SECRET

MT

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THE RIGHT of SILENCE

HOME AFFAIRS

SEPTEMBER 1987.

| Referred to | Date | Referred to | Date | Referred to | Date | Referred to | Date |
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| ~~24.9.87~~ | | | | | | | |
| ~~30.9.87~~ | | | | | | | |
| ~~15.1.88~~ | | | | | | | |
| ~~15.2.88~~ | | | | | | | |
| ~~3.8.88~~ | | | | | | | |
| ~~23.8.88~~ | | | | | | | |
| ~~1.9.88~~ | | | | | | | |
| ~~19.10.88~~ | | | | | | | |
| ~~27.10.88~~ | | | | | | | |
| 10.1.92 | | | | | | | |

PREM 19/3795



SECRET

cc PC
PW

HOME SECRETARY

QUEEN ANNE'S GATE LONDON SW1H 9AT

10th January 1992

Dear Peter

WILL LOOK IF REQUIRED

Thank you for your letter of ~~6~~ November about the right of silence in Northern Ireland. I am sorry not to have written earlier.

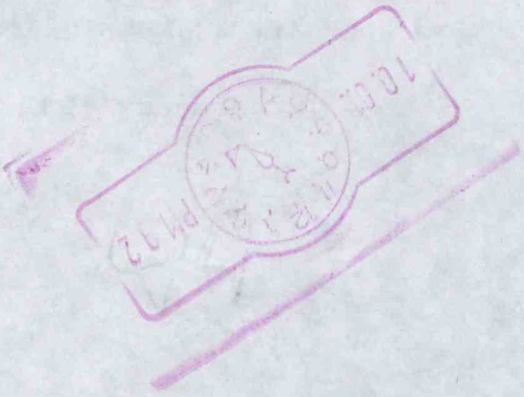
As you know, we decided to include the right of silence issue in the terms of reference for the Royal Commission on Criminal Justice. Rightly or wrongly, the matter is generally thought to bear directly upon the critical balance of advantage between the defence and prosecution. I am sure we were right to ask the Royal Commission to address it. My Department's evidence to the Royal Commission pays particular attention to the arguments in favour of change, including the existence of the Northern Ireland Order.

I agree that the present position is less than satisfactory but I cannot see scope for manoeuvre in advance of the Royal Commission reporting on the subject. I have told the House as much, and I think we shall just have to hold the line. The fact that a Royal Commission is addressing the question directly may perhaps offer some comfort to the Northern Ireland judiciary.

I am copying this letter to the Prime Minister, the Secretary of State for Northern Ireland and the Attorney General

Yours

The Rt Hon the Lord MacKay of Clashfern
House of Lords
London SW1A 0PW



**PRIME MINISTER**

You may wish to know the position with regard to the USA Constitution and the 5th Amendment. The key point seems to be that not only does a defendant have the right to remain silent at trial, but he also has the right (although this is not spelt out in the Constitution) to a specific jury instruction that his silence should not prejudice him.

PRB

(P.A. BEARPARK)

27 October 1988

27 OCT 1988

M. Parker

As indicated by telephone: and promised.

Dave Burns 27/10

FROM : Huw Llewellyn
Legal Advisers
K173 270 3072

DATE : 27 October 1988

Mr Burns
NAD

5th AMENDMENT : USA CONSTITUTION

1. You have asked me for some brief comments on the 5th Amendment. Given the short time available my information is necessarily not complete. However, the following are general statements of the law:

i) The 5th Amendment protects persons from having to give evidence against themselves.

ii) They must receive a "miranda" warning (the right to remain silent) prior to being questioned by the Police.

iii) Statements made without such prior warning are inadmissible. (Exception: Harris v. New York 1971 allowed use of such statements to contradict the defendant's own evidence at trial).

iv) They have the right not to give evidence at trial.

Further, they have the right to a specific jury instruction by the judge to the effect that their failure to testify should not predjudice them in any way.

2. To summarise, the 5th Amendment allows a defendant the right to remain silent at trial and to a specific jury instruction that his silence should not predjudice him.

cc Mr Beasparty, No 10

As requested. The Washington telegrams are also attached.

Huw Llewellyn.

Huw Llewellyn

Huw Pates
27/x.

## ARTICLES IN ADDITION TO, AND AMENDMENT OF, THE CONSTITUTION OF THE UNITED STATES OF AMERICA, PROPOSED BY CONGRESS, AND RATIFIED BY THE LEGISLATURES OF THE SEVERAL STATES PURSUANT TO THE FIFTH ARTICLE OF THE ORIGINAL CONSTITUTION

### ARTICLE [I]*

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

### ARTICLE [II]

A well regulated Militia, being necessary to the security of a free State, the right of the people to keep and bear Arms, shall not be infringed.

### ARTICLE [III]

No Soldier shall, in time of peace be quartered in any house, without the consent of the Owner, nor in time of war, but in a manner to be prescribed by law.

### ARTICLE [IV]

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

### ARTICLE [V]

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use without just compensation.

### ARTICLE [VI]

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall

*Only the 13th, 14th, 15th, and 16th articles of amendment had numbers assigned to them at the time of ratification.

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MDHIAN 9D67

UNCLASSIFIED
FM WASHINGTON
TO IMMEDIATE FCO
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OF 261756Z OCTOBER 88
AND TO IMMEDIATE NIO(L), NIO(B)
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MIPT: NORTHERN IRELAND SECURITY MEASURES:
COMMENTS BY DUKAKIS
1. FOLLOWING IS TEXT OF RELEVANT PORTION OF INTERVIEW:
BEGINS KOPPEL: GOVERNOR, JUST A THOUGHT THAT OCCURRED TO ME A MOMENT AGO, WE WERE TALKING ABOUT TERRORISM A MOMENT AGO. JUST LAST WEEK, PRIME MINISTER THATCHER IMPOSED TWO, OR AT LEAST HER GOVERNMENT IMPOSED, TWO NEW REGULATIONS. ONE THAT DID NOT PERMIT, OR DOES NOT NOW PERMIT, THE BBC RADIO OR TELEVISION FROM BROADCASTING ANYTHING THAT IS SAID BY SOMEONE WHO IS DEFINED AS A TERRORIST OR A SUPPORTER OF THE TERRORISTS. WHAT DO YOU THINK OF THAT AS AN IDEA?
DUKAKIS: I THINK WE NEED FULL DISCUSSION AND FULL LIBERTIES AND FULL INFORMATION, TED, SO I WAS CONCERNED AND, FRANKLY, DISAPPOINTED IN THAT DECISION. I THINK IT'S IMPORTANT THAT WE ENCOURAGE FULL DISCUSSION, AND I THOUGHT THAT WAS AN UNFORTUNATE DECISION.
KOPPEL: AS YOU KNOW, THERE WAS A SECOND ACTION THAT WAS ALSO TAKEN BY THE THATCHER GOVERNMENT, AND THAT IS THAT THEY HAVE NOW REMOVED THE RIGHT TO REMAIN SILENT - THAT'S NOT QUITE ACCURATE. YOU CAN REMAIN SILENT, BUT IF YOU REMAIN SILENT WHEN A CHARGE HAS BEEN BROUGHT AGAINST YOU, THAT CAN BE USED THEN AS EVIDENCE AGAINST YOU. WHAT DO YOU THINK ABOUT THAT?
DUKAKIS: I'M NOT FAMILIAR WITH THAT ACTION AND I'D HESITATE TO COMMENT ON IT. CERTAINLY IT'S NOT CONSISTENT WITH THE KIND OF DUE PROCESS AND THE KIND OF CONSTITUTIONAL RIGHTS THAT WE HAVE IN THIS COUNTRY.
KOPPEL: WELL, YOU KNOW, THE POINT THAT THE BRITISH GOVERNMENT IS MAKING IS THAT RIGHTS SEEM TO HAVE SWUNG SO FAR IN THE DIRECTION, AND IT HAS A CERTAIN RESONANCE OF COURSE IN THIS CAMPAIGN, RIGHTS SEEM TO HAVE SWUNG SO FAR IN THE DIRECTION OF THE CRIMINAL AND AWAY FROM THE VICTIM

THAT, THEREFORE, MRS THATCHER HAS DECIDED THAT WHETHER IT'S SOMEONE, YOU KNOW, WHO'S ACCUSED OF BEING INVOLVED IN ORGANISED CRIME OR TERRORISM, THEY SHOULD NOT HAVE THE RIGHT OT REMAIN SILENT WITHOUT HAVING -
DUKAKIS: TED, I JUST HAPPEN TO DISAGREE WITH THAT. I THINK YOU COULD BE VERY TOUGH ON CRIME AND STILL BE COMMITTED TO THE CONSTITUTION AND DUE PROCESS. THERE'S NO INCONSISTENCY BETWEEN THE TWO. I THINK WE'VE GOT TO PROTECT CONSTITUTIONAL RIGHTS IN THIS COUNTRY. ON THE OTHER HAND, I THINK WE HAVE TO BE VERY TOUGH ON VIOLENT CRIMINALS. THAT'S MY VIEW, AND THAT'S WHAT I'VE DONE, THAT'S WHY WE'VE MADE THE KIND OF PROGRESS THAT WE'VE MADE IN MY OWN STATE. THAT'S THE KIND OF EFFORT I WANT TO LEAD NATIONALLY AS THE PRESIDENT OF THE UNITED STATES. BUT I DON'T THINK YOU HAVE TO DESTROY OR SEVERELY LIMIT OUR RIGHTS UNDER THE CONSTITUTION. THAT'S A VERY IMPORTANT DOCUMENT. WE ALL KNOW WHY WE HAVE IT AND THE WAY IT CAN BE - THE WAY THOSE RIGHTS CAN BE ABUSED. BUT WE CAN BE TOUGH ON CRIME, WE CAN BE TOUGH ON DRUG TRAFFICKING. WE SHOULD BE: WE HAVEN'T BEEN.
ENDS
2. FCO PLEASE PASS TO LEACH, SIL DIVISION, NIO(L).

ACLAND

YYYY

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.NORTHERN IRELAND
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PS/SIR J FRETWELL
CHIEF CLERK
MR BOYD
MISS PESTELL

ADDITIONAL 43

NORTHERN IRELAND



NNNN


27. X.

D60732
MDHIAN 9068

RESTRICTED
FM WASHINGTON
TO IMMEDIATE FCO
TELNO 2579
OF 261750Z OCTOBER 88
AND TO IMMEDIATE NIO(L), NIO(B)
INFO IMMEDIATE BIS NEW YORK, ATLANTA, BOSTON, CHICAGO
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MY TELNO 2554 (NOT TO ALL): NORTHERN IRELAND SECURITY MEASURES: COMMENTS BY DUKAKIS

1. MIFT CONTAINS THE TEXT OF A BRIEF DISCUSSION ON NORTHERN IRELAND ABOUT A THIRD OF THE WAY THROUGH A 90-MINUTE INTERVIEW, WHICH DUKAKIS GAVE TO TED KOPPEL OF ABC NEWS'S QUOTE NIGHTLINE UNQUOTE ON 25 OCTOBER (THE SAME PROGRAMME ON WHICH MR STEWART APPEARED ON 21 OCTOBER).

2. AS THE TRANSCRIPT SHOWS, DUKAKIS WAS MILDLY CRITICAL OF BOTH OF THE RECENTLY ANNOUNCED SECURITY MEASURES FOR NORTHERN IRELAND, ALTHOUGH HE APPEARED TO BE AWARE IN ADVANCE ONLY OF THE NEW RESTRICTIONS ON ACCESS TO THE MEDIA. IN BOTH CASES, HOWEVER, HIS REACTION WAS OFF THE CUFF, AND INDICATIVE OF THE GOVERNOR'S LIBERAL INSTINCTS AND NOT OF ANY CONSIDERED VIEW. THIS PORTION OF THE INTERVIEW, WHICH WAS BROADCAST AFTER MIDNIGHT EASTERN DAYLIGHT TIME, IS UNLIKELY TO HAVE HAD ANY SIGNIFICANT IMPACT. THE SUBJECT IS LIKELY TO HAVE BEEN RAISED ONLY BECAUSE THE INTERVIEW WITH MR STEWART WAS FRESH ON KOPPELS MIND.

