Home Office Research Study 199

The right of silence: the impact of the Criminal Justice and Public Order Act 1994

by
Tom Bucke, Robert Street and David Brown

A Research, Development and Statistics Directorate Report

London: Home Office

Home Office Research Studies

The Home Office Research Studies are reports on research undertaken by or on behalf of the Home Office. They cover the range of subjects for which the Home Secretary has responsibility. Titles in the series are listed at the back of this report (copies are available from the address on the back cover). Other publications produced by the Research, Development and Statistics Directorate include Research Findings, the Research Bulletin, Statistical Bulletins and Statistical Papers.

The Research, Development and Statistics Directorate

RDS is part of the Home Office. The Home Office's purpose is to build a safe, just and tolerant society in which the rights and responsibilities of individuals, families and communities are properly balanced and the protection and security of the public are maintained.

RDS is also a part of the Government Statistical Service (GSS). One of the GSS aims is to inform Parliament and the citizen about the state of the nation and provide a window on the work and performance of government, allowing the impact of government policies and actions to be assessed.

Therefore -

Research Development and Statistics Directorate exists to improve policy making, decision taking and practice in support of the Home Office purpose and aims, to provide the public and Parliament with information necessary for informed debate and to publish information for future use.

"The views expressed in this report are those of the authors, not necessarily those of the Home Office (nor do they reflect Government policy)."

First published 2000

 ISBN 1 84082 424 7
ISSN 0072 6435

Foreword

The Criminal Justice and Public Order Act 1994 made important changes to the right of silence. The accused's failure during police questioning to mention facts which are later relied upon at trial, or the accused's failure to testify at court, may now be the subject of comment at trial. The court may draw appropriate inferences. This report examines the effects of these changes, firstly on the interviewing of suspects at the police station and, secondly, on proceedings at court. It points to a significant reduction in the extent to which suspects rely on their right to silence during police questioning. It is less clear whether the provisions have increased the numbers of convictions, although it seemed that inferences from silence could sometimes add weight to the prosecution case.

David Moxon
Head of Crime and Criminal Justice Unit
Research, Development and Statistics Directorate.

Acknowledgements

We are very grateful to the Chief Constables and Chief Crown Prosecutors of the areas in which we conducted this research. CPS lawyers and police officers willingly gave their time to provide their views about the working of the new provisions and we would like to thank them too. We would also like to extend our gratitude to those members of the Bar, solicitors and legal advisers who found time in their busy schedules to talk to us.

Tom Bucke
Robert Street
David Brown

Contents

Summary

Since the introduction of the Criminal Justice and Public Order Act 1994 (CJPOA), the failure by an accused to mention facts during police questioning, which are later relied on at trial, or failure to testify at trial, may now be the subject of prosecution comment at trial. The court may draw appropriate inferences from any such failure. Inferences cannot in themselves provide sufficient evidence for a conviction: a *prima facie* case must first be established from other evidence. But inferences may be used to reinforce the prosecution case or undermine that of the defence.

The research described in this report examined the practical implications of the new provisions, focusing on:

- the way in which the courts have interpreted the legislation
- the interviewing of suspects at the police station
- the impact of the provisions at court on the prosecution and defence.

The research consisted of:

- an examination of relevant Court of Appeal decisions
- an observational study at 13 police stations. Eight had been included in a previous study, thereby permitting a direct comparison with the pre-CJPOA position
- a survey of investigating officers who had carried out interviews with suspects
- a series of interviews with CPS staff, defence legal advisers and members of the Bar.

Court of Appeal decisions

The Court has had the opportunity to address a number of important issues surrounding the interpretation of the legislation. The main decisions are summarised below.

- The Court has held that failure by the police to disclose details of the prosecution case prior to interview does not make evidence of the accused's silence inadmissible. However, the police must provide enough information to advisers to enable them to advise their clients properly and must not actively mislead.

- Legal advice to remain silent does not necessarily mean that the accused's failure to mention facts later relied on at court is reasonable and that no inferences can be drawn. It is only one factor in a wider assessment of whether silence was reasonable; in particular it is important to consider why the suspect accepted the legal advice.

- The Court has been reluctant to accept other exceptions to the provisions that might prevent inferences being drawn: for example, that testifying in court might lead to the accused's previous convictions being revealed. The accused's physical or mental condition may be appropriate grounds, but only if the defence is able to call convincing supporting evidence.

- The Court has endorsed a specimen direction to the jury on inferences from silence produced by the Judicial Studies Board (JSB). The jury must be reminded that they should not consider the possibility of inferences unless they are first satisfied that the accused has a case to answer. Judges should also stress that adverse inferences should only be drawn if the jury is satisfied that the accused's failure to answer police questions could only sensibly be attributed to his or her having no answer to them or none that would withstand cross-examination.

- Inferences from an accused's silence at the police station should not be drawn where he/she has also refused to testify at trial, because he/she could not be said to be relying on any fact which he/she had previously failed to mention. The only exception would be where he/she sought to rely on facts given in evidence by another witness.

- The European Court of Human Rights has held that the inferences from silence provisions do not in themselves breach the European Convention on Human Rights. However, seeking to found a conviction solely on inferences would be a breach, as would the drawing of inferences from silence during any period when the suspect had been denied legal advice.

Silence at the police station

- The provisions have not led to an increase in demand for legal advice among suspects held in police custody: around one-third consulted a legal adviser, with most consultations being face-to-face rather than by telephone. However, a Law Society scheme to increase professionalism among legal advisers has led to a significant reduction in advice given by unaccredited legal representatives.

- Legal advisers are increasingly asking for, and generally being given, more information about the case against their clients prior to police interviews. However, suspects without a legal adviser are unlikely to make similar requests for disclosure.

- Legal advisers reported that they now had to be very careful about advising their clients not to answer police questions, in view of the possible implications of silence if the case went to court. They might still advise silence if there was insufficient police disclosure, the evidence was weak or their client was vulnerable. Otherwise, they would advise clients to give an account to the police when interviewed.

- Both police and legal advisers felt that many suspects, particularly those who had not been arrested before, did not really understand the new caution.

- The proportion of suspects who refused to answer some or all police questions fell from 23 per cent to 16 per cent. The proportion who gave complete 'no comment' interviews fell from 10 per cent to six per cent.

- The largest drops in the use of silence were among groups who had previously exercised the right most frequently, namely those held in Metropolitan Police stations, legally advised suspects, black suspects and those held for more serious offences.

- Despite decreased reliance on silence, there was no change in the proportion of suspects providing admissions: this remained at 55 per cent. The provision of accounts by suspects, even if not amounting to a confession, was seen as useful by officers as it gave them something concrete to check up on. If suspects changed their story at trial, inferences might be drawn.

- Police officers were sceptical about the impact of the provisions on 'professional' criminals, who were thought to be continuing their

policy of not answering questions or to use a range of tactics to circumvent the new provisions. These included the provision of a written statement at the start of the interview and a refusal to expand upon it when questioned.

- Although they did not cite any specific cases, legal advisers were concerned about the potential impact of the provisions on vulnerable suspects who, because of their suggestibility, might best be advised to remain silent but might feel pressurised into answering questions.

