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Date: **2 February 1994**

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cc Mr Lyon
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**CRIMINAL JUSTICE AND PUBLIC ORDER BILL: COMMITTEE: MR MACLENNAN'S REPORT**

CONFIDENTIAL

My letter below to Richard Bradley sets out the slightly difficult situation we have been confronted with by Mr Maclennan's acquisition - see the Committee Hansard also attached - of a piece of research into right of silence done here in 1990.

It appears we shall have to address the question whether to put the research in the Library of the House. On balance, and subject to seeing what was said, I believe we should. Though it is of limited value, and perhaps at times not drafted quite as might be wished in a document to enter the public domain, I believe we should create more suspicion by appearing to conceal it.

We must go to Ministers before doing so, I suggest, to seek authority and to put them in the picture about Mr Trimble's apparent grievance. He is actually being very helpful over right of silence, and in the present political climate they will no doubt want to be aware of possible resentments.

AJW

**A J Whysall**

PS: I am not at a remand, monitoring group this morning: back, I think, around noon.

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2 February 1994

R Bradley Esq
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Dear Richard,

**CRIMINAL JUSTICE AND PUBLIC ORDER BILL: COMMITTEE: MR MACLENNAN'S REPORT**

We spoke this evening about the report Mr Maclennan read from in yesterday's committee sitting (col 399).

It is clear that the report is a piece of internal research done here in 1990. I attach a copy (excluding the annexes). From the papers to which I have immediate access it appears to have been undertaken at least in part at the request of the Home Office, in anticipation of legislation on right of silence in England and Wales. It seems to have been passed to F4 and c4 at different times in 1990 and 1991.

Though I believe Ministers stated publicly that monitoring of the 1988 Order was being conducted, I do not think they have ever outlined the findings of this research, such as they are, in public. We have certainly never published it, and I doubt we would consider it appropriate for publication. This is not because of any particular sensitivity. Rather the research is, I think, of limited value: it relates to a period early in the Order's operation, before the effects of silence began to make themselves felt at trial, and there are no pre-Order statistics to compare it with. (We did, in fact, take the research further, through the court stage; but that research, too, does not shed great light on the major questions about the Order's effectiveness).

I do not know where Mr Maclennan got his copy of the research from. I would be virtually certain it was not the NIO, and such inquiries as I have been able to make tonight confirm that. The papers suggest that it has circulated only within Government and police circles. I see that Mr Maclennan did not actually say he got the report from us, though Mr Trimble took him to have done so. You mentioned the possibility that it had been passed to the Royal Commission. My recollection is that it was not, but I do not have the papers to hand to

confirm it at present. (In any event the Royal Commission, I believe, kept all its evidence confidential, though some evidence-givers published).

You mentioned to me that later in the proceedings Mr Trimble asked for a copy of the paper to be placed in the Library. I undertook that we would consider this.

Incidentally I and the Private Offices I have spoken to are also mystified by the suggestion that Mr Trimble himself has recently obtained material on right of silence from us. (Neither this division nor, so far as I am aware, any other holds the compilation of judgments you mentioned). When the relevant Hansards are available I should be grateful for a fax.

It follows from the above that I think we did not supply the paper to Mr Maclennan, and are thus innocent of the suspicion Mr Trimble apparently harbours that we are giving Mr Maclennan more favourable treatment than him. I will try to confirm this belief. If meanwhile Mr Maclean is further asked about putting the document in the Library, I suggest he says he has passed the request to the NIO.

Yours,

A.

**A J Whysall**

## Suspects Questioned Under The Criminal Evidence (Northern Ireland) Order 1988

### Background

The Criminal Evidence (Northern Ireland) Order was made on 14 November 1988. The Order amended the law on evidence to permit the courts in Northern Ireland to draw such inferences as appear proper from the fact that an accused remained silent. On the basis of such inferences the court could treat the refusal to answer questions as, or as capable of amounting to corroboration of other evidence. The accused will be warned both by the police through various forms of caution and at any resulting trial of the consequences of remaining silent.

There are 4 situations where such inferences may be drawn. Article 4 of the Order (where the accused is called upon to give evidence in court) became effective from 23 November 1988 and Articles 3 (silence during police questioning followed by explanation at court) 5 (refusal to account for marks/substances on clothing) and 6 (refusal to account for presence at a particular place) became effective on 15 December 1988 under cover of a Practice Note on Guidance to the Chief Constable. This report only considers that part of the Order relating to police questioning. The monitoring of other aspects of this legislation would require data to be collected at court.