3. NEVERTHELESS, ON 26 OCTOBER WE REGISTERED OUR CONCERN WITH DUKAKIS'S STAFF, WHO UNDERTOOK LATER THAT DAY TO DRAW OUR REPRESENTATIONS TO THE GOVERNOR'S PERSONAL ATTENTION. THEY ALSO CONFIRMED THAT DUKAKIS HAD NOT BEEN BRIEFED ON EITHER MEASURE.

4. WE DO NOT THINK ANY FURTHER ACTION ON THIS IS EITHER NECESSARY OR DESIRABLE.

5. SEE MIFT.

6. FCO PLEASE PASS TO LEACH, SIL DIVISION, NIO(L).

ACLAND

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CC/C

From: THE PRIVATE SECRETARY

HOME OFFICE
QUEEN ANNE'S GATE
LONDON SWIH 9AT

19 October 1988

Dear Mike,

**RIGHT OF SILENCE**

Your Secretary of State and mine met this afternoon to discuss the draft Written Answer which was sent to Mr King yesterday under cover of the Home Secretary's letter.

.... I now enclose a final version of the Written Answer as agreed by your and my Secretary of State.

I am copying this letter and enclosure to the Private Secretaries to the Prime Minister, the Foreign Secretary, the Lord Chancellor, the Secretaries of State for Defence and Scotland, the Lord Privy Seal, the Attorney General, the Lord Advocate, the Chief Whip and Sir Robin Butler.

Yours sincerely,

P J C MAWER

M Maxwell, Esq.

PARLIAMENTARY QUESTION FOR WRITTEN ANSWER ON .....

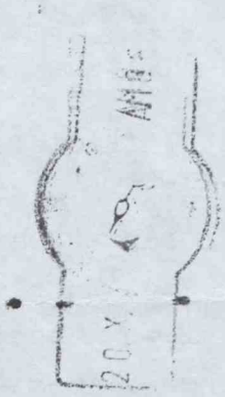
.....: To ask the Secretary of State for the Home Department, whether he intends to propose amendments of the law concerning the right of silence in England and Wales.

DRAFT REPLY

I told the House in May [Official Report, written answers, 18 May 1988, cols 465-66] that I saw a strong case for changing the law in relation to the inferences which may be drawn from a failure to answer questions put to a suspect by the police. I considered that more careful work needed to be done before I could bring forward with confidence a specific proposal for legislation, and I set up a working group (comprising officials, members of the legal profession and a senior police officer) to carry out that further work and submit an early report with a view to legislation.

My rt hon Friend the Secretary of State for Northern Ireland has similarly reached the conclusion that the law of the province needs to be changed. He has laid before the House an Order in Council to this effect.

I will seek the earliest opportunity after receiving the Working Group's report to bring forward legislation on this subject for England and Wales. Although the timing of change will inevitably be different in the two jurisdictions, the Government sees a clear need for substantial changes to be made in both if the law is to be effectively enforced.



CONFIDENTIAL

cc/c.

HOME SECRETARY

QUEEN ANNE'S GATE LONDON SWIH 9AT

18 October 1988

CDD
15/X.

Dear Secretary of State,

**RIGHT OF SILENCE**

I promised over the weekend to let you have a copy of the parallel statement that I intend to make when your Order in Council is laid before Parliament. To provide maximum support, I have it in mind to make the statement in a written answer on the date when your Order is available to Members (which is why the Question, having to be tabled in advance, makes no mention of Northern Ireland).

Our offices have been in touch about this and I should be grateful to know by noon tomorrow whether the enclosed draft is acceptable to you. As you will be laying your Order on Thursday I shall be ensuring that my arranged Question is tabled tomorrow afternoon for answer the next day.

I am copying this letter and enclosure to the Prime Minister, the Foreign Secretary, the Lord Chancellor, the Secretaries of State for Defence and Scotland, the Lord President, the Lord Privy Seal, the Attorney General, the Lord Advocate, the Chief Whip and Sir Robin Butler.

Yours sincerely,

Approved by the Home Secretary and signed in his absence.

The Rt Hon Tom King, MP

CONFIDENTIAL

DRAFT

PARLIAMENTARY QUESTION FOR WRITTEN ANSWER ON .....

.....: To ask the Secretary of State for the Home Department, whether he intends to propose amendments of the law concerning the right of silence in England and Wales.

DRAFT REPLY

I told the House in May [Official Report, written answers, 18 May 1988, cols 465-66] that I saw a strong case for changing the law, along the lines recommended by the Criminal Law Revision Committee in 1972, in relation to the inferences which may be drawn from a failure to answer questions put to a suspect by the police. I considered that more careful work needed to be done before I could bring forward with confidence a specific proposal for legislation, and I set up a working group (comprising officials, members of the legal profession and a senior police officer) to carry out that further work and submit an early report with a view to legislation.

My rt hon Friend the Secretary of State for Northern Ireland has similarly reached the conclusion that the law of the province needs to be changed. He has laid before the House an Order in Council which includes provisions along the lines of those recommended by the Criminal Law Revision Committee.

I will seek the earliest opportunity to bring forward legislation on this subject for England and Wales. In deciding precisely what changes to recommend to Parliament within the area of my own responsibility, I shall have the advice of the working group, which will be looking at the practical implications of a wide range of possible measures concerning the right of silence and disclosure of the defence case.

Although the timing of change will inevitably be different in the two jurisdictions, the Government sees a clear need for substantial changes to be made in both if the law is to be effectively enforced.

FROM THE PRIVATE SECRETARY

HOUSE OF LORDS,
LONDON SW1A 0PW

14 October 1988

**SECRET**
C D Powell Esq
10 Downing Street
LONDON SW1

Dear Charles,

**NORTHERN IRELAND: RIGHT OF SILENCE**

The Lord Chancellor is today visiting members of the judiciary in Northern Ireland. He has asked me to let you know that they have raised with him the question of proposed changes to the law relating to right of silence.

The Lord Chief Justice of Northern Ireland and the members of the Supreme Court said, in the strongest possible terms, that it would be counter-productive and indeed damaging to make any changes in the law relating to the right of silence, or the rules governing hearsay evidence, in advance of or separately from introducing such changes in England and Wales. The Lord Chancellor has asked me to say that he sees a great deal of force in that argument. Moreover, it is his view that the success of the proposed Order in Council would be threatened by such strong opposition from the Northern Ireland judiciary.

I am copying this letter to Phillip Mawer and Mike Maxwell.

Yours sincerely,

Andrea Smith.

**Ms A J Smith**


14. X
PM 8-8

SW2AIX

SECRET AND PERSONAL 6A

PRIME MINISTER

RIGHT OF SILENCE

This is Tom King's proposal for an amendment to criminal law of Northern Ireland concerning the right of silence. I had not realised that you had not yet seen it.

It is now apparent what the problem at next week's meeting is likely to be: Tom King's proposal is limited to Northern Ireland and can be enacted speedily (if controversially) by Order in Council. The Law Officers and possibly others are pressing for the amendment to cover the United Kingdom as a whole. My understanding is that this would require legislation and therefore take much longer. Personally, I would have thought the present situation in Northern Ireland warranted exceptional measures for Northern Ireland alone - and would be seen by most people to do so. One possibility would be to proceed by Order in Council in the case of Northern Ireland with a commitment to take corresponding action in the law of England and Wales in due course.

CDP

MT

(C. D. POWELL)
1 September 1988

SECRET AND PERSONAL

5A

PRIME MINISTER

RIGHT OF SILENCE

I attach a note by the Attorney General on the right of silence. In summary he argues:

- he is prepared to support the proposals made by the Northern Ireland Secretary;

- but they would only apply in cases where there was already sufficient evidence to mount a prosecution;

- their effect would therefore be rather limited;

- they would only be really effective if combined with changes in the law to make hearsay evidence admissible, but this would be opposed root and branch by the Northern Ireland judiciary;

- moreover it would be essential to introduce the changes affecting the right of silence for the United Kingdom as a whole rather than just for Northern Ireland, otherwise we would attract the charge that a lower standard of justice prevails in Northern Ireland.

I do not think that any of us had exaggerated expectations of the practical effects of allowing a judge or jury to draw certain inferences from a defendant who refused to answer questions. But I think the Attorney General's minute may underestimate the additional pyschological pressure on terrorists which will be exerted by making these changes, particularly in the context of a wider package of measures.

CDP

Charles Powell
31 August 1988

SECRET

4(A-G)

CC

CC/OP.

PRIME MINISTER

## RIGHT OF SILENCE

1. Our objectives should be:

(i) to facilitate the conviction of a higher proportion of those guilty of terrorist offences than is presently achieved by the criminal justice system in Northern Ireland;

(ii) to reassure the security forces and the general public in Northern Ireland of the Government's determination to use every legitimate weapon in the fight against terrorism and other serious crime.

These objectives must, however, be achieved in a way which ensures the maintenance of confidence in the administration of justice in Northern Ireland.

2. In pursuit of these objectives I fully support Tom King's proposals to adopt in Northern Ireland provisions equivalent to Sections 18 and 19 of the Irish Criminal Justice Act 1984. I also consider that there is a strong case for adopting the proposals recommended in the 11th Report of the Criminal Law Revision Committee, published in 1972, but I see substantial risk of damage to the standing

SECRET

B

of the Diplock Courts in Northern Ireland if these latter proposals are adopted in Northern Ireland alone and not simultaneously in England and Wales.

3. We should be clear, however, that these measures will not provide a panacea for all the difficulties that stand in the way of our objectives. The lack of convictions for terrorist offences derives much more from lack of evidence sufficient to commence proceedings against suspects than it does from the failure of Diplock Judges to convict at the conclusion of proceedings. In August 1987 the DPP (NI) said, in a memorandum to the Northern Ireland Office in response to legislative proposals by the Chief Constable, RUC,:

> `As the examples in the Crime Department paper illustrate, the principal difficulty in dealing with terrorism under the present arrangements lies in the impossibility of prosecuting terrorists against whom there is not a sufficient prima facie case and proper expectation of conviction. In respect of those against whom there is a sufficient case for prosecution, the conviction rate on the whole is satisfactory in what must be a judicial process.`

C

4. Tom King's proposals would operate principally on a case in which proceedings had already commenced, based upon a sufficiency of evidence for that purpose. Accordingly they would not go far enough to remedy the weakness which lies at the root of our trouble. Draft Clause 1 as proposed by the Criminal Law Revision Committee (`circumstances in which inferences may be drawn from an accused's failure to mention particular facts when questioned, charged, etc.`) would not operate until the accused relied on a particular fact in his defence to the proceedings. Draft Clause 5 (`accused to be called upon to give evidence at trial`) would not operate until the conclusion of the prosecution case was reached in proceedings that had commenced against the accused. Section 18 of the Irish Criminal Justice Act 1984 (`inferences from failure, refusal to account for object`) permits a Court to draw such inferences as appear proper from the failure or refusal of an accused to account for the presence of an object, but it provides that a person shall not be convicted solely on an inference drawn from such failure or refusal. The same may be said of Section 19 (`inferences from accused's presence at a particular place`).

5. The critical point is that a prosecuting authority may not and will not institute proceedings without sufficient evidence being in existence at that time to offer a proper prospect of an ultimate conviction.