- Nearly 40 per cent of suspects exercising their right of silence were given 'special warnings' under the legislation about the consequences of failure to account for incriminating circumstances (such as their presence near the scene of a crime around the time of commission). Relatively few gave a satisfactory account in response. Failure to do so could result in inferences being drawn at court.

- Since the provisions were introduced, the proportion of silent suspects who are charged has fallen. This may be because those who now exercise the right of silence mainly do so where the evidence against them is weak.

Prosecution and trial

- CPS interviewees considered that silence would generally only play a marginal role in the decision to prosecute, although it could provide an additional item of evidence on which to base their decision and could tip the balance in favour of prosecution in some borderline cases.

- They also stressed that, in order for use to be made at court of the accused's reliance on facts not previously mentioned, police questions had to have been framed in such a way that the accused had had the opportunity to mention those facts.

- The CPS were happy to use the provisions when presenting cases in the magistrates' courts, although silence was unlikely to form a central plank of the case. There was a preference for positive evidence (such as witness statements) and it was thought that courts placed more emphasis on this too. Over-reliance on silence might send out signals that the case was weak. For this reason, some CPS respondents felt that silence evidence should be mentioned – although not overplayed – whenever relevant in order that this link was not automatically made.

- Defence solicitors did not consider that the provisions had had a major impact at magistrates' courts because most defendants used to testify and still did. They reiterated the need for care among police station legal advisers in counselling silence during police interviews as they felt that the only grounds for such advice that might be accepted by the magistrates were insufficient police disclosure or the vulnerability of the defendant.

- Prosecuting barristers' use of the provisions in the Crown Court varied and depended upon: the other evidence available and its probative value; concern that making too much play of the defendant's silence might be perceived as unfair by juries; and personal views about the provisions. For their part, CPS respondents considered there to be some reluctance by barristers to make much of the provisions. Barristers generally did not accept this charge. They considered their use of the provisions to be pragmatic: if there was advantage to the prosecution case in using them, then they would generally do so.

- Defence barristers considered that the provisions provided a difficult obstacle and they stressed the problems that legal advice to remain silent, given at the police station, could cause them at trial. They might seek to argue that silence was a reasonable response to police questions because it was exercised on legal advice, but Court of Appeal decisions on this issue made it unlikely that the argument would succeed.

- Most CPS respondents, barristers and defence solicitors agreed that fewer defendants are now declining to testify, particularly in the Crown Court. Statistics on comparable provisions in Northern Ireland confirm a similar trend. CPS respondents saw considerable advantages for the prosecution case in the defendant being available for cross-examination.

- Defence counsel stated that they would only advise an accused not to testify if there were considerable risks (such as inconsistencies in their story or some form of vulnerability) associated with them being cross-examined.

- Where a defendant had refused to answer police questions or testify, defence counsel would try to dissuade the jury from drawing adverse inferences, either by concentrating on other aspects of the case or by suggesting innocent explanations for silence.

- Some defence barristers were concerned that the provisions unfairly disadvantaged vulnerable defendants, raising the possibility of miscarriages of justice if innocent defendants came across poorly and damaged their case.

- There was a difference of opinion between respondents as to whether the provisions had, in practice if not in law, shifted the burden of proof onto the defendant. Those who felt that it had done, argued that the defendant effectively had now to prove his/her innocence by accounting for his/her silence. Those who thought the opposite, argued that the prosecution still had to prove its case beyond reasonable doubt.

- The provisions, coupled with those of the Criminal Procedure and Investigations Act 1996, may have reduced the number of last minute 'ambush' defences, since any defence raised in this way may now attract inferences.

- Magistrates were said to be receptive to the provisions although some CPS respondents and defence solicitors were doubtful about their impact because magistrates may have viewed silent defendants unfavourably before they were introduced.

- Judges were depicted as varying in their receptiveness to the new provisions. However, their directions to juries generally followed the JSB model. A shortcoming was that the direction did not tell juries what kind of inferences they were entitled to draw and this may have caused jurors some uncertainty.

- There was some doubt about the impact of the provisions on juries. While some respondents felt that juries were suspicious of defendants who refused to give evidence, there was no knowing whether they might already have drawn adverse inferences from a failure to testify before the new provisions were introduced.

- Most respondents were uncertain whether the provisions had led to more convictions, although a few thought that they had done. More frequently, they thought that they had enabled the prosecution to prove its case more readily by adding to the available evidence. Official statistics provide no evidence of any increase in the conviction rate. In the Crown Court, the guilty plea rate has fallen slightly (probably due to procedural changes such as the introduction of 'plea before venue' and the abolition of oral committals). However, the provisions are likely to bear on a relatively small proportion of cases and it is unlikely that any changes would show up in aggregate national figures.

Conclusions

- The report concludes that the provisions have had a marked impact on: suspects' use of silence at the police station; police practices in relation to interviewing and disclosure; the advice given at police stations by legal advisers; the proportion of defendants testifying at trial; the way in which cases are prosecuted and defended at trial; and on judges' directions to the jury. This may have introduced efficiencies in the investigation and prosecution process. Three areas are mentioned: more productive interviews, as a result of greater openness between police and legal advisers about the evidence; greater scope for the investigation of accounts provided by suspects during interviews; and greater certainty of convictions where silence augments the other available evidence.

- While the provisions have not led to any discernible increase in charges or convictions, the hope was that they would make it easier to secure 'appropriate' convictions and the conviction of 'professional' criminals. The report suggests that prosecutors are indeed deploying the provisions as a matter of course in many cases in which they are relevant, largely to provide supporting evidence. However, it is not known to what extent magistrates or juries take silence into account in arriving at their verdicts. Respondents were sceptical about the impact of the provisions on 'professional' criminals.

- The research raised some concerns about the fairness of the provisions to defendants. For example, can they be regarded as practically affecting the burden of proof? Respondents' views on this issue appeared irreconcilable. Whatever the answer to the question, the research provides little basis for suggesting that the provisions have, in practice, operated unfairly to defendants by, for example, resulting in a surge of weak cases being brought to court.

- Other concerns related to vulnerable defendants and the possibility of miscarriages of justice. To date, no such cases have come to light. Moreover, various safeguards exist, such as the stipulation in the Act that inferences shall not be drawn where the physical or mental condition of the accused makes it undesirable for him/her to give evidence.

- The research also raised concerns about the position of suspects who choose not to seek legal advice at the police station and whether it is fair that inferences should be drawn when the suspect has not had the benefit of advice. However, some suspects in this position may fully understand the implications of their decision and it would be

against the interests of justice to impose a blanket prohibition on the drawing of inferences. The research suggests that these concerns point to the need to ensure that all suspects are made fully aware of the meaning of the police caution before any police interviews are conducted.

- The research points to areas for further work. These are: decision-making by suspects and defendants and the factors which determine whether they refuse to answer police questions or testify at trial; the extent to which the provisions affect vulnerable groups; the impact on 'professional' criminals; the effect of the Human Rights Act 1998; and (should the restrictions on jury research be lifted) the way in which juries treat silence evidence.