Therefore the newly worded cautions came into use during December 1988. Before questioning can begin about a suspected offence the suspect must be informed that silence may support any relevant evidence against him in court. Questioning can occur prior to this on other issues but once the suspected offence becomes the focus of questioning the caution or cautions (of which there are 3 types) must be given. It should remembered that these cautions (see Annexe 1) do not remove a suspect's right to remain silent.

Even though the cautions do not remove the right to silence concern has been expressed (Standing Advisory Commission on Human Rights Fifteenth Report) about the working of the caution which has been described as 'arguably oppressive'. There have been fears from some quarters that the new cautions alter the psychology of the interview situation in such a way as to imply to the suspect that he has been charged (when he has as yet not been charged) and that his silence may be taken as evidence of guilt. Those in favour of greater control over the presentation of the caution to the suspect argue that suspects should be allowed to consult a solicitor before reaching a decision regarding silence. This report provides some statistical background within which the above issues will continue to be debated.

### The Cautioning Procedure

The Northern Ireland Office 'Guide to the Emergency Powers' states that an interviewing officer may (if it deemed necessary) explain in his own words the meaning of the caution(s). Cautions must be given prior to questioning about a suspected offence for the purpose of obtaining evidence and officers must ensure that a suspect is aware that he is still under caution at each interview (of which there may be many eg R v McGrath, 1990, when at least 41 interviews took place). This means that the cautioning procedure may not be fixed in terms of the words used or the number of times it is given to the suspect. This is relevant to the present exercise which does not record such details about the cautioning procedure. All that can be assumed is that the caution was given even though terrorist and non-terrorist suspects may have different experiences of what this entailed.

## Methodology

Between January and June 1990, 526 suspects were interviewed at Castlereagh (291), Strandtown (204) and Portadown (31) about mainly 'serious arrestable offences' ie offences which could result in a prison sentence of 5 or more years if found guilty. Annexe 2 shows the pro-forma completed on each suspect. It should be noted that while interview locations were chosen in order to yield a balanced sample, suspects were not randomly selected and as such the representativeness of the information cannot be ascertained. Occasionally data was missing from the pro-formas, this accounts for variation in the tables where numbers may not sum to 526.

## Terminology

The term 'silent' as used in the report refers to one or both of 2 situations. The first situation is where the suspect refuses to answer any questions whatsoever. The second refers to those suspects who were either totally silent or who while not silent would not answer questions relevant to the suspected offence. This latter definition of silence shall be referred to as 'essentially silent'. The term 'proceeded against' refers to suspects who have been either charged, summonsed, released on bail pending further enquiries or cautioned.

## Characteristics of suspects

Just over half of the suspects were interviewed at Castlereagh Police Office, 39% were from Strandtown and the remaining 6% from Portadown Police Office. The majority of the suspects (92%) were male. Three-quarters of the suspects were adults ie 21 years of age or over, the remainder were almost all between 17 and 20 with only 21 (4%) in the 10 to 16 age range. Of the 526 suspects interviewed, 288 were questioned about crime of a terrorist nature (see figure1). The percentage of females questioned about terrorist and non-terrorist crime was 7% and 10% respectively (see figure 2). The proportion of adult suspects was much greater in the cases involving crime of a terrorist nature. Only 12% of the terrorist suspects were under 21 years of age compared to 45% of non-terrorist suspects.

## Silence

Those who refused to answer any questions whatsoever and those who refused to answer questions relevant to the offence are considered to be 'essentially silent'. A much higher percentage of terrorist suspects remained essentially silent under questioning (38%) than non-terrorist (6%). A large percentage of terrorist suspects (70%) who remained silent had no proceedings taken against them. This compares with only 4 of the 14 non-terrorist suspects who were silent. Most (80%) of the non-terrorist suspects who totally co-operated in answering questions had proceedings taken against them compared to only 37% of terrorist suspects.

