure to comply with such a requirement by the defence to give notice where appropriate should give rise to a discretion in the trial judge to make an order as to costs thrown away by failure to give such notice.

Duty of prosecution to disclose information prior to summary trial and trial on indictment.

16.18. The duties on the prosecution referred to at (a) (b) and (c) below already apply and apply equally to summary trial as to trial on indictment.

(a) Character of prosecution witness

16.19. If a witness for the prosecution is of known bad character it is the duty of the prosecution to inform the defence of this fact but the prosecution are not under a duty of examining every kind of record, e.g. bankruptcy proceedings to see whether anything exists which might affect a witness' character (R v Collister and Warhurst 1955 39 Cr. App. R 100 and paragraph 443b Archbold 39th Edition). Case papers submitted to the Metropolitan Police Solicitor or the Director of Public Prosecutions include details of any known convictions recorded against prosecution witnesses. It is my practice to supply details of any such convictions to the defence even where there has been no request for such information. All such convictions spent or not are revealed whether or not they appear to be relevant to the case in question because their relevance can often only be accurately assessed by those engaged in the defence having taken the defendant's instructions. I do not recommend any alteration in this existing practice.

16.20. I set out the wording of two directives I issued to my staff, the first in January 1974, the second in

February 1975:

"NOTIFICATION OF PREVIOUS CONVICTIONS OF PROSECUTION WITNESSES

As a result of a recent letter from an M.P., it has been ascertained that our practice with regard to the disclosure of previous convictions of prosecution witnesses is not uniform throughout the Department. In future therefore the following procedure will be followed.

Previous convictions of prosecution witnesses will be disclosed Advocate to Advocate both at the Magistrates' Courts and the Crown Courts, even when there is no request for the information, in accordance with the dicta in R v Collister v Warhurst. In addition if a request for such information is made by defence Solicitors prior to the hearing, the information will be given in a letter sent by Recorded Delivery. In cases of exceptional urgency the information may be given over the telephone. It is considered that it is right that the defence should have this information in advance if they request it so that they may with their Counsel properly consider the strategy of their defence. It is emphasised that information should be given in advance only when requested.

Difficulty sometimes arises when the Police are not sure that one of the witnesses is identical with a person having a criminal record. In such cases a reply to a request for information about the character of prosecution witnesses should be carefully worded, for example, "Mr ..... has

been convicted on two occasions viz... there may be convictions recorded against other prosecution witnesses and if this proves to be the case information will be given as soon as possible".

Reference to the disclosure by Counsel to defending Counsel of the previous convictions will continue to be made in briefs in view of the possibility that some defending solicitors might fail to inform their Counsel of the information given to them or that the defendant might change his solicitor prior to the trial.

10 January 1974. R.E.T.B. "

"From time to time requests are received from defending solicitors to be given the details of any convictions recorded against a co-defendant. The co-defendant's convictions can only become relevant if he gives evidence in the witness box hostile to the other defendant and thus opens the door to his being cross-examined as to character by virtue of Section 1(f)(iii) of the Criminal Evidence Act 1898. However, defending solicitors may well wish to consider in advance whether they should attack the character of the co-defendant if it becomes possible. Accordingly, the details of the previous convictions of a co-defendant should be supplied to a defending solicitor when he requests it. It is

not considered, however, that there is a duty upon the Prosecution to supply these particulars without any such request.

11 February 1975. R.E.T.B."

(b) Statements of witnesses not being called by the prosecution.

16.21. It is the duty of the prosecution if they have taken a statement from a person whom they do not call but whom they know can give material evidence to supply particulars of that witness to the defence thus enabling the defence if they so wish to call that person as a defence witness but the prosecution is not under a further duty of supplying the defence with a copy of the statement of a person they have decided not to call (R v Bryant & Dickson 1946 31 Cr. App. R 146 and paragraph 443 Archbold 39th Edition). Lord Denning suggested obiter in Dallison v Caffrey 1965 1 Q.B. 348 that the duty of the prosecution in such circumstances went further namely to supply to the defence a copy of the statement of any credible witness who is not called by the prosecution who can speak to material facts which tend to show the defendant to be innocent although Lord Diplock in that same case considered it sufficient that the particulars of such a witness were supplied (thus enabling the defence to take their own statement from him) rather than the further requirement

to supply a copy of the statement.

16.22. It is my practice as the Metropolitan Police Solicitor to supply the defence with the particulars of a witness from whom police have taken a statement but whom it is not intended to call as a prosecution witness without any prior request by the defence and further as a general rule to supply on request copies of the statements of such witnesses.

16.23. Indeed if there is a statement which of itself would tend to show the defendant to be innocent it is my practice to supply a copy of that statement to the defence without waiting for any such request. It is said at paragraph 443 Archbold that "Certain prosecuting authorities and prosecutors not infrequently use R v Bryant & Dickson as a justification for never supplying the defence with a statement in such circumstances." As I have indicated above my general rule is to the contrary. I set out the wording of a directive issued to my staff in January 1974.

"SUPPLY OF COPY STATEMENTS OF WITNESSES NOT BEING CALLED BY THE PROSECUTION

The general policy in the Department since R v Bryant & Dickson 1946 31 CAR 146 has been to inform the defence of the names and addresses of all witnesses known to the prosecution who are not being called, but not to supply copies of their statements unless it was thought that an exception should be made. For example where there were a considerable number of

such witnesses most of which could be of no possible use to the defence, it has often been thought unreasonable to refuse to supply statements. The question has recently been under discussion with the Home Office and the practice set out below should be followed in future. This practice is based upon the decisions in R v Bryant & Dickson and Dallison v Caffery 1965 1 Q.B. 348. It will be recalled that in R v Bryant & Dickson it was stated that the prosecution should provide the names and addresses of witnesses whom they do not intend to call but they need not supply the statements. In Dallison v Caffery, Lord Denning stated: "If he (Prosecuting Counsel or Solicitor) knows of a credible witness who can speak to material facts which tend to show the prisoner to be innocent, he must either call that witness himself or make his statement available to the defence. It would be highly reprehensible to conceal from the court the evidence which such a witness can give. If the Prosecuting Counsel or Solicitor knows not of a credible witness but a witness whom he does not accept as credible he should tell the defence about him so that they can call him if they wish". Lord Diplock in the same case said "If he happens to have information from a credible witness which is inconsistent with the guilt of the accused or although not inconsistent with his guilt is helpful to the accused the Prosecutor should make such witness available to the defence (see R v Bryant & Dickson)".

The practice to be followed is that initially the prosecution should inform the defence of the names and addresses of the witnesses whom they do not intend to call but not provide statements unless they have a statement which of itself would tend to show the prisoner to be innocent. In such a case the statement should be provided. If after providing the names and addresses the defence request copies of the statements of such witnesses then these should be provided unless the prosecution have a compelling reason for keeping the statement to themselves, for example if the statement is that of a witness whom the prosecution suspect the defence may threaten to make him change his evidence.

23.1.1974 R.E.T.B."

16.24. There are however occasions when only the particulars of a witness and not his statement would be provided, leaving it to the defence if they so wished to obtain a statement. It is impossible to set out a comprehensive list of the exceptions when it is considered proper not to adhere to the general rule to supply statements of witnesses not being called by the prosecution because much may depend on the circumstances of a particular case. However, I set out below some examples where it might, depending on the particular circumstances of a case be thought proper to leave the defence to obtain their own statement having supplied the

defence with the particulars of the witness.

(i) If it is suspected that the statement might be used for some improper motive, e.g. to enable the witness to lie consistently.

(ii) If police have only been able to obtain the statement from the witness on an undertaking not to reveal its contents; in this connection it must be remembered that police (like any private individual) cannot compel a person to make a statement.

(iii) Where the statement contains details of national security or methods of private security or methods of crime detection the revelation of which might facilitate the commission of other offences.

(iv) Where the statement contains details of great private delicacy to the maker and might cause grave domestic trouble if the contents were revealed and those matters do not appear to be of any materiality to the defence.

(v) The statement may contain allegations against others, not charged, of criminal offences other than those with which the defendant is charged which are not subject of a prosecution.

16.25. In all cases where a copy of a statement is not supplied to the defence but particulars of the witness are

supplied to the defence it is of course possible for the defence having been given particulars of that witness to ask the witness to supply a statement to them. The particulars of the witness should not necessarily include his name and address but sufficient detail to enable the defence to have its request put to the witness. Thus a witness fearful of recrimination from a defendant might not wish his address to be revealed but could be asked to make himself available if he consented for interview with a defence representative at a police station.