1 Introduction

In April 1995 provisions of the Criminal Justice and Public Order Act 1994 (CJPOA) came into force, which had important implications for suspects who remain silent either during police interviews or at their trial. The crux of the new provisions is that the accused's failure to mention facts during police questioning, which are later relied upon at trial, or failure to testify at trial, may now be the subject of prosecution comment. It is open to the court to draw appropriate inferences. While the legislation does not specify that these need be adverse to the defendant, the likelihood is that they would be.

It is important to stress at the outset that the CJPOA has not abolished the right of silence. As before, a suspect can still choose to remain silent both during police interviews and when charged, and a defendant can still choose not to testify in court. However, remaining silent is now a far less attractive option because there is the risk that it may prejudice the defence case.

The debate leading up to the changes in the law

The 1994 Act followed a long-running and heated debate. It began with a report by the Criminal Law Revision Committee (CLRC) in 1972, which recommended a set of changes close to those eventually contained in the CJPOA. However, opposition to change in Parliament, as well as from criminal justice professionals and lay opinion, meant that the proposals were not then implemented. Over the next 22 years the status of the right of silence continued to be a topic of debate. It was considered by two Royal Commissions and a Home Office Working Group (HOWG), and was referred to in many public speeches by politicians, legal professionals and senior police officers. At one level, the debate revolved around the potential effect of a change in the law in terms of securing convictions of the guilty. At another, it was concerned with more fundamental questions about the implications of change for the central tenet of the adversarial system that the burden is on the prosecution to prove its case beyond reasonable doubt.[1]

1. For a full discussion of the issues see Greer, 1990 and Easton, 1998.

The position of suspects when interviewed by the police has been a central focus of the debate. Police officers have for long seen suspects' propensity to rely on the right of silence as restricting their ability to carry out effective interviews and obtain evidence through questioning. Professional criminals and terrorists, in particular, have been described as 'hiding' behind silence and exploiting a weakness in the judicial system (ACPO, 1993). The role of legal advisers has also been a source of contention for the police. A number of studies have shown that suspects receiving legal advice are far more likely to remain silent during interviews (Moston et al., 1992; ACPO, 1993), leading to claims that legal advisers routinely advise silence to obstruct police questioning. It has been argued that the level of safeguards for suspects provided by the Police and Criminal Evidence Act 1984 (PACE) means that they are adequately protected without needing the additional protection of the right of silence. Access at any time to free legal advice, the tape recording of police interviews and limits on the time that can be spent in custody have been seen as providing sufficient protection for suspects. It has been argued that, under these conditions, only the guilty would seek to shelter behind silence when facing police questions (Hurd, 1996).

In contrast, proponents of the right of silence see it as an important safeguard for the accused. Both the Royal Commission on Criminal Procedure (RCCP) (1981) and the Royal Commission on Criminal Justice (RCCJ) (1993) argued against any changes which would put pressure on innocent – especially vulnerable – suspects to respond to police questions and unwittingly incriminate themselves. The possibility of an increase in convictions as a result of any change in the law was seen to be outweighed by the risk of future miscarriages of justice. Other commentators have disputed that the right of silence leads to offenders avoiding conviction. Indeed, the research evidence suggests that those using silence are more likely to be charged than other suspects and are as likely as other defendants to be found guilty in court (Moston et al., 1992) or more so (Phillips and Brown, 1998). Furthermore, it has been contended that, for the minority of criminals who could be classed as 'professional' and who exercise silence in a calculating manner, changes in the law would be unlikely to alter their practice. For them the benefits of remaining silent would be likely to continue to outweigh the possible disadvantages (RCCP, 1981; Zander, 1994).

Arguments against retaining the right of silence in relation to trial at Crown Court or magistrates' courts have tended to focus on 'ambush defences' (CLRC, 1972; Hurd, 1996). These are defences of which the prosecution had no prior notice, which are raised for the first time at trial. Their essence is that, at the time of the police interview, the suspect was aware of the facts on which he or she later relied but failed to mention them (for a fuller definition see Leng, 1993). By waiting until court to disclose the defence, the

police have been deprived of the opportunity to investigate its authenticity. In the interim, the defendant has had time to prepare for trial and brief witnesses, with the result that the prosecution is hampered by the late disclosure. The use of the right of silence in this way has been viewed as a cynical exploitation of the legal process (CLRC, 1972; HOWG, 1989). In contrast, those championing the right of silence have argued that the reform lobby have not proved that ambush defences are a serious problem (Leng, 1993). Indeed, while evidence from the Crown Court has indicated that up to one in ten cases involved 'defences sprung on the prosecution at the last moment', such cases were more likely to end in conviction than acquittal (Zander and Henderson, 1993). Leng (1993) has also queried whether many such defences can truly be described as 'ambushes'. For example, they might rely largely on assertions by the defendant which are essentially unprovable, rather than upon facts known to the defendant at the time of interview. Many might better be categorised as ones unanticipated by the prosecution.

The debate on the right of silence has also touched on fundamental issues concerning the nature of an adversarial criminal justice system (Dennis, 1995). Those opposed to reform emphasise the integral part which the right plays in a system under which it is incumbent upon the prosecution to satisfy the burden of proof without assistance from the accused. Any modification which allows a suspect's silence to be used against him or her has been viewed as shifting the burden onto the defendant to demonstrate his or her innocence. So too has any amendment which means that a suspect is expected to answer the charges before hearing the evidence against him or her (RCCP, 1981). Particular fears have been expressed that allowing inferences to be drawn from silence would make it easier for the prosecution to establish guilt in weak cases and increase the risk of innocent people being wrongfully convicted (Greer, 1990). There has also been some concern that interfering with the right of silence might be the thin end of the wedge and that other fundamental elements of the adversarial system would then come under attack (Greer, ibid.).

In contrast, those (like the members of the CLRC) who supported reform of the right of silence, have emphasised that the criminal justice system serves the public interest by convicting the guilty as well as protecting the innocent. Drawing on the work of the 19th century jurist and philosopher Jeremy Bentham (1825), it was argued that a defendant should be expected to testify at court, as the resulting testimony was the best form of evidence on which to base a trial. To deny the court this indispensable source of evidence was seen by Bentham as misguided, since it could lead to more draconian methods being used by the state to secure evidence (Easton, 1998). Rules allowing silence at trial, or the refusal to testify, were viewed as undermining the integrity and accuracy of the trial, as they preserved values which were extrinsic to determining the truth (Greer, 1990). Those wishing

to emphasise the apparently illogical situation in which an innocent person could decide to remain silent in the face of allegations, were able to draw on Bentham's declaration that: 'innocence claims the right of speaking, as guilt invokes the privilege of silence' (Bentham, 1825). This view – that only the guilty have something to hide – has been invoked many times since by those supporting the restriction or abolition of the right of silence.

The intention to modify the right was finally announced in 1993 by the then Home Secretary, Michael Howard, at the Conservative Party conference. The Criminal Justice and Public Order Bill was introduced to Parliament in the autumn of that year and gained Royal Assent in November 1994. The inferences from silence provisions came into force in April 1995.[2]

The CJPOA provisions

Those suspected of criminal wrongdoing can be said to have a right of silence at three stages in the criminal process. Firstly, there is a right to silence prior to arrest. Thus, people do not have to speak to police officers if stopped and questioned in the street. Secondly, silence may be exercised by persons under arrest, who are questioned by police officers while in custody. Thirdly, there is a right to silence at trial, when the defendant may decline to give evidence or answer questions. The CJPOA does not affect the first of these situations. However, the provisions are relevant after arrest and at the trial stage.