D

6. It was with these considerations in mind that the DPP (NI) expressed the opinion, in the same memorandum, that:

"The three provisions mentioned, if enacted, would have little if any effect on the prosecution of experienced terrorists, trained in counter-interrogation techniques".

They are not all experienced

It is, however, my own view that this may be a little pessimistic. I think that the proposals based upon the Irish legislation can be expected in some cases to lead to the police gaining evidence even from suspects in this category sufficient to enable a prosecution to be brought where this would not otherwise have been possible.

7. I had considered how we might overcome the lack of sufficient evidence to mount a prosecution, in cases where it is known - but not by way of evidence admissible under our present rules - that a particular person is guilty of an offence. In November last year I put forward for consideration the possibility of amending the rule against hearsay evidence in the particular circumstances of Northern Ireland. Tom King had to record, however, in February of this year that the senior judiciary in Northern Ireland all saw substantial difficulties with the probative value of hearsay evidence of a statement from a defendant implicating others in terrorist crime. This judicial view has now been

E.

reflected in a very recent letter to me from Sir Brian Hutton, the new Lord Chief Justice, in the following paragraphs :

`In my opinion it is clear that the abolition of "the right of silence" would be largely ineffective to secure the conviction of known terrorists unless it were accompanied by other far-reaching changes in the law permitting the admissibility of hearsay evidence and providing that silence could constitute corroboration. These changes would be necessary because in many cases where the security forces have strong intelligence pointing to the guilt of a suspect, no evidence whatever can be adduced against him in Court under the existing rules.

This argues for selective detention.

`Such far-reaching changes were suggested to my predecessor, Lord Lowry, by the Northern Ireland Office in a letter dated 11th December 1987, and Lord Lowry discussed the suggestions with the Supreme Court Judges and wrote to the Northern Ireland Office on 14th January 1988 stating that the Judges would not entertain the proposals.

`The reason why the suggestions were rejected by the Judges was this. The changes in the conduct of a criminal trial which would be necessary to bring about

F.

the conviction of persons in respect of whom there was strong intelligence but who exercised "the right of silence" would be so drastic that the trial would cease to be a trial according to due process of law, and a Judge would either decline to convict on the ground that guilt had not been proved to him or, if he did convict, would appear to be "rubber-stamping" a conclusion already arrived at by the security forces.`

8. I have said that I do not think that the Committee`s right of silence proposals should be enacted for Northern Ireland alone. This is because it is very important to the standing of the Diplock Courts that the law that they apply is effectively the same as the law in England and Wales. The Northern Ireland Judges set great store by this. I believe there is a strong case for adopting the Committee`s proposals in England and Wales as well. To adopt them for Northern Ireland alone would be to attract the charge that a lower standard of justice prevails in Northern Ireland than we are content to live under in England and Wales. We would have a good counter to such criticism in respect of the proposals to reproduce in Northern Ireland the effect of Sections 18 and 19 of the Irish Act, since we can reply that these do no more than the Republic has itself thought necessary in the light of similar circumstances in Ireland.

SECRET

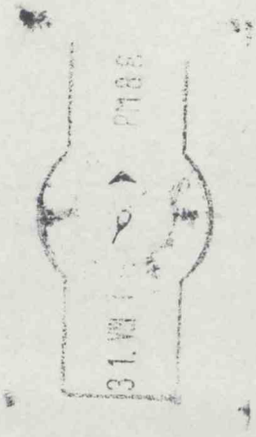
G.

9. Copies of this minute go to Geoffrey Howe, James Mackay, Douglas Hurd, Tom King, John Wakeham and Sir Robin Butler.

PM

31 August 1988

SECRET


31 MAY 1988
P

SECRET AND PERSONAL

3A

cc/PC

MO 19/3L

PRIME MINISTER

RIGHT OF SILENCE

I have seen the Northern Ireland Secretary's minute of 3rd August concerning the right of silence in the criminal law in Northern Ireland.

2. I am very glad to add my support to his proposals, which I recognise are now under urgent review and which we are to discuss in the near future. I know the GOC is keen they should be taken forward. As the minute makes clear, such innovative measures may prove controversial. However the fact that some features already form a part of Irish legislation is helpful given that they can therefore be presented as in keeping with the spirit of Article 8 of the Anglo-Irish Agreement, which is concerned with the harmonisation of areas of the criminal law in the North and the South where there is benefit to be gained thereby.

3. I am copying this minute to recipients of the Northern Ireland Secretary's minute.

G.H.

Ministry of Defence
30 August 1988

SECRET AND PERSONAL

Home Affairs

The Right Honourable

Sept '87

2 CDi 24/8

PRIME MINISTER

The Secretary of State for Northern Ireland copied to me his minute to you of 3 August regarding his proposals concerning the right of silence in the criminal law in Northern Ireland.

In my view the procedural aspects here ie whether or not we should proceed by Order in Council, or by primary legislation, must be regarded as subordinate to a judgement on the broad policy merits of these proposals. If colleagues agree to proceed as proposed I accordingly see no overriding procedural reason why we should not deal with this reserved manner by way of an Order in Council.

I will, as necessary, discuss with the Secretary of State any adaptation of existing procedures that he considers might be helpful in the Parliamentary handling of his proposals.

I am copying this minute to Geoffrey Howe, Douglas Hurd, George Younger, Tom King, Patrick Mayhew, James Mackay and to Sir Robin Butler.

NDJ Denton.

pp JW Approved by the Lord President but signed in his absence.

23 August 1988

SECRET AND PERSONAL

1(A-W)

PRIME MINISTER

RIGHT OF SILENCE

1. I promised to let you and colleagues know of my proposals concerning the right of silence in the criminal law in Northern Ireland.

2. As you know I had earlier expressed disappointment when Douglas Hurd decided that including some modification to the right of silence in this year's Criminal Justice Bill would be premature. My concern was not confined to crimes of terrorism: the climate of fear created by paramilitary groups distorts the whole process of the criminal law in Northern Ireland. I am therefore anxious to ensure that justice can be done in the general criminal law here.

3. My proposals are based on two legislative sources - the Eleventh Report of the Criminal Law Revision Committee (CLRC) published in 1972 and Sections 18 and 19 of the Irish Criminal Justice Act 1984. Attached at Annexes A and B are copies of relevant extracts from the CLRC Report and at Annex C a copy of the relevant sections from the Irish legislation. These proposals are strongly supported by the Chief Constable and the GOC: measures along the lines of the Irish provisions were also recommended by Lord Colville in his December 1987 Review of the Prevention of Terrorism Act.

4. The essence of my proposals is that the law should be amended to permit the courts to draw whatever inferences would be proper from the fact that an accused remained silent when questioned by the police in two particular situations. The first is the "ambush", when the defendant offers an explanation of his conduct for the

B

first time at his trial; and the second is when the accused has failed or refused to explain to the police certain specified facts, for instance his presence near the scene of an offence or the condition of his clothing. The provisions should be along the lines of the CLRC's draft Clause 1 and Sections 18 and 19 of the Irish Criminal Justice Act 1984 (Annex C). I also propose that the law should be amended to provide that, once the prosecution have established that there is a case to answer, a defendant should be warned that he will be called to give evidence and that if he should refuse to do so the court may draw such inferences as would appear proper. These provisions would be along the lines of the CLRC's draft Clause 5. Consequential amendments to the form of caution administered to a suspect would also be necessary.

5. The arguments which the CLRC use in favour of draft Clauses 1 and 5 are set out in Annexes A and B.

6. In order to reassure the security forces and the general public in Northern Ireland of the Government's determination to use every legitimate weapon in the fight against terrorism and other serious crime, I wish to give legislative effect to my proposals at the earliest opportunity. Since I am proposing to amend the general criminal law of Northern Ireland, which is a reserved (rather than excepted) matter, the measures can, in the absence of devolution, be brought into effect by Order in Council subject to affirmative resolution by both Houses of Parliament.

7. I realise that to introduce such innovative and controversial measures by the Order in Council procedure is bound to provoke strong protests. But to introduce them by Bill would mean a considerable delay and take all of the impetus out of our proposals. I shall be happy to consider with the Business Managers what procedures - such as use of the Northern Ireland Committee - we might use to increase the scope for Parliamentary scrutiny of our proposals.

C

8. I should be grateful for your agreement, and that of colleagues, that I may proceed to produce a draft Proposal and draft Order in Council along the lines described with a view to publication in the autumn and laying before Parliament early in 1989.

9. I am copying this minute to Geoffrey Howe, Douglas Hurd, John Wakeham, George Younger, Paddy Mayhew, James Mackay and to Sir Robin Butler.

TK
3 August 1988

CLRC DRAFT CLAUSE 1. A ANNEX D.

PART I

PROVISIONS AS TO VARIOUS MATTERS

*Provisions having special reference to the accused*

Circumstances in which inferences may be drawn from accused's failure to mention particular facts when questioned, charged etc.

**1.**—(1) Where in any proceedings against a person for an offence evidence is given that the accused—

(*a*) at any time before he was charged with the offence, on being questioned by a police officer trying to discover whether or by whom the offence had been committed, failed to mention any fact relied on in his defence in those proceedings; or

(*b*) on being charged with the offence or officially informed that he might be prosecuted for it, failed to mention any such fact,

being a fact which in the circumstances existing at the time he could reasonably have been expected to mention when so questioned, charged or informed, as the case may be, the court, in determining whether to commit the accused for trial or whether there is a case to answer, and the court or jury, in determining whether the accused is guilty of the offence charged, may draw such inferences from the failure as appear proper; and the failure may, on the basis of such inferences, be treated as, or as capable of amounting to, corroboration of any evidence given against the accused in relation to which the failure is material.

(2) Subsection (1) above shall apply in relation to questioning by persons (other than police officers) charged with the duty of investigating offences or charging offenders as it applies in relation to questioning by police officers; and in that subsection "officially informed" means informed by a police officer or any such person.

(3) Nothing in subsection (1) or (2) above shall in any proceedings—

(*a*) prejudice the admissibility in evidence of the silence or other reaction of the accused in the face of anything said in his presence relating to the conduct in respect of which he is charged, in so far as evidence thereof would be admissible apart from those subsections; or

(*b*) be taken to preclude the drawing of any inference from any such silence or other reaction of the accused which could be drawn apart from those subsections.

(4) Subsections (1) and (2) above shall not apply as regards a failure to mention a fact if the failure occurred before the commencement of this Act.

PART I

(5) It is hereby declared that a police officer or other person who suspects a person of having committed an offence is not required by law to caution him before questioning him in relation to the offence.

## CLAUSE 1: INTERROGATION OF SUSPECTS; EFFECT OF SILENCE; JUDGES' RULES

E

28. We propose to restrict greatly the so-called " right of silence " enjoyed by suspects when interrogated by the police or by anyone charged with the duty of investigating offences or charging offenders. By the right of silence in this connection we mean the rule that, if the suspect, when being interrogated, omits to mention some fact which would exculpate him, but keeps this back till the trial, the court or jury may not infer that his evidence on this issue at the trial is untrue. Under our proposal it will be permissible to draw this inference if the circumstances justify it. The suspect will still have the " right of silence " in the sense that it is no offence to refuse to answer questions or tell his story when interrogated; but if he chooses to exercise this right, he will risk having an adverse inference drawn against him at his trial[1].