16.26. So far as the duty of the prosecution is concerned to supply to the defence particulars of material witnesses who can speak as to facts which tend to show the defendant to be innocent I do not draw any distinction between a written statement signed by the witness or an oral statement which for some reason (e.g. perhaps because of the unwillingness of the witness) has not been reduced to writing.

16.27. There are some very exceptional cases where it is in my view proper for the prosecution to retain a discretion not to disclose to the defence either a particular statement or the particulars of the maker of the statement. Depending on the particular circumstances, examples might arise in situations mentioned at (iii) (iv) and (v) of paragraph 16.24, it is not possible to give an exhaustive list of such circumstances but of particular importance here is the need to protect the identity of informers, not only

for their own safety but to ensure that the supply of information about criminal activities does not dry up (Marks v Beyfus 1890 25 Q.B.D. 495).

16.28. In R v Birtles 1969 53 Cr. App. R 469 the Lord Chief Justice said "The court recognises that, disagreeable as it may seem to some people, the police must be able in certain cases to make use of informers, and further - and this is really a corollary - that within certain limits such informers should be protected. At the same time, unless the use made of informers is kept within strict limits, grave injustice may result. In the first place, it is important that the court of trial should not be misled ... There is of course no harm in not revealing the /mere/ fact that there is an informer, but it is quite another thing to conceal facts which go to the quality of the offence. Secondly, it is vitally important to ensure, so far as possible, that the informer does not create an offence, that is to say incite others to commit an offence which those others would not otherwise have committed. It is one thing for the police to make use of information concerning an offence that is already laid on. In such a case the police are clearly entitled, indeed it is their duty, to mitigate the consequences of the proposed offence, for example to protect the proposed victim, and to that end it may be perfectly proper for them to encourage the informer to take part in the offence, or indeed for a police officer himself to do so. But it is quite another thing, and something of which this court thoroughly

disapproves, to use an informer to encourage another to commit an offence or indeed an offence of a more serious character which he would not otherwise commit - still more so if the police themselves take part in carrying it out."

16.29. In R v Mealey and Sheridan 1975 60 Cr. App. R 59 the Lord Chief Justice said "So far as the propriety of using /informers/ we think it right to say that in these days of terrorism the police must be entitled to use the effective weapon of inflitration. In other words, it must be accepted today, indeed if the opposite was ever considered, that this is a perfectly lawful police weapon in appropriate cases, and common sense indicates that if a police officer or anybody else infiltrates a suspect society, he has to show a certain amount of enthusiasm for what the society is doing if he is to maintain his cover for more than five minutes. Accordingly one must expect, if this approach is made by the police, that the intruder who penetrates the suspect organisation does show a certain amount of interest and enthusiasm for the proposals of the organisation even though they are unlawful. But of course, the intruder, the person who finds himself placed in the organisation, must endeavour to tread the somewhat difficult line between showing the necessary enthusiasm to keep his cover and actually becoming an agent provocateur, meaning thereby someone who actually causes offences to be committed which otherwise would not be committed at all."

16.30. The Home Office issued a circular 97/1969 to Chief Constables recognising that informants properly employed were essential to criminal investigation and that within limits they ought to be protected. Although some details of that circular were made public (New Law Journal 1969 p. 513) the Royal Commission will doubtless be supplied with a copy by the Home Office.

16.31. In those very exceptional cases to which I have referred where it is proper that disclosure to the defence of a statement or particulars of a witness should not be made it is in my view a decision that can only effectively be made by those to whom the material facts are known, namely the legal representatives of the prosecution. Although the decision may on occasions be initially made in my Department, Counsel instructed by the prosecution is always given all the material facts so that not only is a check on the propriety of the decision made but also Counsel for the prosecution is not hindered in his duty to ensure that any relevant evidence is either led by him or made available to the defence. Those representatives have in many instances to be trusted to carry out a variety of duties without any kind of check that they are doing so (e.g. revealing previous convictions of the prosecution witnesses to the defence, supplying details of previously inconsistent statements by prosecution witnesses etc). The decision as to disclosure or non-disclosure in those exceptional cases I have mentioned is a similar duty that must be left to the probity of the legal representatives of

the prosecution.

16.32. There are of course occasions when it is clear that although it would not be proper to disclose the identity of a witness or the content of his statement, there may be some fact to which that witness can speak which would assist the defence. Such factual matter can be adduced without any unwarranted disclosure, by the prosecution making an admission under Section 10 Criminal Justice Act 1967.

(c) Prosecution's possession of statement by witness inconsistent with his oral evidence.

16.33. Where a witness whom the prosecution calls gives evidence on a material issue and the prosecution have in their possession an earlier statement from the witness which is materially inconsistent with such evidence, it is the duty of the prosecution to inform the defence of the fact. It is suggested at paragraph 443a Archbold 39th Edition that the better practice is in such circumstances for the prosecution to give the defence a copy of the witness' statement; this practice is one I adopt. It is often the case that the need to give the defence a copy of such a witness' statement when a witness gives inconsistent oral evidence does not arise because a copy of the statement will have been supplied to the defence earlier; for example even if the prosecution intend to call a witness to give oral evidence at committal proceedings it is my usual practice to supply a copy of such a statement to the defence prior to the committal proceedings.

(d) Section 48 Criminal Law Act 1977.

16.34. Power is contained in Section 48 Criminal Law Act 1977 to make rules as to the furnishing of information by the prosecutor in criminal proceedings. At the time of the preparation of this part of my written evidence no rules have been made. It may be that before the Royal Commission makes its recommendations rules may have been proposed or made under that section which rules the Royal Commission may wish to comment upon so I shall state my views generally. I have also expressed my views at (b) above with regard to the supply of the statement of a witness whom the prosecution do not intend to call. Accordingly I shall confine myself here to the statements of prosecution witnesses.

16.35. So far as cases which are dealt with summarily it is my practice on request to give to the defence verbally an outline of the evidence on which the prosecution rely so that the defence are aware of the case which they have to meet. Additionally if such summary cases are difficult or complicated or where the interests of justice require it, it is my practice to supply copies of the statements of the prosecution witnesses to the defence on request. I set out the terms of a directive issued to the members of my Department in 1974:

"PROVISION OF STATEMENTS

Solicitors are reminded of the policy which has been adopted with regard to the provision of statements to defending solicitors in cases being dealt with summarily. There has been great pressure recently for a change in the

law to make it obligatory for the prosecution to serve witness statements on the defence in all summary cases as well as the indictable cases where statements are now served. This has been under discussion with the Home Office. The burden which would fall upon prosecuting authorities if this change were put into effect would be very great. Accordingly, the Solicitor has suggested that there should be some directive either from the Home Office or from the Lord Chief Justice to the effect that prosecuting authorities should provide statements in summary cases to the defence on request if the cases are difficult or complicated or where the interests of justice require it. This would not apply in traffic cases.

As stated in earlier directives all solicitors preparing cases must disclose at the request of defending solicitors statements which fall within the above definition. In some cases it will be sufficient to give the defending solicitor over the telephone the gist of the statement or statements. Where there is sufficient time copies of the statements should be provided. It will be for the solicitor preparing the case in this Department to decide whether the case is difficult or complicated or one where it is essential in the interests of justice for the defence to know the details of the statements. It is important that solicitors exercise their discretion with regard to this carefully and when in any doubt give the benefit of the doubt to the defence.

21.10.1974. R.E.T.B."

16.36. However, apart from those circumstances and the general duties of the prosecution outlined at paragraph 16.33 above it is not my practice to supply statements of prosecution witnesses in summary cases. I feel that any requirement to supply copy statements of prosecution witnesses in every summary case (other than those referred to above) is contrary to the dispatch and comparative informality of summary trial which I referred to at paragraph 16.3.

16.37. The fact that trials on indictment tend to receive more publicity than summary trials tends to disguise the fact that a very high proportion of criminal cases are dealt with summarily in Magistrates' Courts, in 1977 in the Metropolitan Police District 94.55%. In many summary cases particularly where police are the sole witnesses, the evidence may be contained solely in note form and no statements will be in existence. To require that in every summary case copy statements should be prepared for service would impose a very heavy burden on the prosecution both in time and cost. In most straightforward summary cases the likelihood of the defence being taken by surprise by the prosecution evidence is remote but should the defence be so embarrassed the remedy lies in the existing procedure for an application for an adjournment under Section 14 Magistrates' Courts Act 1952 rather than a rigid requirement to produce copy statements in every summary case.

16.38. So far as trials on indictment are concerned here again I shall confine my remarks to the statements of witnesses being called by the prosecution having already dealt at paragraph 16.21 et seq with the case of witnesses whom the prosecution do not intend to call but from whom a statement has been taken.