In considering the CJPOA provisions, it is necessary to make a distinction between the 'right of silence' and the 'privilege against self-incrimination' (Greer, 1990; Easton, 1991). As already stressed, the former has not been abolished. However, the provisions have affected the latter. The privilege against self-incrimination may be taken to refer to the individual's freedom not to divulge information which might be incriminating and, following on from this, the right that no adverse consequences should ensue as a result of exercising that choice. The CJPOA provisions alter this situation by enabling magistrates' courts or juries in Crown Court trials to draw such inferences as 'appear proper' in the circumstances where the accused relies at trial on facts not mentioned during interview or declines to testify at court. The prosecution may draw attention to the defendant's use of silence, as may judges in their summing up to the jury.

There are four situations in which the provisions of the CJPOA make it permissible for juries or magistrates to draw inferences.[3] Three of these relate to silence during police questioning and the fourth to silence at trial.

2. The decision to amend the right of silence in England and Wales follows other similar changes in Northern Ireland and Singapore (see Jackson, 1991 and Yeo, 1983).
3. The full text of the relevant provisions of the CJPOA is given in the Appendix.

Failure to mention facts when questioned or charged (s.34)

In order for this provision to be operative a number of preconditions must be satisfied (s34(1)):

- the accused must have been questioned about an offence by the police and the questioning must have been carried out under caution
- the constable carrying out the questioning must be trying to discover whether or by whom the offence was committed
- the accused failed to mention when questioned a fact later relied on in his or her defence in criminal proceedings
- the fact was one which, in the circumstances existing at the time, the accused could reasonably have been expected to mention when questioned.

The provision also applies to silence at the point that the accused is charged with an offence or officially informed that he might be prosecuted.

There are a number of stages in proceedings at which inferences may be drawn, but the most common situation is likely to be where a court or jury is determining whether the accused is guilty of the offence charged (s.34(2)(d)). Inferences may also be drawn at the point at which the court is deciding whether there is a case to answer and in certain other specified circumstances in serious fraud cases and transfer for trial proceedings (s.34(2)(a) and (b)). Whether a court does in fact decide to draw inferences is a matter of discretion.

The inferences which may be drawn from the accused's silence are 'such .... as appear proper'. The Act does not state that any inferences which are drawn need necessarily be adverse to the accused. In practice, however, they are unlikely to be favourable. It was left to the courts to evolve guidelines in this area. As Pattenden (1995) has noted, this is primarily a task for the Court of Appeal, Criminal Division, when considering appeals from the Crown Court. Because magistrates' courts do not give reasons for decisions, there is limited scope for an appeal on the manner in which the lower courts' discretion to draw inferences is exercised.

It is clear from the Act that a court cannot find a case to answer against an accused person or convict him or her solely on the basis of an inference drawn under section 34 (see s.38(3)). The question then arises of whether

4. The caution contained in Code C to the Police and Criminal Evidence Act 1984 has been amended to take account of the changes made by the CJPOA. It is now in the following terms: "You do not have to say anything. But it may harm your defence if you do not mention when questioned something which you later rely on in court. Anything you do say may be given in evidence".

the inference that may be drawn from the assertion of a late defence is simply that the defence is not credible or whether it is possible to go further and treat the failure to mention such a defence earlier as one item of evidence pointing towards guilt. Card and Ward (1994) have suggested that the distinction between disbelief of a specific fact relied upon by the defence and positive proof of guilt is more semantic than real, in that the one inevitably leads to the other. Pattenden (1995) has also suggested that the accused's silence may be treated as one of a number of items of evidence which may help the Crown establish a *prime facie* case and augment the prosecution evidence at the trial itself. Judicial interpretation also seems to support this view. In the Northern Ireland case of *R. v. Murray* (1991) the Court of Appeal stated that: "[I]f aspects of the evidence .... clearly call for an explanation which the accused ought to be in a position to give, if an explanation exists, then a failure to give an explanation may as a matter of common sense allow the drawing of an inference that there is no explanation and that the accused is guilty". Court of Appeal decisions are considered in more detail in Chapter 2.

Failure to account for objects, substances or marks (s.36) or for presence at a particular place (s.37)

The rationale underlying ss.36 and 37 and the circumstances in which inferences may be drawn are identical and these sections will therefore be treated together. Section 36 allows the court to draw such inferences as appear proper from a failure by an accused to account for any object (including a mark on any such object), substance or mark which is:

- on his or her person
- in or on his or her clothing or footwear
- is otherwise in his or her possession
- is in any place in which the accused is at the time of arrest.

Inferences may also be drawn from the suspect's failure to account for the condition of his or her clothing or footwear.

Similarly, section 37 allows a court to draw such inferences as appear proper where the accused fails to account for his or her presence at a place at the time or about the time of the offence for which he or she has been arrested is alleged to have been committed. At common law it has for long been settled that it is permissible to draw inferences from incriminating circumstances (e.g. the acccused's presence near the scene of a crime) and this remains the case. These sections strengthen the common law position

by allowing the accused's failure to account for any of the incriminating factors also to provide circumstantial evidence of guilt (Pattenden, 1995).

In relation to both sections 36 and 37 there are a number of preconditions which must be satisfied before any inferences can be drawn:

- the accused must have been arrested and cautioned
- the arresting officer or another constable investigating the case must reasonably believe that the incriminating circumstances (e.g. marks on clothing or the accused's presence near the scene of the offence) may be due to the participation of the person arrested in an offence specified by the constable[5]
- the constable must inform the accused person after his or her arrest of this belief and request him or her to account for the incriminating circumstances
- the accused must fail or refuse to do so.

More details of the procedures which a constable must go through in order to make ss.36 and 37 operable are laid down in paragraph 10.5B of Police and Criminal Evidence Act Code of Practice C. This requires the constable to issue a 'special warning' during the course of the interview which tells the accused in ordinary language what the effect would be of failure or refusal to account for the incriminating circumstances. The accused must also be told that a record is being made of the interview and that it may be given in evidence if he or she is brought to trial.

The stages in proceedings at which inferences may be drawn under ss.36 and 37 are the same as under s.34. However, unlike s.34, which requires the defendant to rely on a fact not previously disclosed during interview in order for inferences to be drawn, there is no requirement for the defendant to try to account at trial for the incriminating circumstances covered by ss.36 and 37. It is sufficient to invite the drawing of inferences that the accused failed to provide an explanation when interviewed. This strongly suggests that the inferences which may be drawn under these sections relate to the guilt of the accused rather than to the credibility of any defence raised at trial. If this were not the case, these sections would have little value since they would be restricted to those cases in which the defendant opted at trial to provide an explanation for the incriminating circumstances (Pattenden, 1995).

5. S.37 is narrower than s.36: while the latter refers to 'an offence specified by the constable' (which may not be the offence for which the accused has been arrested), s.37 only applies to 'the offence' for which the accused has been arrested (Dodds, 1995).