29. Since one cannot tell for certain what effect it has on the jury when the accused tells a story in court which he did not mention to the police when questioned, the practical importance of the restriction on comment concerns what the judge may say in summing up. Briefly, he may invite the jury, in considering the weight which they should give to the accused's evidence, to take into account the fact that, by not mentioning his story to the police, he has deprived them of the opportunity of investigating it[2]. The judge may also, apparently, say simply that the jury may take the accused's failure to give his explanation into account when they are considering the weight to give to his evidence in court, without having to add that the reason for this is that he has deprived the police of the opportunity to check his story[3]. But in several cases, including *Hoare*[4] and *Sullivan*[5], it has been held that it is a misdirection to suggest that the jury may infer that the story told in court is false because, if it had been true, the accused would naturally have told it to the police when they questioned him. In some of the cases the comment by the judge which

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[1] In relation to the trial the " right of silence " enjoyed by the accused means that the prosecution have the burden of proving his guilt, that he may refrain from giving evidence and that the prosecution may not comment on his omission to give it. Under our proposals discussed in paragraphs 110 to 113 below comment on the omission will be allowed and it will be permissible to draw adverse inferences from it. We do not propose to weaken in any way the principle that the prosecution have the burden of proving the guilt of the accused: in fact our proposals discussed in paragraphs 140 to 142 are intended to strengthen this principle in one respect.

[2] *Littleboy*, [1934] 2 K.B. 408; 24 Cr. App. R. 192.

[3] *Ryan* (1966), 50 Cr. App. R. 144, 148.

[4] (1966), 50 Cr. App. R. 166.

[5] (1967), 51 Cr. App. R. 102.

F.

was held to have been a misdirection was made with reference to the accused's failure to give an explanation when cautioned as required by the Judges' Rules[1] or when told in the statutory form of words at the end of the case for the prosecution in the committal proceedings that he was not obliged to say anything[2]. In these cases the Court of Criminal Appeal pointed out that, as the accused was told that he was not obliged to say anything, it would be a trap for him if the jury were to be invited to draw an adverse inference from his silence. But we have no doubt that it is now established that the rule that an invitation to draw an inference of guilt from the accused's silence is a misdirection exists independently of any caution. For in *Ryan*, referred to above, the comment related chiefly to the failure of the accused, when apparently caught in the act of stealing and before any question of giving a caution arose, to give the explanation which he gave at his trial; and the court, after having referred to the authorities and " given the most careful consideration to the case ", decided that it fell on the right side of the line indicated above. The judgment contains no reference to any caution, and it seems clear that, had the court construed the comment as meaning that the jury might infer guilt from the accused's failure to tell his story, they would have held the comment to have been a misdirection[3]. Moreover, in the recent case of *Hall v. R.*[4], an appeal to the Privy Council from Jamaica, where the common law applied, Lord Diplock, giving judgment, said:

> " The caution merely serves to remind the accused of a right which he already possesses at common law."

30. In our opinion it is wrong that it should not be permissible for the jury or magistrates' court to draw whatever inferences are reasonable from the failure of the accused, when interrogated, to mention a defence which he puts forward at his trial. To forbid it seems to us to be contrary to common sense and, without helping the innocent, to give an unnecessary advantage to the guilty. Hardened criminals often take advantage of the present rule to refuse to answer any questions at all, and this may greatly hamper the police and even bring their investigations to a halt. Therefore the abolition of the restriction would help justice. One of our members, Sir Norman Skelhorn, argued for an amendment of the law for these reasons in his address " Crime and the Punishment of Crime: Investigation of Offences and Trial of accused persons " delivered at the Commonwealth and Empire Law Conference in Sydney in 1965. The present restriction on judicial comment was also strongly criticized by Salmon L. J. (as he then was) in giving the judgment of the Court of Appeal in *Sullivan*, referred to above[5]. The accused, who was convicted of smuggling watches from Switzerland, had refused to answer questions by Customs officers. The judge, in the course of his summing up[6], had referred to the refusal and gone on:

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[1] E.g. in *Leckey*, [1944] K.B. 80; 29 Cr. App. R. 128.
[2] E.g. in *Naylor*, [1933] 1 K.B. 685; 23 Cr. App. R. 177.
[3] The headnote to *Ryan* suggests that the reason why the judge's comment was upheld was that it was " coupled with an indication that the defendant was under no obligation to given any explanation "; but although this was referred to in the judgment, there seems no doubt that the ground of the decision was that mentioned above. In most, if not all, of the recent cases where a comment was held to have been a misdirection it had been coupled with a similar indication.
[4] (1970), 55 Cr. App. R. 108, 112.
[5] Paragraph 29.
[6] (1967), 51 Cr. App. R. at pp. 104–5.

Gillard (1978) Crim App Rep

G.

" Of course bear in mind that he was fully entitled to refuse to answer questions, he has an absolute right to do just that, and it is not to be held against him that he did that. But you might well think that if a man is innocent he would be anxious to answer questions. Now, members of the jury, that is what it really amounts to."

The Court of Appeal said with reference to this[1]:

" It seems pretty plain that all the members of that jury, if they had any common sense at all, must have been saying to themselves precisely what the learned judge said to them. The appellant was not obliged to answer, but how odd, if he was innocent, that he should not have been anxious to tell the Customs officer why he had been to Geneva, whether he put the watches in the bag, and so on."

Then, after referring to the authorities, the judgment went on to say that sometimes comment on the accused's silence was unfair but that there was no unfairness in this case. It then continued:

" The line dividing what may be said and what may not be said is a very fine one, and it is perhaps doubtful whether in a case like the present it would be even perceptible to the members of any ordinary jury."

The court held that they were compelled, in the existing state of the law, to hold that the judge's comment was a misdirection, but they dismissed the appeal under the proviso to s. 4(1) of the Criminal Appeal Act 1907 (c. 23) on the ground that " no possible miscarriage of justice occurred." We agree with the court's criticism of the present rule.

31. So far as we can see, there are only two possible arguments for preserving the present rule.

(i) Some lawyers seem to think that it is somehow wrong in principle that a criminal should be under any kind of pressure to reveal his case before his trial. The reason seems to be that it is thought to be repugnant—or, perhaps rather, " unfair "—that a person should be obliged to choose between telling a lie and incriminating himself. Whatever the reason, this is a matter of opinion and we disagree. There seems to us nothing wrong in principle in allowing an adverse inference to be drawn against a person at his trial if he delays mentioning his defence till the trial and shows no good reason for the delay. As to the argument that it is " unfair " to put pressure on a suspect in this way, what we said above[2] about fairness in criminal trials generally applies. Bentham's famous comment on the rule that suspects could not be judicially interrogated seems to us to apply strongly to the " right of silence " in the sense under discussion. He wrote[3]:

"If all criminals of every class had assembled, and framed a system after their own wishes, is not this rule the very first which they would have established for their security? Innocence never takes advantage of it. Innocence claims the right of speaking, as guilt invokes the privilege of silence".

[1] Ibid. p. 105.
[2] Paragraph 27.
[3] " Treatise on Evidence ", p. 241.

H.

(ii) It has been argued that the suggested change would endanger the innocent because it would enable the police, when giving evidence, to suppress the fact that the accused did mention to them the story which he told in court. But we reject this argument for two reasons. First, we do not regard this possible danger as a good enough reason for leaving the law as it now is. Second, it is already permissible to draw an adverse inference from the fact that the suspect told a lie to the police or tried to run away; and (as mentioned above[1]) even silence can be taken into account in assessing the value of the evidence given by the accused in court. In neither of these cases is it considered a fatal objection that the police might say falsely that the accused told the lie or that he failed to tell his story.

32. We propose that the law should be amended so that, if the accused has failed, when being interrogated by anyone charged with the duty of investigating offences or charging offenders, to mention a fact which he afterwards relies on at the committal proceedings or the trial, the court or jury may draw such inferences as appear proper in determining the question before them. The fact would have to be one which the accused could reasonably have been expected to mention at the time[2]. The provisions for this purpose are in clause 1(1) and (2). We mention several matters of detail in paragraphs 33 to 39.

33. The clause applies to failure by the accused to mention " any fact relied on in his defence in [the] proceedings." We arrived at these words, after a good deal of discussion, as being precise enough for practical purposes and as precise as it seems possible to be without great elaboration. The words are intended to apply to any definite statement made by a witness at the hearing and supporting the case for the defence. The facts might include an alibi, belief that stolen goods were not stolen (on a charge of handling stolen goods), the defence to a charge of robbery that the accused was resisting an indecent assault by the prosecutor, consent (on a charge of rape) and (on a charge of indecency with a child) innocent association (for example, that the accused took the child into the bushes to show him a bird's nest).

34. The provisions of clause 1 referred to above apply to interrogation by the police or by other persons " charged with the duty of investigating offences or charging offenders " (subsection (2)). These words follow Rule VI of the Judges' Rules (1964), which the Court of Appeal said in *Nichols*[3] were intended to apply to " persons who are professional investigators other than police officers." These would include persons in public positions such as Customs officers (when carrying out these duties) and also, we think, privately employed investigators, including store detectives (to whom the application of Rule VI was assumed, without being decided, in *Nichols*). The new provisions do not apply where the accused has been questioned by a person other than any of these—for example, by the victim of the offence or a member of his family, by an eyewitness or by a person having no interest in the case. Nor do the provisions apply to situations where the accused was not being questioned but was taxed with his conduct by somebody who knew or strongly suspected that

[1] Paragraph 29.
[2] This is mentioned further in paragraph 35.
[3] (1967), 51 Cr. App. R. 233, 236.

the accused was the offender. The possibility of drawing adverse inferences from the silence of the accused, or even from an evasive or otherwise unconvincing denial, in cases of the kinds mentioned is, in our opinion, sufficiently allowed for by the common law. It is well settled that the silence or other reaction of a person when challenged about an offence may in some circumstances amount to an acknowledgment of his guilt (in which case evidence of it may be given under the common law rule as to informal admissions which is to be replaced by the Bill); but the admissibility of evidence of his silence or other reaction is not limited to where this can be regarded as an acknowledgment. For example, in *Christie*[1] Lord Reading said, with reference to the admissibility of evidence of a statement made in the presence of the accused:

> " It might well be that the prosecution wished to give evidence of such a statement in order to prove the conduct and demeanour of the accused when hearing the statement as a relevant fact in the particular case, notwithstanding that it did not amount either to an acknowledgment or some evidence of an acknowledgment of any part of the truth of the statement."

It is true that in *Hall*, mentioned above[2] (which related to silence on the part of the appellant when told by a police officer that his co-accused had said that the appellant was the owner of the drugs which were the subject of the charge), it was suggested[3] that it was only " in very exceptional circumstances that an inference may be drawn from a failure to give an explanation or a disclaimer "; but in the context the reference appears to be to " an inference that [the accused] accepts the truth of the accusation ". In any event we are convinced that there is no reason why the courts should not hold that in cases not covered by the clause it is permissible to draw inferences, of the kind provided for by the clause, whenever the circumstances are such that the inference should be drawn as a matter of common sense and justice. The special difficulty with which the clause is to deal has arisen only in relation to questioning by the police or, at most, by other " professional investigators " such as mentioned above, and we do not think it necessary to complicate the clause by providing for all the situations where such inferences should be allowed to be drawn. But lest it should be suggested that the making of a special provision as to inferences which may be drawn in the case of questioning by the police and the others mentioned was intended to exclude the possibility of drawing such inferences in other cases, subsection (3) provides that the provisions in the clause referred to above shall not prejudice the admissibility in evidence of the silence or other reaction of the accused under the existing law in circumstances to which the clause does not apply or preclude the drawing of inferences permissible under that law, from such silence or other reaction. With this saving, we see no reason why the courts should not take at least as liberal a view of the inferences which may be drawn from a person's failure to exculpate himself to a private person, where it would be natural for him to do so, as from his failure to exculpate himself to a police officer.