16.39. Prior to committal the defence will have been served under the provisions of section 2 Criminal Justice Act 1967 with that evidence contained in prosecution witnesses statements upon which the prosecution intend to seek a committal. The prosecution is not under a duty at committal to adduce evidence from every witness whom it intends to call at the trial. In R v Epping and Harlow Justices 1973 1 All ER 1011 the Lord Chief Justice said .... "it is clear that the function of committal proceedings is to ensure that no one shall stand trial unless a prima facie case has been made out. The prosecution have the duty of making out a prima facie case, and if they wish for reasons such as the present /so that a young girl who was alleged to have been the victim of a sexual assault should not have to go through the ordeal of giving evidence both at committal and trial/ not to call one particular witness, even though a very important witness, at the committal proceedings, that in my judgement is a matter within their discretion".

16.40. There may be other reasons why the prosecution do not adduce evidence at committal from witnesses the prosecution intends to call at the trial (e.g. a witness not

available to make a statement prior to committal or the preparation of scientific evidence not completed prior to committal). Such additional evidence, whether from new witnesses or additional evidence from existing witnesses, is notified to the defence between committal and trial by a notice accompanying copy statements of the additional evidence.

16.41. The statement of a prosecution witness served for committal purposes under section 2 Criminal Justice Act 1967, unless that witness gives oral evidence at the committal, forms the deposition of that witness. It follows that the contents of that statement must be restricted, in the same way as if the witness gave oral evidence, to evidence which is relevant and admissible. Indeed Section 2 Criminal Justice Act 1967 provides that in committal proceedings a written statement by any person shall if the conditions referred to in the section are satisfied "be admissible as evidence to the like extent as oral evidence to the like effect by that person" . In practice if a written statement so tendered contains a small quantity of inadmissible evidence the Magistrates' Court can be asked to exercise its power under Rule 58(5) Magistrates' Courts Rules 1968 to mark the offending passage as inadmissible, but clearly statements must be prepared as far as practicable to avoid unnecessary reliance on Rule 58(5).

16.42. A police officer taking a statement from a witness particularly in an involved and complicated case will often take what is sometimes called an exploratory statement or statements not knowing at that time what other matters will

be revealed by the enquiry. It follows that the relevance or admissibility of the contents of such statements cannot be ascertained until the enquiry has been completed and the extent and nature of the charges on which a committal will be sought have been decided. It is for this reason that it is sometimes necessary to edit statements of prosecution witnesses. The necessity and method of so doing was dealt with in a Practice Direction by the Lord Chief Justice reported at 1969 1 WLR 1862.

16.43. The only comment I would like to make on the Practice Direction itself is the requirement that where there is a legal representative of the prosecutor any such edited statement should be prepared by him. It seems to me that the like effect would be achieved if the edited statement was prepared by police provided that its form was submitted to the prosecutor's legal representative. Sir Henry Fisher at paragraph 29.10 of his Report on the Confait Inquiry said "I accept that no harm may be done if the police prepare the edited statement and then present it to the legal representative for approval, though this would be a breach of the Practice Direction".

16.44. It follows therefore that apart from copy statements of prosecution witnesses served on the defence under the provisions of Section 2 Criminal Justice Act 1967 there may

be other statements from those same witnesses not served under that section. However in the majority of cases there is no objection to providing copies of the earlier statements to the defence and this practice I follow. To impose a rigid duty on the prosecution to supply copies of those statements of the prosecution witnesses would in my view be wrong. It is impossible to set out a comprehensive list of circumstances in which the prosecution might with justification wish to withhold not the existence of an earlier statement but information edited out of such a statement but typical examples are those I referred to at (iii) (iv) and (v) of paragraph 16.24. Of course in these cases the defence has to be notified that the prosecution is in possession of an earlier statement by the witness the contents of which they do not intend to disclose.

16.45. I wish to make it quite clear that the occasions when the contents of any information edited out of a statement are withheld from the defence are extremely rare. A typical example would be where the witness in his earlier statement makes a specific criminal allegation against a named person who is still being sought by police. As in those very exceptional cases where both the identity of a witness and the contents of his statement are withheld from the defence (paragraph 16.27) so also in these exceptional cases is Counsel for the prosecution in full possession of all the material facts so that not only is there a check on the propriety of the decision made but also Counsel for the

for the prosecution is not hindered in his duty to ensure that all relevant evidence is either led by him or made available to the defence.

CHANGES OF CHARGE

Summary trial or committal proceedings

16.46. It is open to the prosecution on a consideration of the existing evidence or on receipt of further evidence prior to the hearing of a case on summary trial or at committal proceedings to prefer a charge or charges additional to or in substitution for the initial charge or charges. In the Metropolitan Police District this would occur in the light of advice received from the Metropolitan Police Solicitor or from the Director of Public Prosecutions. In those straightforward cases where police are not legally represented the accused would almost invariably only be prosecuted on the charge for which he was arrested. Very rarely would additional or alternative charges be preferred in which event they would be preferred by the officer in charge of the case relying if necessary on advice from his senior officers.

16.47. Additionally it is open to the prosecution to apply for the wording of an existing charge to be amended. If the Court grants the application there is no question of a defendant being prejudiced by such amendment because if the defendant has been misled by the need to amend the charge, the Court is under an obligation to adjourn the case so that the defendant is given a proper opportunity of meeting the case against him (Section 100(2) Magistrates' Courts Act 1952).

16.48. A Magistrates' Court considering evidence in committal proceedings is not restricted to committing or refusing to commit a defendant for trial on the charges which have been preferred against him but may commit him for any indictable offence disclosed by the depositions (Section 7 Magistrates' Courts Act 1952).

16.49. If this topic was included among those listed by the Royal Commission in its invitation to submit written evidence because it was felt that the practice might be unsatisfactory or in some way operated unfairly to those accused of criminal offences I do not see it in either of these lights. An arrest or a decision to prosecute frequently has to be made with some speed, often at times of stress on the evidence then available. Further enquiries with regard to the existing evidence or the acquisition of further evidence may reveal that the initial allegation is less or more serious than at first thought or that additional offences are disclosed. It is in the light of these further enquiries or additional evidence that further charges would be preferred additional to or in substitution for the initial charge or charges. A request by the prosecution at a defendant's initial or subsequent appearance at Court for an adjournment or remand while any necessary enquiries are being made or a similar request by the defence for an adjournment or remand in order to prepare its defence are covered by the provisions of sections 6 and 14 Magistrates' Courts Act 1952.

16.50. Accordingly I do not recommend any alterations in the provisions governing changes of charge in summary trial and committal proceedings.

Trial on indictment

16.51. Where a bill of indictment is preferred following the defendant's committal for trial at a Magistrates' Court, the combined effects of section 2(2)(a) Administration of Justice (Miscellaneous Provisions) Act 1933 as amended and R v Groom 1976 2 All ER 321 is as follows:- The counts against a particular defendant in an indictment can only be (i) in respect of charges for offences for which he was committed (not necessarily framed exactly as at committal but without substantial departure from such charges, R v McDonnell 1966 1Q.B. 233) or (ii) counts, either in addition to or in substitution for charges on which he was committed, which are founded on facts or evidence disclosed in the statements relating to his committal. Although notice of additional evidence can be served after committal such additional evidence cannot be used to found an additional count in the indictment. It follows therefore that there should be no question of the defence being taken by surprise by counts which appear in an indictment following committal proceedings because either there must have been a committal on those counts or the evidence in support of those counts must be contained in the statements which were served prior to committal. In any event it is always open to the defence to object to the inclusion in the indictment of any such added or substituted count by motion to quash on the grounds that the particular count is not founded on facts or evidence disclosed in the proceedings before the examining justices.

16.52. In the same way as it is possible to have a charge amended at summary trial so also are there provisions for amending a defective indictment. These provisions are contained in section 5 Indictments Act 1915 and provide for such amendments "as the court thinks necessary to meet the circumstances of the case, unless, having regard to the merits of the case, the required amendments cannot be made without injustice, and may make such order as to the payment of any costs incurred owing to the necessity for amendment as the court thinks fit". Additionally the same section gives the court power to order a separate trial of any count or counts in an indictment if it is "of the opinion that a person accused may be prejudiced or embarrassed in his defence by reason of being charged with more than one offence in the same indictment, or that for any other reason it is desirable to direct that the person should be tried separately for any one or more offences charged in an indictment". The section empowers the court before or at any stage of a trial to postpone the trial if it is expedient as a consequence of such amendment or the ordering of a separate trial of a count.