Silence at trial (s.35)

Section 35 deals with an accused's silence at trial and relates both to a refusal to be sworn or, having been sworn, to a refusal to answer any particular question. In order for the provision to be operative, the accused must have been made aware that the stage in proceedings at which he or she can give evidence has been reached and he or she must have chosen not to do so. A court or jury may draw such inferences as appear proper from any such refusal (s.35(2)). The provision is circumscribed in a number of respects:

- it does not apply to defendants aged under 14[6]
- it does not apply where the defendant's guilt is not an issue (e.g. in Newton hearings)
- it does not apply where the physical or mental condition of the accused make it undesirable for him or her to give evidence
- where any particular questions are refused during the trial, no inferences may be drawn where there is good cause for the refusal (e.g. the questions relate to the accused's previous convictions or the court has exercised its discretion to excuse the accused from answering).

As with ss.34, 36 and 37, inferences drawn from a refusal to testify or to answer particular questions are not on their own sufficient to convict the accused (s.38(3)). The Northern Ireland experience of similar provisions introduced there in 1988 suggests that a *prima facie* case must first be erected from other evidence. This must be a 'clear *prima facie* case' rather than a bare *prima facie* one.[7] Once this has been done, the accused's refusal to testify can be used to reinforce the prosecution case or to undermine that of the defence. It would also appear, based on the same Northern Ireland authorities, that the inference which is drawn need not necessarily relate to specific facts asserted in the prosecution or defence case but may be a general inference of guilt. Thus, once a *prima facie* case exists, the court is entitled to conclude from the accused's failure to testify that he or she is guilty (Pattenden, 1995). However, there is the important caveat that an inference can only be drawn where the accused is in a position from within his or her own knowledge to deny, explain or answer the prosecution evidence against him or her (Pattenden, ibid.).

6. The exemption of under 14s from the inferences from silence provisions was repealed by section 35 of the Crime and Disorder Act 1998. Data for the present study were collected before this provision came into effect.
7. See Murray v. DPP (1993) 97 Cr. App. R. 151.

Aims of the research

The aim of the research described in the remainder of this report is to examine the practical impact of the provisions described above. One important focus is their effect on the interviewing of suspects. The report examines how police, suspects and legal advisers may have altered their practices as a consequence of the possibility that inferences may now be drawn from the suspect's refusal to answer police questions. The other important issue which the report looks at is the use of the provisions at court and, particularly, the extent to which the prosecution are deploying them to help secure convictions. It also examines how the courts have interpreted key aspects of the new legislation.

Methodology

The study drew upon four sources of data in order to address these aims: reports of court decisions (primarily those of the Court of Appeal Criminal Division); observation of the processing of suspects in custody areas; responses to questionnaires issued to investigating officers; and interviews with a range of criminal justice professionals.

Higher Court decisions

In order to establish how the courts have been interpreting the legislation, reported higher court decisions were examined. This exercise yielded information about a number of issues including: the circumstances in which evidence of the accused's silence during police questioning is admissible; the judge's direction to the jury; the relationship between pre-trial silence and silence at trial; and the implications of the European Convention on Human Rights for the legislation.

The observational study

Observation of the processing of suspects was conducted in the custody areas of 13 police stations in ten police forces. This formed part of a wider study of the impact of changes in the Police and Criminal Evidence Act Codes of Practice, which were introduced in 1995. Home Office observers were present in the custody areas of each station every day between the hours of 0900 and midnight (later if it was busy) for a period of three weeks. A minimum of 300 hours observation was therefore carried out at each station, with a combined total of around 4,100 hours at all 13 stations. During this time 3,950 detainees passed through police custody. Observers collected data on the sex, age and ethnic group of suspects, the provision of legal advice, police interviews and case outcomes. The fieldwork period ran from the middle of August 1995 until the end of February 1996.[8]

8. For a discussion of the issues surrounding the conduct of observational work in police stations see Phillips and Brown (1997).

The investigating officer survey

A self-completion questionnaire was given to the police officer responsible for each case in the observational study. The observers were responsible for issuing questionnaires and for ensuring their return. The questionnaire's central focus was the police interview (where conducted) and included questions on admissions made by suspects, the exercise of the right to silence, and the issuing of 'special warnings' (see above in relation to ss.36 and 37 of the CJPOA). Questionnaires were returned in 90 per cent of cases (3,537 out of 3,950).

It was possible to make a detailed comparison between the results of the investigating officer survey in the present study and a similar survey carried out before the implementation of the CJPOA by Phillips and Brown (1998).[9] The comparison is based upon eight stations which featured in both Phillips and Brown's research and the present study.[10] Both studies used the same methodology to collect their data and provided detailed information about the detention of suspects, including the exercise of the right of silence.

Interviews with criminal justice practitioners

A series of semi-structured interviews was conducted with police officers, legal advisers, Crown Prosecution Service (CPS) officials and barristers, both on the prosecution and defence sides. These interviews were conducted in some of the ten police force areas covered by the observational study and investigating officer survey. All the barristers interviewed were based in London, Manchester, Newcastle, Cambridge or Southampton. Table 1.1 provides details of the number of interviews conducted with each group of practitioners.

Table 1.1: Coverage of criminal justice practitioners in interviews

Interviewees	Total number of interviews
Police officers	82
Legal advisers	19
CPS lawyers and case workers	34
Barristers	18
Total	153

9. The fieldwork for Phillips and Brown's study was carried out between September 1993 and March 1994.
10. These were: Luton (Beds); Rochdale and Stretford (Greater Manchester); Beaumont Leys (Leics); Croydon and Hackney (Metropolitan); Gateshead (Northumbria); and Queen's Rd (West Midlands).

Structure of the report

Chapter 2 looks at Court of Appeal judgements which have dealt with the interpretation of certain of the CJPOA provisions, as well as considering the implications of the European Convention on Human Rights for the legislation. Chapter 3 examines the impact of the CJPOA provisions on suspects in police custody. It looks at what effect the changes have had on the provision of legal advice to suspects, the rate at which suspects exercise their right of silence during police interviews and what influence, if any, the provisions have had on the decision whether to bring charges. Chapter 4 considers the role the CJPOA provisions now play in the trial process. In particular, it looks at the decisions made by CPS lawyers and officials and the experiences of defence and prosecuting barristers. The main findings of the research and their implications are discussed in Chapter 5.