35. The clause allows for the drawing of "such inferences ... as appear proper " from the failure of the accused to mention the fact relied on. What,

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[1] [1914] A.C. 545, 565–6; 10 Cr. App. R. 141, 166.
[2] Paragraph 29.
[3] (1970), 55 Cr. App. R. at p. 112.

if any, inferences are proper will depend on the circumstances. In a straightforward case of interrogation by the police where the accused has no reason for withholding his story (apart from the fact that he has not had time to invent it or that he hopes to spring it on the court at his trial) an adverse inference will clearly be proper and, we think, should be readily drawn. Obviously there may be reasons for silence consistent with innocence. For example, the accused may be shocked by the accusation and unable at first to remember some fact which would clear him. Again, to mention an exculpatory fact might reveal something embarrassing to the accused, such as that he was in the company of a prostitute. Or he may wish to protect a member of his family. It will be for the court or (with the help of the judge's direction) for the jury to decide whether in all the circumstances they are justified in drawing an adverse inference.

36. For the clause to apply to the accused's failure to mention a fact the fact will have to be one " relied on in his defence " at the hearing. The stage at which it will appear that the fact is relied on in the defence will depend on how the defence is conducted. Usually, we think, it will be sufficiently clear from the cross-examination of the witnesses for the prosecution whether a fact is being relied on in this way, and then the prosecution will be able to adduce evidence that the accused did not mention it when interrogated. It is true that sometimes the defence will be able to avoid showing this before the accused gives evidence at the trial (subject, in trials on indictment, to the requirement under s. 11 of the Criminal Justice Act 1967 (c. 80) to give notice of a defence of alibi). The prosecution will then be able to ask the accused in cross-examination why he failed to mention this fact when interrogated; and if the court in its discretion under clause 23(1) gives leave, the prosecution will be able to call evidence to prove the failure. The clause enables inferences to be drawn at committal proceedings (for the purpose of determining whether to commit the accused for trial) as well as allowing them to be drawn at the trial (by the court, for the purpose of determining whether there is a case to answer, and by the jury or magistrates' court, for the purpose of determining whether the accused is guilty); but the clause will seldom have any application to committal proceedings, as it is unusual for the accused to reveal his defence at this stage.

37. The clause applies not only to the accused's failure to mention a fact during interrogation but also to his failure to do so on being charged (or officially informed—i.e. by a police officer or other person investigating the offence (subsection (2))—that he might be prosecuted. At first we were in favour of limiting the provision to the stage before the charge (or official information as mentioned above). This was because we felt that, once this stage was reached, the investigatory process should be regarded as at an end and the judicial process as having begun. Therefore it might be thought reasonable that the accused should be entirely free to decide that he should say no more to the police but only to his solicitor. After this stage further interrogation is generally not allowed. Rule III(*b*) of the Judges' Rules says:

> " It is only in exceptional cases that questions relating to the offence should be put to the accused person after he has been charged or informed that he may be prosecuted. Such questions may be put where they are necessary for the purpose of preventing or minimising harm or loss to

K.

some other person or to the public or for clearing up an ambiguity in a previous answer or statement."

But we have come to the conclusion (with one dissentient) that it would be artificial to make the new rule apply to silence immediately before the accused is charged but not to silence on his being charged. For on the assumption (on which the clause is based) that it is natural to expect an innocent person who is being interrogated to mention a fact which will exculpate him, it seems equally natural to expect him to do so when he is charged if he has not done so before. Sometimes indeed a suspect may deliberately refrain from mentioning a fact during the interrogations because this may embarrass him and may mention it only at the charge stage when he has seen that the police " mean business." If he really thought at the charge stage that it was now too late to mention a matter, it will be open to him to say so at his trial when he gives his explanation why he did not mention it before. Moreover, to draw a distinction at the charge stage would be artificial in another way. For if the accused has not mentioned the fact in question at this stage, he will presumably not have done so before, and it would be curious to give evidence that he said nothing during the interrogation and not go on to say whether he said anything when charged. If he has mentioned the fact during the interrogation, his omission to repeat it when charged will hardly ever have any significance.

38. Apart from these general arguments, there are two particular arguments for applying the clause to the accused's silence on being charged. The first is that this is consistent with police procedure; for in the ordinary course the officer who charges the accused will have had nothing to do with the investigations. Where a suspect has been interrogated and the officer in charge of the investigations thinks that there is a sufficient case to justify charging the suspect, he takes him before the station officer and puts the information before the latter. The station officer may accept the charge, or reject it and release the prisoner, or defer a decision pending further investigation (such as an inquiry into a statement by the accused, made in response to the officer's invitation, which, if true, would exculpate him). This power to delay preferring a charge is often used in drug cases, the suspect being released on bail pending a scientific analysis of the material in question. It might be suggested because of this procedure that the clause should apply only up to the stage immediately before the charge; but we do not think that one should draw so fine a distinction as this, and it would be awkward to frame a provision by reference to police procedure, as this is not statutory and therefore might change. The second reason for applying the clause to the charge stage is that occasionally a person is charged without any previous interrogation. It will be noted that the clause will not apply to the limited questioning which is allowed by Rule III(*b*) of the Judges' Rules after the accused has been charged[1].

39. At the trial, the clause allows the drawing of inferences not only for the purpose of determining whether the accused is guilty but also for that of determining whether there is a case to answer. It might be suggested that to allow inferences for the latter purpose is excessive, especially as the court may not know at this stage what is the accused's reason, if any, for not having mentioned the fact on which he is going to rely. But (although probably the question will seldom arise) we think it would be artificial to draw this distinction.

[1] See paragraph 37.

For the court, in considering whether there is a case to answer, has to consider whether the accused could properly be convicted on the evidence so far given; and it would be strange if the court, in considering for this purpose how much importance to attach to the fact that the accused is relying on a fact to exculpate him, were not to be allowed to treat his failure to mention this fact in the same way as might be done for the purpose of determining whether he is guilty. It would also be difficult to tell whether the court had wrongly taken account of the accused's silence in this way unless they were to say expressly, when ruling on the submission of no case, that they had taken it into consideration. In any event, if the court determines that there is a case to answer, the defence will have the opportunity to show, if they can, that no weight should be given to the accused's silence for the purpose of determining whether he is guilty.

40. Under the clause, in any case where an adverse inference may properly be drawn from the accused's silence, it will be permissible to treat his silence as corroboration of the evidence against him for any purpose for which corroboration is material[1]. Of course whether in any case silence can or will amount to corroboration will depend entirely on the circumstances, in particular on the nature of the inference drawn from the silence. This is secured by the provision in subsection (1) that silence may be treated as corroboration "on the basis of" inferences properly drawn from the silence. Further, in order to be capable of being corroborated by the accused's silence, the evidence will have to be evidence to which the silence is " material." The effect will be this: if (i) the existence of some fact can properly be inferred from the accused's silence, and (ii) proof of this fact by other means would be capable of being corroboration of the evidence against the accused, then his silence will be capable of being corroboration of that evidence.

41. Our decision to recommend that silence might count as corroboration was taken only after very full consideration. The following seem to us to be the arguments against allowing it to count as corroboration:

(i) To allow silence to give rise to an adverse inference is a strong measure. and it may be thought excessive to go further and in effect cause the safeguards provided by the rules as to corroboration to be dispensed with merely because the accused has failed to mention a fact on which he relies in his defence.

(ii) Since failure to mention a fact is something negative, it may be thought that it cannot be sufficiently direct to be rightly treated as corroboration for the purposes of the special requirements as to corroboration.

42. The following arguments have been put forward in favour of allowing silence to be corroboration:

(i) Once it is accepted that failure to mention a matter should be capable of giving rise to an adverse inference, it seems illogical that it should not be capable of amounting to corroboration. Evidence of the failure, having been made admissible, should be admitted for all purposes for which it is logically probative.

[1] If our proposals in paragraphs 185, 191, 195 and 208 are accepted, the present rules as to corroboration will be greatly modified, but corroboration will remain important for some purposes.

M.

(ii) We think it artificial, especially in a statute, to provide that a particular kind of evidence which would naturally be regarded as capable of being corroboration should never be capable of being so.

(iii) Not to allow silence to amount to corroboration would involve the judge's having to direct the jury in a way which would require them to draw a distinction which most people would regard as artificial. For example, if, on a charge of indecent assault, the defence is an alibi, and failure to mention the alibi to the police is capable of giving rise to an adverse inference but not of being corroboration, the judge will have to say something like this to the jury:

> " You may think that no man who had been in the Pig and Whistle for the last hour before being stopped by the constable would have refused to answer the constable's question as to where he was and that in the circumstances his silence goes to show that, when he now tells you he did not assault the girl, he is not telling the truth. But even if you do think this, you must on no account regard his silence as going to show that the girl is telling the truth when she says he did assault her."

This would seem hardly to make sense. We have formed the view that the arguments for allowing silence to be capable of being corroboration outweigh the contrary arguments.

43. If our proposal to allow adverse inferences to be drawn from the accused's silence is accepted, it follows that the requirements of the Judges' Rules to caution a suspect must be abolished or replaced by different kinds of warnings or intimations. Rule II requires that the " first caution " should be given when the police officer " has evidence which would afford reasonable grounds for suspecting that [the person in question] has committed an offence "; and Rule III(*a*) requires that the " second caution " should be given when the suspect is " charged with or informed that he may be prosecuted for an offence ". Both cautions include the statement " You are not obliged to say anything unless you wish to do so " and the warning that anything said may be given in evidence[1]. The warnings included in the first and second cautions are, on the face of them, a discouragement to the suspect to make a statement and are therefore directly contrary to the provision in clause 1(1). But apart from this, whatever may have been desirable in the past, we think that there are serious objections to the requirements to administer these cautions.

(i) It is of no help to an innocent person to caution him to the effect that he is not obliged to make a statement. Indeed, it might deter him from saying something which might serve to exculpate him. On the other hand the caution often assists the guilty by providing an excuse for keeping back a false story until it becomes difficult to expose its falsity. In fact the caution seems to stem from the ancient fallacy to which we referred earlier[2] that " fairness " in criminal trials requires

[1] There is also a caution which must be given under Rule III(*b*) before any of the limited questioning which is allowed after the charge takes place; but what is said in this paragraph is not intended to apply to this caution, which will require special consideration when and if administrative directions are being prepared to replace the Judges' Rules in accordance with our recommendation in paragraph 46.

[2] Paragraph 27.

that a guilty person should not be allowed to convict himself too easily. In any event practised criminals have little respect for the caution. An illustration of this is in *Weaver*[1], where the two accused brothers, when spoken to by the police about their having obtained money by false pretences, proceeded immediately " in a light-hearted way " to address the officers in the terms of the caution.

(ii) It is illogical that, when the police have a duty to question persons for the purpose of discovering whether and by whom an offence has been committed, they should be required to tell a person being questioned that he need not answer. In particular, the first caution (under Rule II), which was introduced when the rules were revised in 1964, has been objected to on the ground that it interrupts the natural course of interrogation and unduly hampers the police, as there may be a good deal more information which they wish to get, perhaps involving other offences and persons, after the stage when they have " evidence which would afford reasonable grounds for suspecting that [the person being questioned] has committed an offence." Indeed there may be a strong temptation for police officers not to interrupt an interrogation at a critical point by administering a caution which may render the investigation fruitless.

As the cautions are not required by statute or by a rule of the common law, but only administratively, there is no need to make provision in the Bill to abolish the need for them. But as they have become so much a part of the procedure in police interrogations, we think it desirable to include a declaration of the absence of any legal requirement to give a caution. This we have done in clause 1(5).