16.53. Once again these provisions seem both fair and sensible and do not in my view require alteration.

CHANGES OF PLEA

Change of plea from guilty to not guilty

16.54. For a plea of guilty to be binding and effective it must be unambiguous (R v Field 1943 29 C.A.R. 151). It follows that if a defendant pleads guilty and then puts

forward a statement which if true would be a defence to the charge, the Court should enter a plea of not guilty (R v Durham Quarter Sessions ex parte Virgo 1952 1 All ER 466). An application to change a plea of guilty to one of not guilty is possible at any time before final sentence is passed (S, an infant v Recorder of Manchester and Others 1971 A.C. 481). That there is a need for caution in dealing with such applications to change a plea was explained by the Lord Chief Justice in R v Mutford and Lothingland Justices ex parte Harber 1971 55 C.A.R. 57 when he said ..."there is clearly a danger ..... that accused persons content to plead guilty... will endeavour to change their plea as soon as they realise that they are at risk of greater punishment /than they expected/".

16.55. These sensible provisions work well and give rise to no problems when the application to change the plea of guilty is made to the court of trial before whom the plea of guilty was made whether that court of trial is a Magistrates' Court or a Crown Court, because the Court in dealing with the application is personally seized of the circumstances of the initial plea as well as the grounds of the application to change it.

16.56. Difficulties however often occur when the plea of guilty was made before a Magistrates' Court and the application to change the plea is made before the Crown Court either on appeal, or if there has been a committal for sentence to the Crown Court, under the provisions of

sections 28 or 29 Magistrates' Courts Act 1952 as amended. The application to the Crown Court to change a plea of guilty made in the Magistrates' Court can only be made on the ground that the plea before the Magistrates was equivocal if the case is before the Crown Court on appeal but if the case is before the Crown Court on sentence the application can be made even if the plea before the Magistrates' Court was unequivocal. In R v Fareham Justices ex parte Long 1976 Crim. L.R. 269 and in R v Coventry Crown Court and Another 1978 Crim. L.R. 356 the Crown Court referred cases back to the Magistrates' Court and in both cases the justices refused to deal with the case so that the position in both cases was that there was a defendant subject to a charge but no court prepared to deal with the case. In both cases application had to be made to the Divisional Court. In the former case the Magistrates' Court was directed to hear the case and in the latter case the Crown Court's order directing the Magistrates' to re-hear the case was quashed.

16.57. It is certainly unsatisfactory that a Magistrates' Court finds that the circumstances of proceedings which have taken place before it on a guilty plea have either been misrepresented to the Crown Court or that the Crown Court has failed to make sufficient inquiry into the proceedings before the Magistrates' Court. In either such case the Magistrates' Court finds itself directed to re-hear a case when it is aware that such a course is without justification. In one such case which has yet to be heard by the Divisional Court,

an experienced Stipendiary Magistrate in refusing to re-hear a case sent back by the Crown Court said "I can see ..... no valid basis for the Crown Court to have exercised its discretion as it did. I may be criticized for even presuming to examine the situation but ... I see no valid basis for the exercise of this discretion".

16.58. The unsatisfactory nature of the law in this respect means that where in such a situation both the Crown Court and the Magistrates' Court refuse to deal further with the case this entails the expense of an application to and subsequent hearing before the Divisional Court resulting in a direction to either the Crown Court or the Magistrates' Court to deal with the case. Such procedure causes yet further delay before a defendant is subsequently acquitted or convicted. In some cases there is perhaps a tendancy for the Crown Court to grant an application too readily on the application of Counsel without a careful consideration of evidence as to what did occur in the Magistrates' Court. In an attempt to overcome this problem I RECOMMEND that it be statutorily enacted as follows: When a defendant who has pleaded guilty at a Magistrates' Court to an offence subsequently makes application to the Crown Court (dealing with the case either for the purpose of sentence or by way of appeal) to change his plea, the Crown Court's decision shall be binding on the Magistrates' Court. The only grounds on which the Crown Court should accede to the application are that it is satisfied on evidence adduced before it (having

given the applicant and the prosecution an opportunity of adducing such evidence) either (a) that the plea of guilty was equivocal or (b) if the plea of guilty was unequivocal, additional information not available to the Magistrates' Court is revealed to the Crown Court which would have probably caused the Magistrates' Court to have entered a plea of not guilty.

A plea of guilty or a change of plea from one of not guilty to guilty

16.59. It is doubtless because it is necessary that a defendant should have a complete freedom of choice whether or not to plead guilty (R v Inns 1975 Crim. L.R. 182) that (subject to the exception provided by the provisions of the Magistrates' Courts Act 1957 which relate to certain summary offences dealt with under a special procedure) the law requires a plea to be entered by a defendant personally and not through his Counsel or anyone else on his behalf (R v Ellis (James) 1973 57 Cr. App. R. 571) so that when a defendant pleads guilty he is heard to do so.

16.60. It seems to me relevant to consider how far it is and should be permissible for that freedom of choice to be influenced by two factors while still remaining a defendant's free choice. The factors I have in mind are (a) the likely penalty which the Court will impose and (b) the willingness of the prosecution not to proceed on other counts or charges, frequently referred to together as "plea-bargaining".

(a) Likely penalty which the Court will impose.

16.61. I am completely opposed to a system of plea-bargaining such as is now in practice in America where not only do Courts indicate what precise penalty they would impose on a plea of guilty but actively are seen to negotiate with a defendant or his legal advisors on the type and extent of penalty to be imposed. Such a system in my view not only gravely puts at risk the freedom of choice as to a plea but brings any system of criminal justice into disrepute.

16.62. The question of plea-bargaining was considered by the Court of Appeal in R v Turner 1970.2 Q.B. 321 in which the Court made four observations which were:-

1. Counsel must be completely free to do what is his duty, namely, to give the accused the best advice he can and if need be advice in strong terms. This will often include advice that a plea of guilty, showing an element of remorse, is a mitigating factor which may well enable the court to give a lesser sentence than would otherwise be the case. Counsel of course will emphasise that the accused must not plead guilty unless he has committed the acts constituting the offence charged.

2. The accused, having considered counsel's advice, must have a complete freedom of choice whether to plead guilty or not guilty.

3. There must be freedom of access between counsel and judge. Any discussion, however, which takes place must be between the judge and both counsel for the defence and counsel

for the prosecution. If a solicitor representing the accused is in the court he should be allowed to attend the discussion if he so desires. This freedom of access is important because there may be matters calling for communication or discussion, which are of such a nature that counsel cannot in the interests of his client mention them in open court. Purely by way of example, counsel for the defence may by way of mitigation wish to tell the judge that the accused has not long to live, is suffering maybe from cancer, of which he is and should remain ignorant. Again, counsel on both sides may wish to discuss with the judge whether it would be proper, in a particular case, for the prosecution to accept a plea to a lesser offence. It is of course imperative that so far as possible justice must be administered in open court. Counsel should, therefore, only ask to see the judge when it is felt to be really necessary, and the judge must be careful only to treat such communications as private where, in fairness to the accused person, this is necessary.

4. The judge should, subject to the one exception referred to hereafter, never indicate the sentence which he is minded to impose. A statement that on a plea of guilty he would impose one sentence but that on a conviction following a plea of not guilty he would impose a severer sentence is one which should never be made. This could be taken to be undue pressure on the accused, thus depriving him of that complete freedom of choice which is essential. Such cases, however, are in the experience of the court happily rare. What on

occasions does appear to happen however is that a judge will tell counsel that, having read the depositions and the antecedents, he can safely say that on a plea of guilty he will for instance, make a probation order, something which may be helpful to counsel in advising the accused. The judge in such a case is no doubt careful not to mention what he would do if the accused were convicted following a plea of not guilty. Even so, the accused may well get the impression that the judge is intimating that in that event a severer sentence, maybe a custodial sentence would result, so that again he may feel under pressure. This accordingly must also not be done.

The only exception to this rule is that it should be permissible for a judge to say, if it be the case, that whatever happens, whether the accused pleads guilty or not guilty, the sentence will or will not take a particular form, e.g. a probation order or a fine, or a custodial sentence.

Finally, where any such discussion on sentence has taken place between judge and counsel, counsel for the defence should disclose this to the accused and inform him of what took place."

16.63. In R v Cain 1976 Crim. L.R. 464 the Court of Appeal qualified the judgement of Lord Parker's observations in R v Turner in two respects:-

"(i)(a) Lord Parker: "where any such discussion on sentence has taken place between judge and counsel, counsel

for the defence should disclose this to the accused and inform him of what took place."