2 Court of Appeal decisions

Birch (1999c) has noted that issues relating to the inferences from silence legislation – particularly section 34 – have frequently been targeted in appeals. As a result, the Court of Appeal has had the opportunity to address a number of important issues surrounding the interpretation of the legislation. Some knowledge of the Court's decisions is necessary in order to understand practitioners' approaches to the provisions (particularly in relation to their operation at court).[11]

Pre-interview disclosure by the police

The issue of the extent to which the police should disclose information relating to the case against the suspect has acquired particular significance since the new provisions were introduced. While the police have no duty under PACE to provide pre-interview disclosure of their case, it has been argued that insufficient disclosure by the police should make evidence of the accused's silence inadmissible. The basis for this argument is that it is reasonable for suspects to remain silent in the face of police questions until they know the evidence against them. The Court of Appeal rejected this argument in *R. v. Argent* (1997),[12] stating that the crucial issue is whether the police have given sufficient information to enable legal advisers to advise their clients properly. This was a matter for the jury to consider when deciding the wider question of the reasonableness (or otherwise) of the accused's conduct (see also *R. v. Kavanagh* (1997)). The kind of circumstances in which the provision of information might be so deficient as to make silence a reasonable response were considered in *R. v. Roble* (1997) Rose L.J. stated that:

> "Good reason may well arise if, for example, the interviewing officer has disclosed to the solicitor little or nothing of the nature of the case against the defendant, so that the solicitor cannot usefully advise his client, or where the nature of the offence, or the material in the hands of the police is so complex, or relates to matters so long ago, that no sensible immediate response is feasible."

11. For a detailed critique of the case law in this area see Pattenden (1995), Sharpe (1998) and Birch (1999c).
12. The dates given against cases reflect the date of the case report (usually in Criminal Law Review) rather than the year that the case was actually heard.

However, the Court of Appeal has rejected suggestions that section 34 of the CJPOA in particular implied a duty on the police to give as full pre-interview disclosure as possible. The Court's view was that the only duty of the police was not to actively mislead the suspect (see *R. v. Imran and Hussain* (1997)).

Reasonableness of the accused's conduct

Section 34 states that inferences may be drawn from an accused's failure, on being questioned by the police before charge or on being charged, to mention a fact which 'in the circumstances existing at the time the accused could *reasonably* have been expected to mention'. In *R. v. Condron and Condron* (1997) the appellants argued that the question of drawing inferences from silence should not have been put to the jury because they had been silent on legal advice and it was therefore not reasonable to expect them to have mentioned the facts in question. The Court of Appeal rejected this argument, stating that the nature of any legal advice given was one factor to be considered in a wider assessment of the reasonableness of an accused's conduct in staying silent. This assessment was a question of fact for the jury.

A similar line of reasoning was followed in *R. v. Roble* (1997). It was held that legal advice to remain silent was not in itself to be regarded as sufficient reason for not mentioning facts relevant to the defence. The evidence generally had to go further and indicate the reason for that advice, because that was relevant when the jury were assessing the reasonableness of the accused's conduct in remaining silent.[13] In this case, the solicitor was not called to give evidence and the only evidence which the jury had came from the appellant, who simply stated that he had been advised to remain silent. In the absence of any reason for that advice, it was held that this was unlikely to inhibit the jury from drawing adverse inferences. The trial judge was therefore correct to direct the jury that it was open for them to draw such inferences. More recently, in *R. v. Taylor* (1999), the Court held that a similar argument to that put forward in the above cases could not hold water where the accused had already indicated that he intended to remain silent during interview for reasons unconnected with the legal advice he had received.

In *R. v. Argent* (1997) the Court held that the consideration by the jury of whether the accused could reasonably have been expected to mention a particular fact, should take the accused's personal characteristics into account and should include broad reference to the circumstances at the time of questioning.

13. The issue of adducing evidence in court of the advice given by solicitors has arisen in several right of silence cases. In her commentary on the R. v.Roble case, Birch (1997) notes that waiving professional privilege by allowing the defendant's solicitor to give evidence in court may expose other aspects of the advice given, which the defence may prefer to keep to themselves. If the defendant seeks to give evidence of the legal advice received, he or she may fall foul of the hearsay rule (R. v. Davis (Desmond) (1998)).

Exceptions to the provisions

In a number of appeals, attempts have been made to establish exceptions to the ambit of the provisions. The Court of Appeal has mostly rejected these arguments. As noted above, silence on the basis of legal advice is unlikely to be seen as sufficient justification for not mentioning matters relevant to the defence (see *Condron and Condron*). What is important is the reason for that advice and why the defendant relied upon it. These are questions of fact to be decided by the jury. Similarly, insufficiency of police disclosure will not be an automatic ground for ruling silence evidence inadmissible (see above). Again, this should be a question of fact, to be considered by the jury (see *Argent*).

It was established in *R. v. Cowan, Gayle and Ricciardi* (1996) that the defence could not escape the possibility of inferences being drawn under s.35 by arguing that the defendant's failure to testify was based on the fear that his previous convictions might be put to him. The same issue was also dealt with in *R. v. Taylor* (1999). There the difficulty was noted that the defendant would already have been given the mandatory warning under s.35(2), in the presence of the jury, of the risk that he would be running by not testifying. If he then chose not to testify on the basis that evidence of past discreditable conduct would prejudice the jury, it would be difficult for the judge, when directing the jury against drawing inferences, to give no reasons for this instruction. Yet, in giving reasons, he might create the very prejudice which the defendant sought to avoid.

In a series of cases (*R. v. Pointer* (1997), *R. v. Gayle* (1999), *R. v. McGuinness* (1999), *R. v. Ioannou* (1999) and *R. v. Odeyemi* (1999)), the defence has sought to rely on technicalities either in the PACE Codes of Practice or in s.34(1) of the CJPOA to argue that the circumstances of the police interview should prevent the drawing of adverse inferences. Under PACE Code C (11.4) a police officer should cease interviewing once he or she believes that a prosecution should be brought and that there is sufficient evidence for it to succeed. The suspect should first be asked if he or she has anything further to say. S.34(1)(a) of the CJPOA refers to the accused's failure to mention facts when being questioned by a constable 'trying to discover whether or by whom the offence had been committed'. In the above cases, it has been argued that inferences should not be drawn from silence where an officer carries out or proceeds with an interview when he or she already believes there is sufficient evidence for a successful prosecution. Furthermore, it has been argued that questioning in such circumstances falls outside of s.34(1)(a), because the officer could not realistically be said to be seeking to discover whether an offence has been committed and by whom.

Birch (1999a) has drawn attention to some inconsistencies between the cases in this area. However, there seems to be some consensus that interviewing continues to be proper so long as the officer has not completely closed his or her mind to the possibility that the suspect may have an innocent explanation to offer, albeit that the evidence appears strong. In this situation, he or she could still be said to be "trying to discover whether or by whom the offence has been committed". However, the cases seem to indicate that, if the interview is indeed shown to have been conducted improperly, it would be difficult to argue that any part of it should be admitted for the purposes of drawing inferences.

Cases in which the accused's physical or mental condition are a cause for concern have also been the source of defence argument that it is undesirable for inferences to be drawn. However, it seems clear from the case of *R. v. A* (1997) that the Court of Appeal will only interfere in the trial judge's decision under section 35(1) as to whether it was undesirable for a defendant to give evidence on the basis of his or her physical or mental condition, if that decision was manifestly unreasonable. Where the defence is seeking to exclude the defendant from the operation of the provisions on the basis of his or her mental condition, it is up to the defence to call evidence relating to this issue. There is no obligation on the court to investigate the defendant's physical or mental condition of its own motion and, hence, no grounds for the court to depart from the position that it is open to them to draw such inferences as appear proper. In *R. v. Friend* (1997) such evidence was called in the case of a defendant aged just over 14 charged with murder. Expert psychological testimony was given that the defendant's mental age was around nine and that he would find giving evidence difficult. The judge rejected a submission that the jury should not draw inferences from his failure to give evidence before a jury and this decision was upheld on appeal. The Court of Appeal affirmed that they would only interfere with the trial judge's decision if it was manifestly unreasonable. They also held that the trial judge was correct in taking account of other evidence about the conduct of the accused before and after being interviewed by the police and the interview itself, as well as the expert psychological testimony. The Court accepted that there were circumstances where it would be undesirable for an accused to give evidence (for example, where this might trigger an epileptic attack) but held that there was no 'right' test to be applied. Short of a ruling that it is undesirable for an accused to give evidence, it therefore appears open to a jury to draw such inferences as appear proper from a failure to give evidence.