44. On the other hand, the fact that adverse inferences may be drawn from the failure of the accused to mention a fact on which he is going to rely at his trial raises the question whether suspects should be warned, when being interrogated, of this danger to them. This does seem to us necessary, because the new rule makes a great change from the present law. No doubt the change will be given plenty of publicity; but it may be some time before it becomes known to all persons whom it is likely to affect. Clause 1(4) provides that the new provisions shall not apply as regards a failure to mention a fact if the failure occurred before the commencement of the Act; but even if the failure occurred soon after this, the defence might argue that, as the accused did not know of the change in the law, the judge should direct the jury, as now, that they should not treat the failure to mention the fact as any indication of guilt. On the other hand, any procedure introduced for warning suspects of the danger of remaining silent should avoid as far as possible the disadvantages of the present rules as to cautions. In particular one does not want to interrupt the natural course of interrogations or to have side issues as to whether the proper warning was given. Nor must the need to give a warning be made an excuse for using threats. We think that the best course would be that there should be an administrative requirement (of the kind shown below[2]) that,

[1] [1968] 1 Q.B. 353, 357 D; 51 Cr. App. R. 77, 80.

[2] Paragraph 46 (where it is recommended that the Judges' Rules should be replaced by administrative directions by the Home Secretary). These would include the requirement to give the proposed warning.

when the accused is charged (or officially informed that he may be prosecuted), he should be given a written notice to the following effect:

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

The reasons for suggesting that the notice should be given in writing are that this will provide a record that it was given and also that some suspects try to interrupt and otherwise obstruct police officers trying to give them oral notices. We do not wish to recommend that there should be any general requirement to warn suspects at an earlier stage of the interrogations, because this might have the disadvantages mentioned above which result from the present cautions and because in any case the circumstances are likely to differ so much that it is difficult to lay down any fixed procedure in this respect. The matter must depend on what is fair and proper in each particular case.

45. Our proposals that the first two cautions should be abolished[1] but that a warning should have to be given as to the effect of clause 1[2] involve the complete reconsideration of the Judges' Rules. The present rules were issued in January 1964 to replace the four rules originally issued in 1912 and the five added in 1918. The text of the present rules is given, together with an introductory note, in Appendix A to the Home Office Circular No. 31/1964 published by the Stationery Office. The introductory note summarizes the origin and history of the rules. In addition to the cautions the rules lay down certain requirements as to interrogation and the taking of statements. Appendix B contains administrative directions to the police on ancillary matters concerning interrogation and the taking of statements. The legal status of the rules was described as follows by A. T. Lawrence J. in giving the judgment of the Court of Criminal Appeal in *Voisin*[3]:

> " In 1912, the judges, at the request of the Home Secretary, drew up some rules as guides for police officers. These rules have not the force of law, they are administrative directions the observance of which the police authorities should enforce on their subordinates as tending to the fair administration of justice. It is important that they should do so, for statements obtained from prisoners contrary to the spirit of these rules may be rejected as evidence by the judge presiding at the trial."

In practice it seems that nowadays, before the prosecution can adduce evidence of a statement obtained in breach of the rules, there must be a positive decision by the court to exercise its discretion in favour of admitting the statement. The introductory statement of the five " principles " which are declared to be unaffected by the rules says:—

> " Non-conformity with these Rules may render answers and statements liable to be excluded from evidence in subsequent criminal proceedings."

In *Collier and Stenning*[4], Lord Parker C. J. said, with reference to the require-

[1] Paragraph 43.
[2] Paragraph 44.
[3] (1918), 13 Cr. App. R. 89, 96.
[4] (1965), 49 Cr. App. R. 344, 350.

ment in Rule III(*a*) to administer the second caution, that any evidence obtained in breach of the rule " will, subject to the discretion of the judge, be inadmissible." The legal status of the administrative directions in Appendix B, so far as concerns the law of evidence, has not been precisely laid down. Clearly a breach will not make evidence of a resulting statement inadmissible: but it seems from *Roberts*[1] that evidence of the statement might, because of the breach, be excluded in exercise of the general exclusionary discretion, though a breach of a requirement as to a matter of detail at least would presumably be regarded as less serious than a breach of a requirement of the rules themselves.

46. Apart from the fact that some of the requirements of the Judges' Rules are inconsistent with our proposals referred to in paragraph 44, the substance of the rules has been criticized in various respects, in observations sent to us and elsewhere, in particular in that they hamper the police in their investigations. But the existence of the rules has also been objected to strongly on the ground that restrictions on the way in which the police should interrogate persons should be imposed not by the judges but by the authority responsible for the police (in this case, by the Home Secretary) or, if the matter is important enough, by law. We all think this last criticism is justified, and many of those who have sent us observations (including judges) have expressed the same view. None of those who have sent us observations has argued, at any rate expressly, for keeping the rules as " Judges' Rules ", though many persons and organizations have argued for or against the substance of the rules in some form. There have been a very few suggestions that the rules or parts of them should be made statutory. We are against making any of the provisions statutory. We think that the right course would be for the rules to be replaced by administrative directions by the Home Office dealing, so far as is thought desirable, with the matters provided for in the rules, and that the approval of the judges to the issuing of the directions should be sought, and referred to in the directions when issued, in some such way as was done in the case of the present directions in Appendix B to the Rules. Evidence of a statement obtained by means of a breach of the directions should clearly remain admissible in law. Whether and to what extent the present practice as to excluding evidence of a statement in exercise of the general discretion, if the statement was obtained by a breach of the Judges' Rules, should apply to a statement obtained by a breach of an administrative direction (whether this is a direction replacing an existing rule or one replacing an existing direction) is a matter which we think should be left to be decided by the courts. In addition there will be the sanction of judicial criticism of those responsible for breaches and, in the case of breaches by the police, enforcement by their superiors.

47. We have considered, but do not favour, suggestions that provision (which would have to be statutory) should be made for interrogation of suspects before magistrates. The suggestions took various forms. The essential feature is that at a certain stage the suspect should be taken compulsorily before a magistrate and obliged to listen to questions. The questions, and the answers if any, would be admissible. On some versions of this scheme evidence of anything said during interrogations by the police before the suspect was taken before the magistrate would be inadmissible. This is the rule provided

[1] [1970] Crim. L.R. 464; *Times*, 4th May 1970.

for by the Indian Evidence Act of 1872. But any scheme which made inadmissible evidence of what was said during police interrogations would be inconsistent with the principle underlying our clause 1. Provision might be made for compulsory interrogation before a magistrate while still allowing evidence to be given of interrogations not in the presence of a magistrate. On this scheme the questioning would probably have to be done by the police, as the magistrate could hardly be expected to acquire all the knowledge of the case which would enable him to put the questions which the police might profitably put. It is claimed for the system that it would ensure beyond doubt the " fairness " of the interrogation and that disputes as to what was said in the course of it would be avoided. We do not think it has been, or could seriously be, claimed that the system would make it more likely that the person interrogated would tell the truth. The formality of the procedure would, we think, often defeat its own purposes and the person interrogated would be likely to refuse to answer questions—even those by the police preceding the interrogation before the magistrate. We believe that magistrates, stipendiary and lay, would be opposed to the system and would be very reluctant to undertake the work. In any event we doubt very much whether it would be possible to arrange for magistrates to be available at all the times at which the police might think it necessary to conduct an interrogation immediately in order to enable them to identify associates of the suspect or to take steps which might be necessary for the protection of persons or the recovery of property. Nor do we think it possible to be confident that even a statement taken from an accused person at a formal interrogation in the presence of a magistrate would be accepted by the defence at the court of trial without challenge, at any rate as to the form and manner of the questioning. If there were a dispute as to what was said during the interrogation or how it was conducted, it might be necessary for the magistrate to be called as a witness and cross-examined, and it seems to us undesirable that magistrates should be subjected to this inconvenience and possible embarrassment.

48. We have considered whether to recommend that provision should be made as to the use of tape recorders in criminal interrogation. This is partly because of their increasing use generally and their value when rightly used and partly because our proposal to allow adverse inferences to be drawn from a person's silence when interrogated makes it even more important to have a reliable account of the interrogation. The latter consideration applies strongly to evidence of confessions, which subject is dealt with in the next section of the report[1]. Tape recordings are specially useful to prove an overheard conversation, for example to prove a blackmailing threat or the offer of a bribe. They have also been used many times to prove a conversation between two persons charged with an offence. An example is *Ali and Hussain*[2], where two Pakistanis charged with murder made incriminating statements in a conversation in a Punjabi dialect after the police had hidden a microphone in the room. The advantage of a requirement to use tape recorders in interrogations would sometimes be great, because, if the recording was made in favourable conditions, the playing over of the tape in court would show clearly what was said and in what tone of voice. As a Canadian judge said,

[1] Paragraphs 53–69.
[2] [1966] 1 Q.B. 688; 49 Cr. App. R. 230.

established by clause 1 provides a powerful sanction for the answering of questions by the police. At present the Judges' Rules provide that all statements made by a person in custody must be written down at the time, and the use of electronic recording would hardly be more inhibiting for an offender than the sight of a police officer writing down what he is saying, though it is true that the Judges' Rules on this point are often neglected. Even if some suspects refuse to answer when they know they are being recorded, the loss of this evidence must be accepted as the price paid for an essential safeguard.

R.

CLRC DRAFT CLAUSE 5 B [redacted] ANNEX B S

Accused to be called upon to give evidence at trial.

5.—(1) At the trial of any person for an offence the following provisions of this section shall apply unless he pleads guilty, except that subsection (2) shall not apply if—

(*a*) the court holds that there is no case to answer; or

(*b*) before any evidence is called for the defence, the accused or counsel or a solicitor representing him informs the court that the accused will give evidence; or

(*c*) 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.

(2) Before any evidence is called for the defence, the court shall tell the accused that he will be called upon by the court to give evidence in his own defence and shall tell him in ordinary language what the effect of PART I this section will be if, when so called upon, he refuses to be sworn; and thereupon or, if the court in the exercise of its discretion under section 4(4) of this Act allows the defence to call other evidence first, after that evidence has been given, the court shall call upon the accused to give evidence.

(3) If the accused—

(*a*) after being called upon by the court to give evidence in pursuance of this section, or after he or counsel or a solicitor representing him has informed the court that he will give evidence, refuses to be sworn; or

(*b*) having been sworn, without good cause refuses to answer any question,

the court or jury, in determining whether the accused is guilty of the offence charged, may draw such inferences from the refusal as appear proper; and the refusal may, on the basis of such inferences, be treated as, or as capable of amounting to, corroboration of any evidence given against the accused.

(4) Nothing in this section shall be taken to render the accused compellable to give evidence on his own behalf, and he shall accordingly not be guilty of contempt of court by reason of a refusal to be sworn in the circumstances described in subsection (3)(*a*) above.

(5) For the purposes of this section a person who, having been sworn, refuses to answer any question shall be taken to do so without good cause unless—

(*a*) he is entitled to refuse to answer the question by virtue of section 6(1) of this Act or any other enactment, whenever passed, or on the ground of privilege; or

(*b*) the court in the exercise of its general discretion excuses him from answering it.

(6) In relation to the trial of a child *for homicide* the foregoing provisions of this section have effect subject to section 22(3) of this Act.

110. In our opinion the present law and practice are much too favourable to the defence. We are convinced that, when a prima facie case has been made against the accused, it should be regarded as incumbent on him to give evidence in all ordinary cases. We have no doubt that the prosecution should be entitled, like the judge, to comment on his failure to do so. The present prohibition of comment seems to us wrong in principle and entirely illogical. Assuming that the point which might be made in commenting is valid, it must seem strange to the jury that the prosecution should not make it in their final speech; and if the judge then makes the point, he may seem like an extra prosecutor. Moreover, now that the final speech for the defence always comes after that for the prosecution, the defence will be in a position to make such reply as they can to comment by the prosecution. A few suggestions have been put to us that only the judge should be able to comment because the prosecution may not use enough discretion in doing so; but we do not think that this is a strong enough argument, especially when both the defence and the court will be able to put the matter in perspective. As to what may properly be included in a comment, we have no doubt that the same kinds of adverse inferences, such as common sense dictates, should be allowed to be drawn from the accused's failure to give evidence as those which we have proposed[1] should be allowed to be drawn from his failure to mention, when interrogated, a fact on which he intends to rely at his trial. In fact the argument for allowing this seems even stronger in the case of failure to give evidence. We would stress that our proposals depend on there being a prima facie case against the accused. Failure to give evidence may be of little or no significance if there is no case against him or only a weak one. But the stronger the case is, the more significant will be his failure to give evidence.