(b) Qualification: It was not at all uncommon for a defence counsel who did not know the judge well and who was not quite familiar with the tariff of sentencing to wish to get some guidance from the judge as to what sentence he had in mind, so that he might accordingly advise his client. One of the advantages that flowed from the close relationship between judge and barrister was that the barrister in that situation could go to the judge and ask him for guidance. If the judge felt disposed to give it to him, counsel would then have a reliable idea of what sort of sentence his client faced, and could advise him properly. But the whole point would be destroyed if he disclosed what the judge told him. The confidentiality in their relationship would be broken.

(ii) (a) Lord Parker: "A statement that on a plea of guilty /the judge/ would impose one sentence but that on a conviction following a plea of not guilty he would impose a severer sentence is one which should never be made."

(b) Qualification: That /sentence/ required further investigation because it was trite to say that a plea of guilty would generally attract a somewhat lighter sentence than a plea of not guilty after a full dress-contest on the issue. Everybody knew that it was so, and there was no doubt about it. Any accused person who did not know about it should know it. The sooner he knew the better. What was being condemned by Lord Parker was a more precise offer or

suggestion on the part of the judge in which the actual penalties were more closely defined. The judge [in such circumstances] would, in a sense be inviting the accused to bargain with him, and that was something which should be condemned."

16.64. The observations and their qualifications were the subject of the following Practice Direction 1976 Crim. L.R. 561 "The decision in Cain has been subject to further consideration by the Court of Appeal. In so far as it is inconsistent with Turner the latter decision should prevail". It is perhaps with some justification that the Editors of the fifth supplement to the 39th Edition of Archbold comment "The exact implications of this Direction are not easy to determine".

16.65. In my view it is both dangerous and open to objection for a Court to give any indication to a defendant whether directly or through his legal advisors, before a defendant enters a plea, of the sentence that might be imposed whether in general or specific terms. I appreciate that the penultimate paragraph of the observations in R v Turner which I quote above provides that it should exceptionally be permissible for a judge to say that whether or not a plea of guilty is tendered the sentence will or will not take a particular form. However, in R v Ryan 1978 Crim. L.R. 306 the judge said (admittedly on the basis of a plea of guilty) that he would consider a probation order or bind over on condition that hospital treatment was undergone; subsequently

on receiving medical reports on the defendant, immediate sentences of imprisonment were imposed. The Court of Appeal said the case was a stark example of the danger of the judge indicating a possible sentence.

16.66. It seems to me and I so RECOMMEND that no Court should be permitted to indicate to a defendant either directly or through his legal advisors prior to a defendant's plea, its view as to a possible sentence either in general or specific terms, with the exception of the information which it was said in R v Cain should be known to every defendant (which one presumes would be given to him by his legal advisors) that a plea of guilty may attract a lighter sentence or be a mitigating factor which would be taken into account in determining sentence.

(b) The willingness of the prosecution not to proceed on other counts or charges.

16.67. A defendant facing more than one count or charge sometimes expresses a willingness to plead guilty to one or more of the offences with which he is charged if the prosecution do not proceed on other counts or charges. The situation can arise in one of three ways. First, where a defendant is prepared to plead guilty to an alternative offence similar to but less in gravity than one to which he is not prepared to plead guilty (e.g. a willingness to plead guilty to an offence of maliciously inflicting bodily harm contrary to section 20 Offences Against the Person Act 1861 but not guilty to an offence of causing grievous bodily harm

with intent contrary to section 18 of that same Act). Second, where a defendant is prepared to plead guilty to an offence or offences of equal or more gravity than other offences to which he is not prepared to plead guilty (e.g. a willingness to plead guilty to six offences of theft but not guilty to two other offences of theft). Third, where a defendant is faced with two charges or counts which are alternative to each other but of similar gravity (e.g. a willingness to plead guilty to an offence of handling stolen property but not guilty to an offence of stealing that same property).

16.68. There are some who may argue that this agreement by the prosecution to accept pleas of guilty to some offences and not guilty to others is a form of plea-bargaining which is repugnant to a proper system of justice and would argue that if the prosecution has seen fit to indict a defendant before a court on a specific charge the prosecution should justify its action in proceeding on that charge. I do not agree. It seems to me perfectly proper for the prosecution to retain its present discretion to agree, or not, as the case may be, to accept pleas of guilty to some offences and pleas of not guilty to others. It is important to remember that this discretion, both in summary trial and in trial on indictment, is not one which rests entirely with the prosecution but is subject to the approval of the Court where the justification or otherwise of the exercise of the discretion in a particular way is dealt with in open Court (R v Bedwellty Justices ex parte Munday 1970 Crim. L.R. 601: R v Soames 1948 32

Cr. App. R. 136).

16.69. In making its decision the prosecution takes and I feel rightly so three matters into account namely (a) the strength of the evidence in support of the counts or charges and how strong or otherwise is the liklihood of a conviction on those matters to which a defendant is not prepared to plead guilty; (b) the justification or otherwise in incurring what in some cases would be the very considerable expense of a contested trial bearing in mind the pleas of guilty offered and (c) the justification in subjecting witnesses to the sometimes unpleasant ordeal and often time-consuming task of giving evidence.

16.70. To summarise my evidence in this Chapter it is that in general no alterations are suggested in the existing procedure and practice with the exception of the following recommendations:-

(1) If at trial on indictment a defendant intends to raise a specific defence not previously disclosed, notice of it should be given to the prosecution in sufficient time and detail prior to trial so that the prosecution have an opportunity of investigating it (paragraph 16.13).

(2) In cases of trial on indictment the defence should notify the prosecution within twenty-one days of the end of the committal proceedings of any aspects of the evidence adduced by the prosecution which it is <u>not</u> intended to dispute at the trial, such notification to have a similar

effect to an admission under section 10 Criminal Justice Act 1967 (paragraph 16.17).

(3) When a defendant who has pleaded guilty at a Magistrates' Court to an offence subsequently makes application to the Crown Court (dealing with the case either for the purpose of sentence or by way of appeal) to change his plea the Crown Court's decision shall be binding on the Magistrates' Court. The only grounds on which the Crown Court should accede to the application are that it is satisfied on evidence adduced before it either (a) that the plea of guilty was equivocal or (b) if the plea of guilty was unequivocal, additional information not available to Magistrates' Court is revealed to the Crown Court which would have probably caused the Magistrates' Court to have entered a plea of not guilty (paragraph 16.58).

(4) No Court should be permitted to indicate to a defendant either directly or through his legal advisors prior to a defendant's plea, its view as to a possible sentence either in general or specific terms (paragraph 16.66).

CHAPTER XVII

(The evidence in this and the preceding Chapter, being concerned with detailed legal matters is that of the Metropolitan Police Solicitor)

THE TRIAL

The admissibility at a trial of oral and written statements made by an accused person during a police investigation

17.1. In Chapter IV the Commissioner made suggestions for alterations to the form of the cautions in the Judges Rules to give effect to his recommendation that a suspect when being questioned by police should not, as at present, be entitled to shelter behind a shield of silence in the sense that although a suspect should still be entitled to remain silent, a court of trial should be entitled to draw what inferences it sees fit from such silence. In that same Chapter he also recommended that provision should be made in the Judges Rules for a printed notice to be given to arrested persons on their arrival at a police station setting out the rights and facilities available to them and of the obligations to which they were subject and further that the rights of a suspect to communicate and consult privately with a solicitor should remain unchanged. I do not wish to repeat the details of those recommendations here but the Royal Commission may wish to bear them in mind when considering my views on the closely allied subject of the admissibility of evidence in relation to oral or written statements made during a police investigation.

17.2. The present position as to admissibility of evidence was neatly summarized by the then Lord Chief Justice in R v May 1952 36 Cr. App. R. 91, albeit in relation to an earlier form of the Rules but the same principle still applies namely "The test of the admissibility of a statement is whether it is a voluntary statement. There are certain rules known as the Judges Rules which are not rules of law but rules of practice drawn up for the guidance of police officers; and if a statement has been made in circumstances not in accordance with the Rules, in law that statement is not made inadmissible if it is a voluntary statement, although in its discretion the Court can always refuse to admit it if the Court thinks there has been a breach of the Rules".

17.3. I shall consider the question under three heads:-

(a) whether or not the Judges Rules or any amendment to that code should be enacted in statutory form;

(b) what should be the test for the admissibility of a defendant's statement;

(c) what should be the effect of any breaches of the Judges Rules and what sanctions should exist to cover any breaches of those Rules.

(a) <u>Whether or not the Judges Rules or any amendment to that code should be enacted in statutory form</u>.

17.4. As the Commissioner pointed out at paragraph 9.3, if his recommendation as to the effect of a suspect's silence during police questioning were to be adopted it would not be

sufficient to vary the Judges Rules because that right of silence in the Judges Rules "merely serves to remind the accused of a right he possesses at common law". Certainly to that extent it would be necessary to remove the effect of that right of silence by statutory enactment, because his recommended cautions would otherwise conflict with the common law.