If it appears that the statutory preconditions for the drawing of inferences are not met (see Chapter 1) the judge should refrain from putting the question of inferences to the jury (see, for example, *R. v. Pointer* (1997)).

Judge's direction to the jury

Before the formulation of a specimen direction to the jury by the Judicial Studies Board (JSB) in 1995,[14] directing a jury on this new area of law was a potentially difficult task for trial judges. For example, in R. v. Byrne (1995) the Court of Appeal held that the trial judge failed to make it sufficiently clear that the defendant was still entitled to remain silent under the new legislation and that a jury could draw inferences if they concluded that a defendant's silence in court could only sensibly be attributed to him or her having no answer to questions.

In *R. v. Cowan, Gayle and Ricciardi* (1996), the Court of Appeal considered the JSB specimen direction in relation to section 35 and concluded that it was generally a sound guide. The Court's approach in Cowan has since been followed in other appeals concerning the direction given in cases involving an accused's silence at trial (e.g. see *R. v. Melville* (1997) and *R. v. Alford Transport Ltd* (1997)). In *R. v. Birchall* (1999) the Court considered the implications of the omission of one of the essential elements of the direction – in this instance, the requirement to remind the jury that they must find there to be a case to answer on the prosecution's evidence before drawing an adverse inference. The Court held that the departure by a trial judge from the prescribed formula of words would by no means always justify the upsetting of a jury's verdict. In this instance, however, the Court considered that it was essential to the interests of justice that a jury should not start to consider whether they should draw inferences from the accused's failure to testify until they had concluded that there was a case to answer. As Birch (1999b) has noted, if this were not done, there is the risk that a defendant might be convicted wholly or mainly on the basis of his or her silence at trial.

In *R. v. Condron and Condron* (1997), the Court affirmed the JSB's specimen direction in relation to section 34, adding that the jury should be told that they should not draw an adverse inference unless they concluded that the defendant's failure to mention facts later relied upon could only be sensibly attributed to his or her having no answer to police questions, or none that would withstand cross-examination. In *R. v. McGuinness* (1999) it was contended by the defence that the trial judge should go further and direct the jury that they should only draw an adverse inference if they concluded that the only reason for the accused relying on facts not mentioned during the police interview was that he or she had fabricated the evidence subsequently. Following the judgement in *R. v. Cowan, Gayle and Ricciardi* (1996), this argument was rejected. (See also *R. v. Roble* (1997) and *R. v. Beckles and Montague* (1999) to similar effect.) In *R. v. Daniel* (1998) the Court of Appeal considered that the jury should also have been directed that they might draw an adverse inference if they concluded that

14. The JSB direction lays down the procedure which the trial judge should follow when putting the question of inferences from silence to the jury.

the accused's reticence during the police interview was due to unwillingness to be subjected to further questioning, or that he had not thought out all the facts, or that he did not have an innocent explanation to give.

In *R. v. Nickolson* (1999) the Court of Appeal emphasised that, in directing a jury as to the drawing of inferences under s.34, the judge should make it clear that inferences should only be drawn where there had been a failure on the part of an accused to mention when questioned any *fact* relied on in his or her defence. A distinction needed to be drawn between this and the situation in which, during the trial, an accused simply offered a theory or speculation, which had not been raised earlier, to account for incriminating evidence.

The issue of what constitutes a "fact" within the meaning of section 34 was also considered in *R. v. Mountford* (1999). Here, the Court of Appeal held that the particular fact which the appellant had failed to mention in police interview comprised his defence to the charge against him. The jury could not have rejected the appellant's reason for failing to mention the fact in question without also rejecting the truth of the fact (and therefore his defence). Consequently, in the Court of Appeal's view, there was no evidential basis upon which the question of section 34's application could have been resolved as an independent issue in the case, and thus adverse inferences could not be employed as additional support for the prosecution case. In failing to point this out to the jury, the trial judge had erred and accordingly the conviction was quashed.

Relationship between pre-trial silence and silence at trial

In *R. v. Moshaid* (1998) the Court of Appeal held that where an accused had given a 'no comment' interview and then had neither called nor given evidence at trial, section 34 of the provisions was inapplicable since he could not be said to be relying in his defence on any fact which he had previously failed to mention. However, section 35 might be applicable. Similarly, where a defendant had been silent at the police station and at trial, and the defence's intention was simply to put the prosecution to proof, no inference could be drawn under section 34. But, a section 34 inference could be drawn if the defence sought to rely on a fact by way of evidence given by another witness for either the defence or the prosecution. Thus, in *R. v. Bowers, Taylor and Millan* (1998) the Court of Appeal held that a fact relied on may be established by the defendant himself in evidence, by a witness on his behalf, or by prosecution witnesses, either in cross-examination or examination in chief.

In *R. v. McGarry* (1999) a rather different situation arose. The accused had given a statement at the police station, setting out a defence of self-defence to a crime of violence, but made no other comment. He relied on the same defence at trial. There was the danger that the accused's reticence at interview might be held against him by the jury. However, he could not be said to have been relying on any new facts at trial and the prosecution did not therefore invite the drawing of inferences and no judicial direction was provided. It was held by the Court of Appeal that, as this was a case falling outside of s.34, the trial judge should have directed the jury, as required by common law, that they should not draw adverse inferences.

The provisions and human rights

The human rights implications of the provisions (in terms of whether they infringe the right to a fair trial) have been considered by the European Court of Human Rights, most notably in the Northern Irish case of *John Murray v. United Kingdom* (1996). However, on occasion the Court of Appeal has also drawn attention to human rights issues.

The *Murray* case was primarily concerned with the relationship between denying a suspect access to legal advice for up to 48 hours (permissible under the Prevention of Terrorism (Temporary Provisions) Act 1989) and the drawing of inferences from silence under the terms of the Northern Ireland 'right of silence' provisions.[15] The European Court held that, while a system under which inferences could be drawn from silence did not itself constitute a breach of the European Convention on Human Rights, to deny access to legal advice when operating such a system was a breach of the Convention.