111. Similar considerations in our view apply to corroboration. At present the failure of the accused to give evidence is not allowed to be treated as corroboration[2]. We disagree with this rule. It seems to us clearly right that, when the prosecution have adduced sufficient evidence of a fact to be considered by the jury or magistrates' court, the failure of the accused to give evidence denying the fact should be capable of corroborating the evidence of it. Admittedly, if the case is one where corroboration is required by law and the prosecution have not enough corroborative evidence to adduce, they may be unable to start the proceedings, because they will not know whether the accused will or will not give evidence; but there may be other corroborative evidence, and failure to give evidence will add to this. In any event the question relates also to where corroboration, though desirable, is not required as a matter of law.

112. The changes which we propose in paragraphs 110 and 111 will, we hope, operate as a strong inducement to accused persons to give evidence. But we wish to go further still for this purpose. We propose that, once the court has decided that there is a case for the defence to answer (which the court is under a duty to consider even if the defence do not submit that there is no case), the court should tell the accused that he will be called on at the appropriate time to give evidence in his own defence and should tell him what the effect will be if he refuses to do so; and we propose that, when this time comes, the court should formally call on the accused to give evidence. The intimation by the court will leave the accused under no mistake as to what will be his position. This is particularly important if the accused is unrepresented. We think that the formal calling on the accused to give

[1] Clause 1.
[2] *Jackson* (1953), 37 Cr. App. R. 43 (mentioned in paragraph 109) at p. 48.

evidence, followed by his refusal, would have value in demonstrating to the jury or magistrates that the accused had the right, and obligation, to give evidence but declined to do so. Admittedly the introduction of these procedural requirements is not a necessary consequence of the proposed change in the law as to refusal to give evidence, and there is a risk that they may sometimes be overlooked; but our general opinion is that the value of the procedure will outweigh this objection.

113. The provisions for this purpose are in clause 5. The main provisions as to calling on the accused and the effect of his refusal to give evidence are in subsections (2) and (3). Apart from the fact that the suggested procedure will apply only where the court holds that there is a case for the accused to answer (subsection (1)(*a*)), we propose that there should be two exceptions. First, there is no need to tell the accused that he will be called on if he or his counsel or solicitor has already informed the court that he will give evidence (subsection (1)(*b*)), nor will it be necessary in this case to call on the accused formally to give evidence at the appropriate time. Second, the procedure will 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 " (subsection (1)(*c*)). The latter exception is to provide, in particular, for a case where there is a defence of insanity or diminished responsibility. In this case it would hardly ever be appropriate to comment adversely on the failure of the accused to give evidence. We propose that the provision as to the effect of refusing to be sworn should apply also to refusing without good cause to answer a particular question (subsection (3)(*b*)). The only cases where there will be a good cause will be (i) where the accused is entitled (under clause 6(1)) to refuse to answer a question about other misconduct which he has committed, (ii) where he is entitled to do so under any other enactment (for example his limited right under clause 15(2)(*b*) to refuse to answer on the ground that this might incriminate himself or his spouse, and the right of a person charged with the commission of an offence when he was aged twenty-one or over to refuse to answer a question, asked in breach of s. 16(2) of the Children and Young Persons Act 1963 (c. 37)[1], about an offence of which he was found guilty when under fourteen), (iii) where he is entitled to claim professional privilege (for communications with his solicitor) and (iv) where the court in its discretion excuses him from answering (for example, because the question is too oppressive). These cases are specified in subsection (5). In this connection we hope that, if the defence claim that the accused should not be called on to give evidence or to answer a particular question, and their claim depends on the ascertainment of any facts not already before the court, the court will require evidence to be given on oath in support of the claim. We stress this because sometimes counsel has been allowed to tell the jury of some fact said to justify the accused in not giving evidence. We think this is wrong and that any fact relied on in support of an objection should have to be proved by proper evidence. The right of the prosecution to comment on the accused's failure to give evidence will follow from the repeal, which we propose, of s. 1(*b*) of the 1898 Act.

[1] As to be amended by clause 46(2) of, and Schedule 1 to, the draft Bill.

IRISH CRIMINAL JUSTICE ACT 1984

*Inferences from Accused's Failure to Account for Certain Matters*

[redacted]

Inferen... failure, refusal to account for objects, marks, etc

V.

18.—(1) Where—

(*a*) a person is arrested without warrant by a member of the Garda Síochána, and there is—

(i) on his person, or

(ii) in or on his clothing or footwear, or

(iii) otherwise in his possession, or

(iv) in any place in which he is at the time of his arrest

any object, substance or mark, or there is any mark on any such object, and the member reasonably believes that the presence of the object, substance or mark may be attributable to the participation of the person arrested in the commission of the offence in respect of which he was arrested, and

(*b*) the member informs the person arrested that he so believes, and requests him to account for the presence of the object, substance or mark, and

(*c*) the person fails or refuses to do so,

then if, in any proceedings against the person for the offence, evidence of the said matters is given, the court, in determining whether to send forward the accused for trial or whether there is a case to answer and the court (or, subject to the judge's directions, the jury) in determining whether the accused is guilty of the offence charged (or of any other offence of which he could lawfully be convicted on that charge) may draw such inferences from the failure or refusal as appear proper; and the failure or refusal may, on the basis of such inferences, be treated as, or as capable of amounting to, corroboration of any other evidence in relation to which the failure or refusal is material, but a person shall not be convicted of an offence solely on an inference drawn from such failure or refusal.

(2) References in *subsection (1)* to evidence shall, in relation to the preliminary examination of a charge, be taken to include a statement of the evidence to be given by a witness at the trial.

(3) *Subsection (1)* shall apply to the condition of clothing or footwear as it applies to a substance or mark thereon.

(4) *Subsection (1)* shall not have effect unless the accused was told in ordinary language by the member of the Garda Síochána when making the request mentioned in *subsection (1) (b)* what the effect of the failure or refusal might be.

(5) Nothing in this section shall be taken to preclude the drawing of any inference from a failure or refusal to account for the presence of an object, substance or mark or from the condition of clothing or footwear which could properly be drawn apart from this section.

(6) This section shall not apply in relation to a failure or refusal if the failure or refusal occurred before the commencement of this section.

Inferences from accused's presence at a particular place.

19.—(1) Where—

(*a*) a person arrested without warrant by a member of the Garda Síochána was found by him at a particular place at or about the time the offence in respect of which he was arrested is alleged to have been committed, and

(*b*) the member reasonably believes that the presence of the person at that place and at that time may be attributable to his participation in the commission of the offence, and

(*c*) the member informs the person that he so believes, and requests him to account for such presence, and

(*d*) the person fails or refuses to do so,

then if, in any proceedings against the person for the offence, evidence of the said matters is given, the court, in determining whether to send forward the accused for trial or whether there is a case to answer and the court (or, subject to the judge's directions, the jury) in determining whether the accused is guilty of the offence charged (or of any other offence of which he could lawfully be convicted on that charge) may draw such inferences from the failure or refusal as appear proper; and the failure or refusal may, on the basis of such inferences, be treated as, or as capable of amounting to, corroboration of any evidence in relation to which the failure or refusal is material, but a person shall not be convicted of an offence solely on an inference drawn from such failure or refusal.

(2) References in *subsection (1)* to evidence shall, in relation to the preliminary examination of a charge, be taken to include a statement of the evidence to be given by a witness at the trial.

(3) *Subsection (1)* shall not have effect unless the accused was told in ordinary language by the member of the Garda Síochána when making the request mentioned in *subsection (1) (c)* what the effect of the failure or refusal might be.

(4) Nothing in this section shall be taken to preclude the drawing of any inference from the failure or refusal of a person to account for his presence which could properly be drawn apart from this section.

(5) This section shall not apply in relation to a failure or refusal if the failure or refusal occurred before the commencement of this section.

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Date 15 February 1988

Dear Douglas.

**RIGHT OF SILENCE**

Thank you for copying to me your letter of 29 January to John Wakeham.

I am content with your proposal for an arranged PQ to make it clear how we intend to proceed with the further work on the right of silence issue. I was interested by your comments on Patrick Mayhew's views and my own on tape recording. I personally would not regard this as a concession to be made if necessary, but rather as an essential protection for the liberty of the subject. However this is not the stage to take that further.

I hope that you can agree to my earlier request that my officials be given the opportunity to look at the report in draft to make sure that the position under the Companies Act and the Financial Services Act is not inadvertantly compromised in any way.

I am copying this letter to other members of H, Patrick Mayhew and to Sir Robin Butler.

Yours ever,

KENNETH CLARKE

FE2ABY

QUEEN ANNE'S GATE LONDON SW1H 9AT

29 January 1988

Dear John.

**RIGHT OF SILENCE**

I was grateful for your agreement to the terms of what I said about the right of silence during the Second Reading debate on the Criminal Justice Bill.

As we had agreed, I did not announce how I proposed to carry forward the detailed further work to which I referred, but I undertook to do so before the Bill left the Commons. I can see some advantage in making the announcement sooner rather than later. To delay it might cause unhelpful speculation about our intentions, and could provoke probing amendments while the Bill is in Committee, which I would prefer to avoid if possible. I have also lined up the outside members of the working group, and would prefer not to keep them in suspense for any longer than necessary.

I enclose a draft announcement in the form of an arranged written Answer which I should like to give if possible before the commencement of Committee stage on 11 February. In inviting comments on it, perhaps I could respond to colleagues' reactions to my earlier letter of 12 January to James Mackay.

James Mackay himself was concerned that we should not adopt that aspect of the Criminal Law Revision Committee's proposal under which failure by the accused to mention to the police a fact subsequently relied on in his defence would not only be capable of giving rise to adverse inferences but could corroborate other prosecution evidence. As he will know, there are arguments both ways on this, and the CLRC view was that it would be illogical (and confusing for the jury) not to allow silence to count as corroboration. I have no settled view on the matter and had it in mind to invite the working group to consider it - hence the reference in the draft announcement to "the precise form of the change in the law which would best achieve our purposes".

My officials will continue to keep in touch with their opposite numbers in the Lord Chancellor's Department about the implications for court business and legal aid.

/I welcome

The Rt Hon John Wakeham, MP

I welcome Tom King's intention to look at the case for proceeding independently in Northern Ireland. I had seen the working group as confining itself to the case for change in criminal proceedings for all offences in England and Wales. I can see advantage in presenting the issue in that way, should Tom King decide in the event to bring forward more stringent proposals for the province. That being so, I hope Tom King may be willing not to press his suggestion that one of his officials should be a member of the working group. As will be clear from the draft announcement, I see the group as a small team of advisers, rather than a traditional departmental committee with wide-ranging membership. To extend the group's remit to include Northern Ireland might make it more difficult for Tom King to proceed independently, should he decide to do so. I can, however, assure Tom King that we shall keep his officials closely in touch with the work of the group and that the chairman will ensure that they see papers and have an opportunity to feed in their comments and concerns.

As regards timetable, there is a good deal of detailed ground to be covered. All members of the group will have other commitments, and I doubt if we can reasonably expect them to report much before the end of the year.

I had not intended to include provisions on the right of silence in the Prevention of Terrorism Bill, because, at any rate on the mainland, I think it would be difficult to justify making the change for terrorist trials alone. The Bill's scope will, of course, be insufficiently wide for it to be a suitable vehicle for any general change in the criminal law.