17.5. Such a statute could incorporate a provision empowering the Secretary of State by statutory instrument to formulate a code to replace the existing Judges Rules and Administrative Directions. But as I indicate later I do not suggest that failure to comply with such a code should automatically render a statement made by an accused person inadmissible. I say this because it would be possible that the effect of a failure to comply with the code might, depending on the circumstances, as now, be no more than a technicality or due to misjudgement or inadvertence by an officer which would in no way affect the voluntariness of a statement. Accordingly I take the view as now that the test for admissibility should remain voluntariness.

17.6. It is important in this context to remember the wide range of offences and type of suspect which police investigations cover. An officer may be investigating a very trivial offence amounting to little more than a nuisance, whether to the public generally or to a particular individual, albeit an act or omission which Parliament in its wisdom has

decreed to be a criminal offence; or an officer may be concerned with a very serious offence where there is a real danger of loss of life or serious bodily injury to a large number of people. The suspect can vary from a frail old lady suspected for the first time in her life of a 'shoplifting' offence to a professional criminal or sex maniac.

(b) What should be the test for the admissibility of a defendant's statement.

17.7. The present position is summarized in principle (e) in the introduction to the Judges Rules namely

"That it is a fundamental condition of the admissibility in evidence against any person, equally of any oral answer given by that person to a question put by a police officer and of any statement made by that person, that it shall have been voluntary, in the sense that it has not been obtained from him by fear of prejudice or hope of advantage, exercised or held out by a person in authority or by oppression".
The prosecution has the onus of satisfying the Court beyond reasonable doubt that the statement was made voluntarily (D.P.P. v Ping Ling 1975 3 All E.R. 175).

17.8. It is quite impossible to lay down any fixed and certain rules which would cover every situation in advance so as to indicate what circumstances would make a statement voluntary or involuntary. What might be oppressive in one case would not necessarily be so in another. In R v Priestly 1965 51 Cr. App. R. 1 Mr Justice Sachs as he then was said,

"Whether or not there is oppression in an individual case depends upon many elements. I am not going into them all. They include such things as the length of time intervening between periods of questioning, whether the accused person had been given proper refreshment or not and the characteristics of the person who makes the statement. What may be oppressive as regards a child, an invalid or an old man or someone inexperienced in the ways of this world may turn out not to be oppressive when one finds that the accused is a tough character and an experienced man of the world".

17.9. In R v Roberts 1970 Crim. L.R. 464 the then Lord Chief Justice commented on the word "oppression", although his comments only appear in the full judgement and not from the law report to which I have referred. In the judgement he said "Oppression as such has never been defined, and it is just as well because it may take a variety of different forms, the essence of it being that it is such as to sap or has sapped the free will which must exist before a confession can be said to be voluntary; or, as it has been put in some cases, such as to overbear the mind of the person being interrogated. It must be borne in mind that the question in each case is whether the confession which has been made had been voluntary in the sense that the mind has not been overborne or the free will sapped, and there is no doubt when one is dealing with a child that it needs stronger evidence to prove that in the case of such a child with no parent present, the prosecution have proved that the statement is voluntary".

17.10. There are those who argue that the test of admissibility should be based not only on the principle of voluntariness but also on the disciplinary principle. In other words to encourage compliance with the Judges Rules or any code replacing them, any breach of the Rules or code would automatically render a statement by an accused inadmissible. I am totally opposed to this exclusionary rule or disciplinary principle as a test of admissibility which should be solely confined to the question of voluntariness. I deal subsequently in this Chapter with the effect of breaches and sanctions for breaches of the code. But to incorporate a disciplinary principle as a test for admissibility could result in a perfectly voluntary statement being ruled inadmissible because of some perhaps unintentional breach or oversight of the code by an officer. Thus if the Commissioner's recommendation as to the new cautions were adopted and a police officer failed to administer the First Caution (see 1. below) through inadvertence or otherwise at the appropriate time, but the person questioned made a perfectly voluntary statement, the admission of such a statement would be wholly unobjectionable. On the other hand if an officer failed to administer the caution and the suspect did

Footnote

1. First Caution (paragraph 4.13)

("I suspect that you /the nature of the offence(s) to be outlined by the officer in simple language/. You will be asked questions about it (them). If you are prosecuted later and have not answered the questions now, the Court will be told of your failure to answer and your evidence may be less likely to be believed").

not mention some relevant matter, the Court should not be entitled to draw any inference from that failure. It is in the public interest that voluntary statements should be admitted and to render the public at a disadvantage because of a breach (not affecting voluntariness) by an officer is wielding the stick of discipline in the wrong direction.

17.11. Again there are some who argue that if a statement be ruled as inadmissible because it was not voluntary, the discovery of facts arising from that statement should likewise be inadmissible. Thus if a suspect or an accused makes a statement subsequently ruled inadmissible which discloses some positive fact (e.g. that a gun is to be found at a certain location) it is argued that evidence as to the finding of the gun is tainted with illegality and evidence as to that finding should also be inadmissible. I oppose this argument which overlooks the reason for an involuntary statement being ruled inadmissible; it is ruled inadmissible not necessarily because the contents <u>are</u> untrue but because the circumstances in which it was taken cast doubts upon its reliability. However the finding of property as a result of a statement held to be inadmissible is a factual matter which exists quite independently from the reliability or otherwise of the statement.

17.12. Accordingly <u>I RECOMMEND</u> that breaches of the Judges Rules or any code replacing them which are found not to have affected the voluntariness of a statement by a suspect or an accused person should not render that statement inadmissible but that the test for the admissibility or

exclusion in evidence of an oral or written statement to police by a suspect or accused person be as now based on the voluntary principle and not on an exclusionary rule or disciplinary principle and that a Court should retain its present discretion to admit or reject such a statement on that basis. Furthermore I RECOMMEND that as at present facts revealed by a statement which is subsequently ruled inadmissible should be admissible in evidence if capable of proof by means other than the inadmissible statement.

Inducements

17.13. Principle (e) to the Judges Rules interprets voluntary "in the sense that /the statement/ has not been obtained from him by fear of prejudice or hope of advantage, exercised or held out by a person in authority or by oppression". Obviously a statement obtained as a result of violence or oppression cannot be said to be a voluntary statement. What however I do find unsatisfactory so far as the present law is concerned is the fact that any threat or inducement however mild or slight uttered or held out by a person in authority makes a resulting confession inadmissible. My views in this respect were shared by the Criminal Law Revision Committee and as I shall indicate later in this Chapter I adopt the recommendation which the majority of that Committee made (see paragraph 65 of that Committee's Eleventh Report Comnd 4991).

17.14. It is difficult to find anything but confusion in the authorities as to what is or is not an inducement. A few examples will suffice to make this point:

"Don't run your soul into more sin but tell the truth" (R v Sleeman 1853 6 Cox 245) - no inducement.

"I think it would be better if you made a statement and told me exactly what happened". (R v Richards 1967 51 Cr. App. R. 266) - an inducement.

"You had better as good boys tell the truth" (R v Reeve and Hancock 1872 L.R. 1CCR 362) - no inducement.

"I should be obliged to you if you would tell us what you know about it; if you will not, of course, we can do nothing". (R v Partridge 1836 7 C & P 551) - an inducement.

17.15. An interviewing police officer may not even himself have uttered the inducement because it is sufficient that he was present and did not contradict it. Thus in R v Thompson The Times 18th January 1978 a social worker present when a juvenile was being interviewed by police twice interrupted the interview saying first "Do not admit something you have not done. But it is always the best policy to be honest. If you were at the house, tell the officers about it" and later, "If you were concerned, tell him about it and get the matter cleared up for your own sake". The accused's confession was held inadmissible.

17.16. The present position that any inducement renders a confession inadmissible would have to be altered if the Commissioner's recommendation as to the effect of an arrested suspect's silence to police questioning (paragraph 4.27) were implemented because his suggested first caution (paragraph 4.13) and second caution (paragraph 4.15) might well themselves said to be (perfectly properly I submit) inducements.

17.17. But apart from a consideration of the Commissioner's recommendation with regard to silence it seems to me unsatisfactory that any inducement however slight renders a confession inadmissible, even if an inducement did not in fact in the circumstances of a particular case make a confession unreliable.

17.18. Accordingly I RECOMMEND (as did the Criminal Law Revision Committee at paragraph 65 of its Eleventh Report) that the rule as to the admissibility of a confession made as a result of a threat or inducement be limited to threats or inducements of a kind likely in the circumstances existing at the time to produce from an accused an unreliable confession.