## Grounds for suspicions against suspects

Grounds for suspicion cover numerous options (which were not mutually exclusive). As regards terrorist suspects, in 28% of the cases the ground was 'eye witness evidence'. This ground was quoted in 76% of non-terrorist cases. Eye-witnesses could be 'independent', 'victim', or 'police officers'. Over half of the terrorist suspects (52%) were suspected because of 'information from another suspect'. This compares with 12% for non-terrorist suspects. The average number of grounds against a terrorist suspect was 1.3 compared to 1.4 for non-terrorist suspects.

## Legal Advice

A large percentage of terrorist suspects requested access to a solicitor (87%) compared to 32% of non-terrorist suspects. Denial of such access occurred in 38% of terrorist suspect cases and 4% of non-terrorist cases. In a minority of cases (4% of terrorist suspects and 8% of non-terrorist suspects) access was granted but not achieved. Presumably this was due to non-availability of a solicitor, inability to contact a particular solicitor or the suspect released before such access was achieved. Detailed information on this issue was not collected for this exercise.

## Value of the interview evidence

The interviewing officers indicated whether the interview evidence was essential, important etc in reaching a decision of whether or not to prosecute. In 74% of cases involving terrorist suspects the interview evidence was considered to be 'very important'. The equivalent figure for non-terrorist suspects was 56%.

## Final decision taken

Fewer terrorist suspects (about 4 out of 10) were proceeded against than non-terrorist suspects (about 8 out of 10). This will be due to a number of factors such as silence, grounds for suspicion (number and quality of these grounds) and combinations of these and other factors such as number of previous convictions (a measure of familiarity with the system), number of accomplices and the advice given by solicitors. It is possible to use multivariate statistical procedures to explore how these factors 'go together' and to rank them in order of their importance to the final decision. An investigation of this sort would require further analysis.

## Summary of results

**There were 288 (56%) terrorist and 223 (44%) non-terrorist suspects.**

**74 suspects remained totally silent throughout the interview. Only 1 of these was a non-terrorist suspect.**

**38% of terrorist suspects remained essentially silent compared to 6% of non-terrorist suspects.**

**22 (17%) of the silent terrorist suspects were charged.**

**87% terrorist suspects requested legal advice compared to 22% of non-terrorist suspects. Almost all (97%) suspects who requested legal advice received it (even if after an initial delay).**

**About 38% of the terrorist suspects were denied access (at some stage) to a solicitor compared to about 4% of the non-terrorist suspects.**

**179 (36%) suspects were proceeded against. Twenty nine per cent of the terrorist suspects were proceeded against and 79% of the non-terrorist suspects.**

**RUC Officers rate interview evidence as 'essential' even when it does not result in a charge. This is because interview evidence is used to decide not to proceed as well as to proceed.**

In general, terrorist suspects compared to non-terrorist suspects are (i) likely to remain silent (38%) (ii) not likely to be prosecuted (72%) (iii) often suspected due to 'information from another suspect' (52%) (iv) numerically less likely to have grounds against them than non-terrorists and (v) likely to request legal advice (87%).

Non-terrorist suspects are (i) unlikely to remain silent (6%) (ii) likely to be prosecuted (77%) (iii) often suspected due to 'eye witness evidence' (66%) (iv) not likely to request legal advice (78%). Both groups of suspects receive legal advice if requested though terrorist suspects usually have such advice delayed at some stage.

[Mr. Maclennan]

the view of the nine members of the royal commission. Paragraph 22, page 54 of the report states:

"The majority of us, however, believe that the possibility of an increase in convictions of the guilty is outweighed by the risk that the extra pressure on suspects to talk in the police station and the adverse influences invited if they do not may result in more convictions of the innocent. They recommend retaining the present caution and trial direction unamended. In taking this view, the majority acknowledge the frustration which many police officers feel when confronted with suspects who refuse to offer any explanation whatever of strong *prima facie* evidence that they have committed an offence. But they doubt whether the possibility of adverse comment at trial would make the difference which the police suppose."

The hon. Member for Upper Bann (Mr. Trimble) was right to tell us of his experience of the position in Northern Ireland, where a law similar to that before the Committee is in operation. I shall refer, cliptically and intrusively, to the hon. Gentleman's speech and to evidence which was passed to me from Northern Ireland, which referred to inquiries carried out by the Northern Ireland Office and detailed in a report entitled, "Suspects questioned under Northern Ireland Criminal Evidence Order 1988". It referred to a sample of 526 suspects held at Castlereagh, Portadown and other police stations surveyed during the period January to June 1990.