Both Patrick Mayhew and Kenneth Clarke expressed the hope that the change would not be implemented until tape-recording of police interviews was universal. I have always seen this as a concession which might have to be made to secure the passage of the legislation in due course. I would propose to continue to treat it in that light, subject to anything that the working group may say. We should certainly take stock of progress with the introduction of tape-recording before reaching a final decision.

I am copying this letter to the other members of H, Patrick Mayhew and Sir Robin Butler. If colleagues have comments on the draft announcement, it would be helpful if I could receive them by 9 February.

Yours,

Douglas.

To ask the Secretary of State for the Home Department whether he will give details of the further work he proposes on the consequences when an accused person produces at his trial a line of defence which he has not previously mentioned to the police.

**DRAFT REPLY**

As I said during the debate on Second Reading of the Criminal Justice Bill [Official Report, 18 January 1988, col 687], I started a discussion, beginning with a lecture to the Police Foundation in July, on a recommendation made by the Criminal Law Revision Committee in 1972. This was that the court should be able to draw whatever inferences appeared proper from the accused's failure, when interviewed by the police, to mention facts later relied on in his defence, and such failure should also be able to corroborate other evidence against him.

There has been a lively debate, and I have listened carefully to the arguments for and against change. I am not convinced that the protection which the law now gives to the accused person who ambushes the prosecution can be justified. The case for change is strong. But I am persuaded by some of the comments which have been made that more careful work needs to be done before we can bring forward with confidence a specific proposal for legislation. I do not see the Criminal Justice Bill, which is already long and detailed, as the right vehicle for such a proposal.

The work which needs to be done covers such matters as the precise form of the change in the law which would best achieve our purposes (given the significant changes in police and criminal procedure in England and Wales in recent years), and of any warning given by the police to suspects before commencing interviews; the practical implications, both for police interviews and in court; and the relevance of other measures to encourage

/early disclosure

early disclosure of the defence case. I am asking a small working group under the chairmanship of a senior Home Office official to carry this work forward, and advise me by the end of the year, with a view to legislation in due course.

The members of the working group will be:

| | |
|---|---|
| Mr W J Bohan | Head of the Criminal Policy Department, Home Office (chairman). |
| Mr K R Ashken | Crown Prosecution Service. |
| Mr Colin Bailey | Assistant Chief Constable (Crime), West Yorkshire Police. |
| Mr Michael Kalisher, QC | Barrister and a Recorder of the Crown Court. |
| Mr P M Raphael | Solicitor. |

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the department for Enterprise

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Date 15 January 1988

Dear Secretary of State,

RIGHT OF SILENCE

I have seen your letter of 12 January to the Lord Chancellor and am content with your proposals for handling this subject and for making an announcement next Monday. I would like to see the report of the working group in due course and to be kept in touch with major developments.

As you know, I am in favour of the change you are proposing, in principle, but it obviously does require very detailed working-up. In my opinion, the form of the caution will certainly have to be changed. I would also hope that you could delay introducing the new system until tape-recording of interviews has become universal as a protection for the vulnerable and the innocent.

As you know companies and individuals being investigated under the provisions of the Companies Act 1985 or the Financial Services Act 1986 do not have the 'right of silence' and their answers may be given in evidence against them. Given the complicated nature of the subjects under investigation this is an essential feature of the effectiveness of these provisions and I would not want them undermined in any way. In these circumstances it would be helpful if officials in my Department could have the opportunity of commenting on the report in draft.

JA3ACF

dti

the department for Enterprise

I am sending copies of this letter to James Mackay and other members of H and to Patrick Mayhew.

Yours sincerely,

Alastair Morgan

pp

KENNETH CLARKE
(Approved by the Chancellor and
signed in his absence)

JA3ACF

888-273

M Atkins Ryl & Stence Sept 97

M Atkins Sept 97

Not to be published before 7.30 pm on Wednesday, 30 September

**THE RIGHT TO APPEAL AND THE RIGHT OF SILENCE**

EXTRACT FROM A SPEECH BY THE RT HON LEON BRITTAN QC MP TO THE ANNUAL DINNER OF THE CARDIFF SOUTH AND PENARTH CONSERVATIVE ASSOCIATION AT THE PENARTH CONSERVATIVE CLUB ON WEDNESDAY, 30 SEPTEMBER 1987

"Public confidence in the criminal justice system is a delicate plant. It can so easily be seriously damaged by a few, invariably well-reported, cases where it seems that the sentence passed is too lenient. Such cases form a tiny proportion of the enormous number of cases heard by the Courts. Usually the punishment is entirely appropriate. For the Courts in England are not a soft touch. They are indeed notably tougher than in many, if not most, neighbouring countries. But it is the very few cases where the sentences seem inadequate that attract such disproportionate and damaging publicity.

"That is why as Home Secretary I put forward the proposal that apparently lenient sentences could be referred to the Court of Appeal. An authoritative judgement could then be given, stating clearly whether or not a particular sentence was too lenient, and setting out for the future the appropriate penalty for similar cases. The Court would not be able to change the actual sentence passed, but only to lay down guidelines for the future. The reason for this limitation was the very widespread feeling then existing that once convicted a defendant should know where he stood, and should not, therefore, face the prospect of an increased sentence many months later, when he might even have already been released from custody.

.../...

"At the time many people felt that the proposal fell between two stools. It did indeed introduce the new concept of the prosecution taking a view of the appropriate sentence. But it was felt that as the sentence in the particular case could not itself be increased, public outrage would not be diminished. Indeed it might even become greater. For the criminal would continue to serve a sentence which had been denounced as too lenient, not just by the popular press, but by the Court of Appeal itself.

"As a result of those criticisms the proposal was rejected. But I was convinced at the time that the problem would not go away. There were bound to be more such cases, inevitably attracting enormous publicity. And that is exactly what has happened. Those cases and the resulting disquiet have harmed public confidence in the whole system. It is no use just pointing out their statistical infrequency or complaining about the lurid and excessive publicity they attract. Nor is it wise to dismiss with lofty disdain the popular concern that such cases evoke. For once confidence in the criminal justice system is impaired, a dangerous situation can arise in which an angry public may understandably demand a variety of draconian measures which would do little to reduce crime but much to threaten civil liberties.

"That is why I have now come to the conclusion that the right course to adopt is to allow the Court of Appeal to increase a sentence which it considers is too lenient. It is only by imposing the right sentence in the actual case under consideration that public disquiet can be allayed.

.../...

"But an increase in sentence should only be permitted where the case has been referred to the Court of Appeal by the Attorney General, because he considers that the sentence passed is so lenient as to be altogether wrong in principle. This will ensure that the power to increase sentences is available, but only as a necessary safety valve, and not as a matter of routine. It is right for the prosecution to be able to point out the relevant facts relating to the defendant, and inform the Court of the available sentencing options, as the Lord Chief Justice has suggested. But it would be a major and undesirable change in the role of the prosecution for it to have to take a view of the appropriate penalty in all cases.

"The other major element in the criminal justice system that has been much talked of recently is the proposal to abolish the right to silence. At present when a person is arrested he is under no obligation to say anything, and if he refuses to answer questions, the prosecution cannot ask the jury to infer guilt from that silence.

"It has always been a fundamental feature of our law that the onus is on the prosecution to prove guilt. That rule of law is not just a procedural nicety. It is a fundamental bulwark on which our freedom rests.

"If the prosecution could rely on the silence of the accused as part of its case, the burden of proof would be substantially shifted. For the accused would inevitably be under great pressure to answer questions - however impeccably the police behaved - and would in effect have to prove his innocence, even if the evidence otherwise available against him was altogether insubstantial.

.../...

"It is not the professional criminal who would lose out. He would be ready with his answers to the police. It is the person who is innocent, but has been arrested because of circumstances which aroused legitimate suspicion, who would be at risk. For it is innocent people who often find the process of arrest and interrogation frightening and confusing, however properly it is conducted. As a result they may give an account which is misleading or incomplete, and which in the cold light of the Court may wrongly seem incriminating. It is because of the risk of this occurring that it is important that suspects should continue to be told that they are not obliged to say anything.

"It may be that there should be a very limited exception to the present rule, so that the prosecution can rely as part of its case on the fact that an alibi has not been disclosed at the time of arrest. But to support a more far-reaching change in so fundamental a general principle, I would have to be persuaded that the case for it is overwhelming. So far I do not think that case has been made out.

.../...

"The powers of the police and the rights of the suspect are comprehensively set out in the Police and Criminal Evidence Act. When we were taking that Act through Parliament we were ferociously denounced by the Opposition for increasing the powers of the police and taking away the rights of the citizen. It is ironic that it should now be suggested that that Act makes the police's task more difficult. What it in fact did was to reform a branch of the law that had not been properly modernised for nearly a hundred years. It did so, building on the Report of the Royal Commission on Criminal Procedure. It was designed to provide the police with the powers that they need, and indeed in many cases extended them substantially. At the same time it provided the citizen with safeguards against any abuse of those powers. The Act was subjected to the most painstaking scrutiny in two sessions of Parliament. The balance reflected in it should not lightly be disturbed."

CONFIDENTIAL

10 DOWNING STREET
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*From the Private Secretary*

24 September 1987

The Prime Minister has seen the Home Secretary's paper H(87)30, and has commented that she believes that it is possible that the proposal could undermine the necessity for the prosecution to prove the case beyond reasonable doubt. I am sure she will be interested to hear the outcome of the H Committee discussion.

I am copying this letter to Mike Eland (Lord President's Office).

P A BEARPARK

Philip Mawer, Esq.
Home Office

CONFIDENTIAL

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PRIME MINISTER

23 September 1987

RIGHT OF SILENCE

A The proposal to end the accused right of silence

1 As the Home Secretary recognises, it will receive a bad press from articulate lawyers. What he fails to recognise is that we will be regaled by stories from lawyers who know how vulnerable innocent persons are in the moments after arrest. If the public are expected to explain themselves fully at the moment of shock when a policeman arrests them, we will hear how many unjust assumptions will be made in court. Full explanation which the courts regard as satisfactory often requires unruffled thought. If the individual has not been in contact with the Police before, the greater the surprise if a Policeman mistakenly arrests him or her. Consequently the innocent may well be that least able to give chapter and verse until the dust has settled and they remember the details of what they were doing at the time of the alleged crime.

2 As the public hear this argument many are likely to see themselves in the shoes of the innocent wrongly arrested and turn against the Government. Consequently, we may appear harsh.

3 Further, the Home Secretary's paper is without analysis of how many additional convictions are to be predicted by his proposed exercise. This is critical. If we become more unpopular for no clear result then the failure of this measure is complete.

4 Realising the Home Secretary has little to say at Blackpool should not spur him into a measure rejected ever since it was first seriously canvassed in 1972.

5 We are the party that gives rights to individuals. We

should not give the argument to our opponents that our claim is bogus.

B A better way forward

1 If at the Magistrates hearing a criminal case is to be committed to Crown Court, the accused has not recalled what happened at the relevant moments, then the public must be entitled to draw inferences.

2 While these preliminary proceedings are not to become lengthy and a drain on resources, there is precedent for the defence "in outline" being served on the prosecution. In alibi cases the defence must warn the prosecution that this will be its line. Moreover, it is important that the Prosecutor should not be ambushed as the Home Secretary points out. Consequently, the Defence could be required to give details of the line of defence at the preliminary hearing.

3 If the trial is in the Magistrates Court then before the hearing but after the moment of arrest when the Police interview the accused then at that time if the accused gave no explanation this could be taken into consideration at time of trial.

Conclusion

1 The present proposal is dangerous.

2 The benefits from the proposal have not been adequately made.

3 There is a better way forward if one is wanted here.

Hartley Booth

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Grey Scale #13
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