17.19. As to the contents of any new form of the Judges Rules, apart from the basic test of voluntariness with which I have just dealt and the provisions the Commissioner recommended at paragraphs 4.12 to 4.19 (with regard to cautions etc) I RECOMMEND the retention of the existing guidelines set out in the Administrative Directions on Interrogation and the

taking of statements contained in Appendix B to the Judges Rules paragraphs 1 to 7 with the following modifications necessary to meet the Commissioner's recommendations namely -

Paragraph 2 substituting reference to the Commissioner's recommended First and Second Cautions (paragraphs 4.13 and 4.15) for reference to Rule II and III.

Paragraph 6(a) Deleting the form of caution there set out and replacing it by the Commissioner's recommended Second Caution.

(c) What should be the effect of breaches of the Judges Rules and what sanctions should exist to cover any breaches of those rules?

17.20. I have already recommended above that the test for the admissibility or not of an oral or written statement to police by a suspect be as now the voluntary nature or otherwise of that statement.

17.21. Any breach of the code is a matter which should be taken into account by a Court in deciding whether or not a statement be voluntary. But it seems to me to be a matter of common sense that provided a Court is satisfied that any breach of the code did not affect the voluntariness of the statement that breach should not affect the admissibility of the statement.

17.22. There are those who argue that since the purpose of such a code is not only to ensure the voluntariness of a statement but to ensure the well being of a suspect, the

is more likely to be observed strictly to the letter the result of <u>any</u> breach (even due to an oversight) were have the automatic effect of making a statement inadmissible even if it were an entirely voluntary statement.

17.23. Such an argument seems to me to ignore the purpose of a trial. A trial is held not for the benefit of police or to investigate police behaviour but for the benefit of the public to determine the guilt or otherwise of an accused person. In coming to its conclusion as to guilt or otherwise the Court in deciding whether or not a statement made by the accused is voluntary may have to consider <u>for that purpose</u> whether or not there were any breaches of the code but if those breaches do not affect the voluntariness of the statement, the fact that there were breaches in no way touches upon the fact of the guilt or otherwise of the accused.

17.24. It is pertinent to realise that the phrase "strict observance of the Judges Rules" avoids recognition of the fact as the Commissioner indicated at paragraph 9.4. that the breach or observance of the Judges Rules is not always a question which is clear cut, even if a given set of facts are agreed. The correct observance often depends upon a question of correct judgement in particular circumstances e.g. should a caution have been administered earlier or even later than it was in fact administered or was a refusal to allow a suspect access to a solicitor at a particular point in time justified on the basis that

hindrance was reasonably likely to be caused to the processes of investigation or the administration of justice. Lawyers, after careful consideration of a particular set of circumstances often hold opposing views as to the correct application of the Rules to those circumstances. It is therefore not surprising that police officers with the need to make instant judgements are sometimes found to have erred.

17.25. What sanctions should exist to cover any breaches of the code? Some who pose this question do so under the mistaken impression that no sanctions exist beyond the exclusion of a statement at the trial of a suspect; others acknowledging that such sanctions do exist suggest that they are not sufficient.

17.26. It is my view that the existing sanctions for the punishment of any malpractice by police towards a person whether in custody or not are perfectly adequate. I have in mind sanctions by way of proceedings against a police officer for criminal and disciplinary offences and civil actions to which the Commissioner referred in Chapter IX.

17.27. In cases of real oppression for example assault by an officer, it is of course open to any person to institute criminal proceedings against a police officer. Quite apart from such private prosecutions, if any complaint is made by a member of the public against a member of a police force the chief officer of police is under a statutory duty to cause that complaint to be investigated

(unless the complaint alleges an offence with which that officer has been charged) and the chief officer of police is under the further statutory duty of submitting the report of that investigation to the Director of Public Prosecutions unless the chief officer of police is satisfied that no criminal offence has been committed (Section 49 Police Act 1964). That duty is interpreted in this Force in such a way that <u>every</u> complaint case involving a police officer is submitted to the Director of Public Prosecutions if there is any evidence however slight to indicate that a criminal offence may have been committed by the officer.

17.28. As the Commissioner indicated at paragraph 9.8 another sanction is that provided by disciplinary proceedings against police officers. I am not suggesting that a comparatively trivial breach of the Judges Rules (e.g. a failure to record the time at which a statement began and ended - Rule III(c)) would be made the subject of disciplinary proceedings. It is far more probable if such a breach were established that suitable words of advice would be given to the officer; it is very likely that the Police Complaints Board would not dissent from such action. However for more reprehensible conduct towards a person in custody disciplinary proceedings would be taken.

17.29. In this connection it is important to realise that prior to the Police Act 1976 whether or not disciplinary proceedings were brought against a police officer was entirely within police discretion. This is no longer the

case because of the introduction by the Police Act 1976 of the entirely independent Police Complaints Board none of whose members can be any person who is or has been a constable in any part of the United Kingdom. Now where a chief officer of police has received a report of an investigation into a complaint by a member of the public under Section 49 Police Act 1964 and has not preferred disciplinary charges he must send (subject to certain exceptions e.g. where the complaint has been withdrawn) to the Police Complaints Board a copy of the complaint and a memorandum signed by him stating his opinion on the merits of the complaint. If the Police Complaints Board disagree with his decision not to prefer disciplinary charges the Board can make recommendations to him as to the charges which they consider should be preferred. Failing agreement between the chief officer of police and the Board, the Board can <u>direct</u> him to prefer such charges as they may specify (Section 3(2) Police Act 1976).

17.30. Finally, as the Commissioner indicated in paragraph 9.5. there is the sanction of civil proceedings. Such proceedings would be particularly appropriate in those cases where there is an allegation of oppression such as assault. The availability of free advice and legal aid in appropriate cases means that the opportunity of instituting such proceedings is available to all.

Principle (d) of the Judges Rules

17.31. I find this principle, which relates to the appropriate time when police should charge an accused, to be an unsatisfactory requirement.

Principle (d) of the Judges Rules states

> "That when a police officer who is making enquiries of any person about an offence has enough evidence to prefer a charge against that person for the offence, he should without delay cause that person to be charged or informed he may be prosecuted for the offence".

Rule III(a) states

> "Where a person is charged with or informed that he may be prosecuted for an offence he shall be cautioned in the following terms ....."

In R v Collier and Stenning 1965 49 Cr. App. R. 344 it was held that "charged" in Rule III(a) meant actually charged and did not mean "charged or ought to have been charged" and that the words "or informed that he may be prosecuted" are intended to cover the case where a suspect has <u>not</u> been arrested and where in the course of questioning, a time comes when police contemplate that a summons may be issued. Consequently an officer who does not charge as soon as he "has enough evidence against /a/ person "is in breach of principle (d) (albeit not in breach of Rule III(a) because he has not actually charged. In

Conway v Hotten 1976 63 Cr. App. R. 11 it was said that when a defendant is told that he will be charged he comes into the category of a man who had been charged.

17.32. The unsatisfactory nature of principle (d) is that an officer may have sufficient evidence to charge but may wish to defer charging an arrested person to seek advice from his superior officers or to seek legal advice whether or not it is appropriate in all the circumstances of the case to charge. An officer so delaying a charge is in breach of principle (d). Equally he is open to criticism if he does <u>not</u> delay and goes ahead and charges although he wanted guidance from his superior officers or legal advice on the exercise of his discretion to prosecute. Additionally an officer may have sufficient evidence to charge a person but wishes to attempt to put that evidence to the test by seeking to obtain corroborative evidence in support. A typical example is that shown in the case referred to at pp 64-5 of Part I of the Commissioner's Evidence under reference CR 201/76/265 where police received an admission to a murder sufficient to support a charge but the charge was delayed in order to test the veracity of the admission and in particular to recover the murder weapon from the river where it had been thrown. Had police charged immediately after the confession and the confession had proved as false as the earlier untrue explanations the suspect had put forward as to his movements police would doubtless have been criticised for charging

prematurely although certainly they had sufficient evidence to charge; by delaying the charging until they had obtained corroborative evidence it could be argued that police were in breach of principle (d).

17.33. For these reasons I suggest that the principle in rule (d) be amended to recognise the fact that despite the possession by an officer of "enough evidence" to prefer a charge there may well be perfectly proper reasons why it is not appropriate to charge "without delay".

The accused's right to make an unsworn statement at his trial.

17.34. Although this is a topic allied to the accused's right of silence at his trial (with which I shall deal subsequently) it can be considered separately. The accused's right to make an unsworn statement was preserved by section 1(h) Criminal Evidence Act 1898 and is one of the three courses open to an accused at the close of the prosecution's case, the others being to give evidence on oath or to remain silent.