It is interesting to note that 288 or 56 per cent. were held under the Prevention of Terrorism Acts and 223 or 44 per cent. were held under the Police and Criminal Evidence Act 1984. The survey found that people held under the Prevention of Terrorism Acts were more likely to remain silent—38 per cent. People held under the Police and Criminal Evidence Act 1984 were unlikely to remain silent—6 per cent. In 4 per cent. of the Prevention of Terrorism Acts cases where access to legal advice was granted, 73 of the PTA suspects maintained absolute silence, of whom only 17 per cent. were charged, whereas only one PACE suspect remained completely silent. Although that is a small sample in a short period of time, it reinforces my proposition that the amendment that the clause seeks to effect is more likely to catch the little man than the serious criminal. I have no confidence that the Northern Ireland experience should be given great weight in this debate.

**Mr. Trimble:** I thank the hon. Gentleman for revealing the information that he obtained from the Northern Ireland Office. That information was not vouchsafed to me, which demonstrates the lack of co-operation that exists between the Northern Ireland Office and ourselves.

I should have thought that the figures quoted by the hon. Gentleman proved the opposite point. He said that persons held under the Police and Criminal Evidence Order answered questions, whereas those held under the Prevention of Terrorism (Temporary Provisions) Act 1989—many, if not most of whom, are terrorists trained in how to resist interrogation—exercise the so-called right to silence. Surely that makes the point that it is those who expect to be questioned and who have been advised about what to do when being questioned, who remain silent. In the Northern Ireland context such people are trained terrorists, but in the English context they are likely to be regular, professional criminals.

**Mr. Maclennan:** We are at odds not about the facts but about their interpretation. It is striking that it was the alleged professional terrorists who were unaffected by the change in the law and who were less likely to come forward with a story, because they felt confident that they could defend themselves through lawyers. No doubt their resources were such as to ensure that the best possible construction was put on their silence. It is significant that only one of those detained under the Police and Criminal Evidence Act 1984 remained completely silent. This is anecdotal evidence, but it is the best that I could obtain, based on experience of the operation of the law.

I have a final point to make on the merits of the general principle of clause 27 which the group of amendments would tackle. The Lord Chief Justice said, in a speech which has been much quoted:

"There is no proposal to force a defendant to testify nor to answer police questions."

That is strictly true of the clause and, indeed, the Bill, but whether that would be the effect of legislating in that way is more open to question. I am sure that there would be no disposition on the part of police forces around the country to authorise any departure from the standards that we expect of them. However, the temptation to bring pressure to bear on defendants to testify or to answer questions will be strong. It is that point more than any other which has led me, after quite a lot of discussion and heartsearching, to come down on the side of the majority regarding the royal commission.

On the alternative proposed in the amendments, it is not entirely satisfactory for Opposition parties to seek to introduce different systems of procedure and analysis along the lines of those contained in the amendments. It is difficult for Opposition parties to get it right. I understand that the Labour party is trying to put before the Committee, although not necessarily in a properly considered way, the royal commission's general underlying argument. I strongly sympathise with that. It gives the Committee an opportunity to consider the commission's proposals as an alternative to the Government's proposals. I doubt whether any Opposition would succeed in persuading a Home Office Minister, over such a fundamental change, that the drafting—never mind the underlying principals—were appropriate. It falls to Governments, who have the power to consult widely and the expertise to draft accordingly, to introduce such changes. The principle underlying the royal commission's proposal was submitted in good faith as a means of narrowing the dispute about the facts, without putting at risk the defendant's proper rights against self-incrimination.

I am attracted to the idea behind the amendments, although I doubt whether it can be implemented without more focused debate. It would probably be a criminal justice Bill in itself, not an amendment to a gargantuan Bill such as this. However, the idea shows that the Opposition parties that tabled the amendment are fully aware of the problems caused by ambush defences, and are anxious to avoid that type of procedural device which allows the guilty to escape conviction.

I hope that the idea will be taken seriously and reviewed as the Bill proceeds through the House and through the other place, where no doubt the legal expertise of those who will deliberate on clause 27 is at least the equal of any here. I support the amendments in principle in the hope that they will be given a fair discussion.