17.35. Section 1(h) Criminal Evidence Act 1898 provides that "Nothing in this Act shall affect ... any right of the person charged to make a statement without being sworn". This provision does not of course relate to an accused who has an objection to taking an oath (for which adequate provision is made by section 5 Oaths Act 1978) but to the right of an accused who does not wish to remain silent but wishes to avoid cross-examination by making a statement from the dock.

17.36. The effect of such an unsworn statement was explained by Lord Justice Shaw in R v Coughlan (Joseph) 1977 64 Cr. App. R. 11 as follows:

"When the Criminal Evidence Act 1898 made it possible for a person charged with an offence to be a witness in his own defence, it expressly preserved by Section 1(h) what had until then been the only right of such a person, namely, to make a statement without being sworn. The section makes a clear distinction between the position where an accused person elects to assume the role of a witness in his defence and the situation where he makes an unsworn statement. In the latter case he is not a witness and he does not give evidence. Nonetheless, in preserving his right to make an unsworn statement, the statute tacitly indicated that something of possible value to the person charged was being retained. What is said in such a statement is not to be altogether brushed aside; but its potential effect is persuasive rather than evidential. It cannot prove facts not otherwise proved by the evidence before the jury, but it may make the jury see the proved facts and the inferences to be drawn from them in a different light. Inasmuch as it may thus influence the jury's decision they should be invited to consider the content of the statement in relation to the whole of the evidence. It is perhaps unnecessary to tell the jury whether or not it is evidence in the strict sense. It is material in

the case. It is right, however, that the jury should be told that a statement not sworn to and not tested by cross-examination has less cogency and weight than sworn evidence".

17.37. I shall comment later on the effect of an accused exercising his right to remain silent, but given that he has that choice of remaining silent or giving evidence as a witness I see no useful purpose whatsoever in an accused having this third option of making an unsworn statement. A jury untrained in the sifting of evidence must have a difficult enough time weighing up conflicting evidence when they have to give equal consideration to the evidence that is placed before them. But in the case of giving consideration to an unsworn statement their task is almost superhuman when they attempt to attach to an unsworn statement its proper value if only because its proper value is so difficult for them to ascertain. They will be told not to ignore it but to consider it "in relation to the whole of the evidence" and that it is of less "weight than sworn evidence" and that it is "persuasive rather than evidential". These unhelpful and uncertain guidelines which are the only guidelines a jury can expect in the present state of the law are likely in my view only to add to a jury's already onerous task and may well lead a jury to attaching too much or too little importance to such an unsworn statement. It seems to me that if an accused wishes a jury to consider such a statement he should be prepared

like every other witness whether for the prosecution or the defence to have its credibility tested by cross-examination.

17.38. Accordingly I RECOMMEND as did the Criminal Law Revision Committee in its Eleventh Report that the right of an accused at his trial to make an unsworn statement about the facts instead of giving evidence as a witness should be abolished (paragraph 104 of that Report). I accept the Criminal Law Revision Committee's recommendation that if this right were abolished an unrepresented accused's right to address a Court or jury in the capacity of an advocate as opposed to that of a witness making an unsworn statement be retained (paragraph 105 of the same Report).

Accused's right of silence at his trial

17.39. At present, once a Court accepts that a prima facie case against an accused has been established by the prosecution, the accused has three choices open to him. One of those choices, that it is right to make an unsworn statement, I have already discussed. I shall now deal with the second of those choices namely to remain silent under the provisions of section 1(a) Criminal Evidence Act 1898.

17.40. In a civilised society no-one can be compelled to speak, neither do I suggest that the right which an accused has to remain silent should be removed. But I do suggest that once the Court accepts that the prosecution have established a prima facie case against an accused then the effect of the exercise of that choice of silence

be altered.

17.41. At present the prosecution is statutorily debarred from making any comment on an accused's failure to give evidence (section 1(b) Criminal Evidence Act 1898). The judge although in his discretion may comment on the accused's failure to give evidence but he can only do so in the mildest of terms (R v Bathurst 1968 1 All E.R. 1175).

17.42. I RECOMMEND that it should be open to both the prosecution and the judge to comment fully on the accused's failure to give evidence so that a Court or jury would be entitled to draw such inferences from the accused's failure to give evidence as appear proper and that such failure can be treated as capable of amounting to corroboration of evidence given against the accused. This recommendation is again one that was suggested by the Criminal Law Revision Committee in its Eleventh Report (paragraphs 110 and 111). So that there is no doubt in the mind of an accused or the jury I FURTHER RECOMMEND that the effect of a decision not to give evidence should be explained to an accused once the Court accepts that the evidence adduced by the prosecution has established a prima facie case against an accused.

17.43. Doubtless my suggestion will be met by similar arguments concerning antiquity, unfairness to the suspect and the innocent suspect which the Commissioner dealt with at paragraphs 4.6 - 4.10 of Part I of his evidence when considering a suspect's silence during police

questioning. I shall not repeat those arguments here except to deal with three matters.

17.44. I emphasise that under my recommendation no question relating to an accused's failure to give evidence could arise until such time as the Court had agreed that the evidence adduced by the prosecution had established a prima facie case against an accused. Obviously if the prosecution were not able to establish such a case no question of an accused giving evidence would arise.

17.45. When the Criminal Law Revision Committee made its recommendation in this respect its opponents argued that such a recommendation would shift the burden of proof from the prosecution to the defence. This would not be the case, the burden of proof would remain as now throughout the trial upon the prosecution. The difference would be that the Court or jury would have additional material either by way of having heard the accused's evidence or by being able to consider <u>together with</u> all the evidence both from the prosecution and defence the effect of the accused's silence.

17.46. The Criminal Law Revision Committee in its Eleventh Report (p. 176 clause 5(1)(c) of its draft Bill) suggested that the obligation on an accused to give evidence or the effect of his failure to do so should not apply if "it appears to the Court that the physical or mental condition of the accused makes it undesirable for him to be called upon to give evidence". With respect to the

Criminal Law Revision Committee I do not agree that such an exception should be made. If such an exception were made it would give rise to a trial within a trial to decide upon the physical or mental condition of the accused. It would seem more appropriate that the judge should give an appropriate direction to the jury in such a case of the insignificance of the failure of the accused to give evidence. Lest it be thought that I am being callous in this respect my intention is quite the opposite. I do not for one moment suggest that there should be any obligation on accused to give evidence or for an adverse comment to be drawn from his failure to do so when an issue is being tried as to an accused's fitness to plead or take his trial in accordance with the Criminal Procedure (Insanity) Act 1964. But if that issue is raised and the accused is found fit to plead and take his trial then it seems to me that his trial should be subject to the same rules of procedure as any other trial. Those accused at a trial range from the highly intelligent to those of very low mentality, from those who express themselves with ease to those who have great difficulty in doing so. A jury properly directed or a court are perfectly capable of taking the intelligence of an accused or lack of it into account in assessing the importance or otherwise of the refusal or the evidence he gives; if it is thought that a jury does not have that ability then it is difficult to see how reliance can be placed on the other abilities which a jury is expected to possess in order to carry out its task.

17.47. To summarize my recommendations in this chapter they are:-

(1) The test for the admissibility or exclusion in evidence of an oral or written statement to police by a suspect or accused person should be as now based on the voluntary principle and not on an exclusionary rule or disciplinary principle (paragraph 17.12).

(2) Facts revealed by a statement subsequently ruled inadmissible, as now, if capable of proof by means other than the inadmissible statement should be admissible (paragraph 17.12).

(3) The rule as to the inadmissibility of a confession made as a result of a threat or inducement should be limited to threats or inducements of a kind likely, in the circumstances existing at the time, to produce from the accused an unreliable confession (paragraph 17.18).

(4) The retention of the Administrative Directions on Interrogation and the Taking of Statements contained in Appendix B to the Judges Rules, save for the modification necessary at paragraphs 2 and 6(a) to meet the recommendations in Part I of this evidence (paragraph 17.19).

(5) The principle (d) at present referred to in Appendix A of the Judges Rules be amended to recognise the fact that despite the possession by an officer of "enough evidence" to prefer a charge there may well

be perfectly proper reasons why it is not appropriate to charge "without delay" (paragraph 17.33).

(6) The right of an accused person to make an unsworn statement at his trial instead of giving evidence as a witness should be abolished (paragraph 17.38).

(7) When a court accepts that the evidence adduced by the prosecution has established a prima facie case against an accused person it should warn him that if he fails to give evidence the court or jury will be entitled to draw such inferences from his failure as appear proper and that such failure can be treated as capable of amounting to corroboration (paragraph 17.42).

END