In addition, the Court thought that to base a conviction solely or mainly on the accused's silence was incompatible with the Convention. While the terms of the CJPOA 1994 provisions ensure that a conviction cannot be based solely on inferences from silence (see section 38(3)), it is a possibility that a conviction could be based mainly on such inferences. For the provisions place no limit on the weight of any inferences drawn, irrespective of the strength of the rest of the prosecution evidence.[16]

The Human Rights implications of the provisions were also recognised in *R. v. Birchall* (1999) (see above). The Court noted the danger that the inferences from silence provisions might lead to wrongful convictions and stressed the need for juries to be properly directed. In this instance the jury should have been told that they should first be satisfied that the prosecution

15. The Northern Ireland provisions, which are contained in the Criminal Evidence (Northern Ireland) Order introduced in 1988, are broadly similar to those contained in the CJPOA.
16. However, Birch (1999c) has expressed the view that it is unlikely that silence evidence would form the main evidence in a case. The JSB specimen direction appears to confine it to a supporting role: jurors are told that they may take silence evidence into account as "some additional support" for the prosecution case.

had established that there was a case to answer before starting to consider whether they should draw inferences from the accused's failure to give evidence at trial. As Birch (1999b) has noted, one function of this safeguard is to ensure that defendants are not convicted wholly or mainly on the basis of silence, which would be incompatible with the immunities afforded by the European Convention on Human Rights.

The human rights implications of the inferences from silence provisions may be raised more frequently once the Human Rights Act 1998 is implemented in October 2000. The Act will allow challenges under the European Convention on Human Rights to be mounted in domestic courts. In addition, there are further cases from the United Kingdom currently before the European Court of Human Rights, notably the *Condron and Condron* case (see above). The application in this case concerns the extent to which it is permissible for juries, which do not provide written reasons for their decisions, being asked to draw inferences from the accused's silence during police questioning, where silence had been exercised following legal advice. Birch (1999c) has noted that the European Court was clearly influenced in the Murray case by the fact that inferences were drawn by an experienced judge during a Diplock trial in Northern Ireland and that judges provide reasons for their decisions.

3 Silence at the police station

This chapter examines the impact of the inferences from silence provisions on suspects in police custody. It looks first at the issue of legal advice and the influence the provisions have had on legal advisers' dealings with their clients and investigating officers. It then examines whether there have been any changes in the extent to which silence is now used by suspects in police interviews. Finally, the chapter looks at whether the provisions have affected the number of suspects charged by the police.

Legal advice and the right of silence

The provision of legal advice

Previous studies have shown that a minority – albeit a substantial one – of suspects receive legal advice while in custody (Bottomley et al., 1989, Sanders et al., 1989, Brown, 1989). Despite the right of silence provisions leading to greater significance being accorded to what suspects say or do not say during police interviews, there appeared to be no significant rise in the proportion of suspects requesting and receiving legal advice. Thus, around 40 per cent of suspects interviewed by the police received legal advice in both the present study and the pre-CJPOA study conducted by Phillips and Brown (1998).[17] Nor was any significant difference found between the two studies in the way in which advice was provided: the proportions receiving advice by telephone or in person at the station were broadly the same. Thus, 56 per cent of suspects received advice face-to-face at the police station, 18 per cent by telephone and 26 per cent by both means.

Because of the potential significance of failing to answer police questions, it has become increasingly important that the advice suspects are given is well judged. In the past there has been concern about the quality of legal advice received by those in custody. Particular concern has surrounded 'legal representatives' who, while having some legal knowledge, are not qualified solicitors, and could be sent to a police station after telephone consultation

17. In the present study, 67 per cent of suspects in police custody were interviewed by police officers. Those interviewed were more likely to receive legal advice than those not interviewed. Among suspects generally (i.e. whether interviewed or not) around one-third received legal advice in both the present study and that by Phillips and Brown.

between the suspect and a solicitor.[18] The use of representatives has been criticised on the basis of their lack of legal expertise and confidence, the possibility of them being co-opted or exploited by the police, and the failure of some representatives to reveal their status to suspects (McConville and Hodgson, 1993). Following recommendations made by the Royal Commission on Criminal Justice, the Law Society introduced a scheme under which legal representatives who pass a series of tests can become 'accredited' and are given similar rights of access to suspects as qualified solicitors. This initiative appears to have affected the pattern of legal advice provision at police stations. Comparing data from the present study with that from Phillips and Brown's research, Table 3.1 shows a fall in the use of unaccredited legal advisers to six per cent, with a consequent rise in solicitors attending police stations and the emergence of accredited representatives. The implication that the quality of legal advice may well have improved is to some extent confirmed by research funded by the Law Society, although some shortcomings still exist (Bridges and Choongh, 1998).

Table 3.1: Type of legal adviser

	Phillips and Brown's study %	Present study %
Solicitor	74	84
Unaccredited representative	26	6
Accredited representative	-	10

Note: Sample size Phillips and Brown: 574; present study: 798

Pre-interview disclosure

Because inferences may, in appropriate circumstances, be drawn from a failure to answer police questions, legal advisers need to know whether it is wise or not to advise their clients to provide 'no comment' interviews. In order to provide such advice, advisers need to have a reasonable appreciation of the case against their client. The disclosure of information prior to interview has traditionally been a source of tension between officers and legal advisers, reflecting their conflicting roles in an adversarial criminal justice system (McConville et al., 1991; Dixon, 1991; McConville and Hodgson, 1993). Investigating officers have tended to be reticent about disclosing information in their possession, since to do so would be to give

18. The term 'legal representative' is used here to refer to a range of non-solicitor staff, including articled clerks, former police officers and representatives with no formal legal qualifications. Past estimates of their use have ranged from nine per cent of advisers attending police stations to 76 per cent, depending upon location (McConville and Hodgson, 1993).

up a major advantage they have over the suspect and the legal adviser.[19] Limiting the information given to suspects and legal advisers provides police officers with a tactical advantage during interviews and reduces the likelihood of guilty suspects constructing credible alibis and defences (McConville and Hodgson, 1993).

A common theme in interviews with police officers was that legal advisers were now asking for more information about the case against their clients than in the past. Advisers also felt that the provisions had resulted in greater emphasis being placed on police officers disclosing sufficient details about a case, even though no reference is made to disclosure in the legislation. In particular, s.34 limits the drawing of inferences to cases in which suspects fail to mention facts later used in their defence when it is reasonable to expect them to have mentioned such facts when questioned. Legal advisers interpreted this as requiring officers to provide them before interview with enough evidence to prove that a *prima facie* case existed. Without such information, they argued that it was reasonable in the circumstances for them to advise their clients not to answer questions.

> *'In a way it's probably helped us because it's thrown the emphasis back on to the police in that we obviously require a disclosure before we advise clients. "We're not going to answer your questions, because it is on tape that you're not prepared to disclose what your evidence is. Therefore how can we advise the clients in the proper manner?" So that straight away throws the emphasis back on the officer.'* [Legal adviser]

> *'I mean police officers now, because of the provisions, are more inclined to give details of their evidence. So you're able to assess what the strength of the case is before advising your client. I see that as a positive advantage.'* [Legal adviser]

> *'Yeah, on the whole I'd say that they are fairly helpful. Officers are aware of the legislation, they know that by not giving us disclosure that's a tool we can use to avoid, to prevent, our client from saying anything.'* [Legal adviser]

As a result of legal advisers seeking a greater degree of information pre-interview, disclosure had become an increasingly topical issue among police officers. There were three schools of thought. First, there were those who described how they had resisted the push towards fuller disclosure and continued to provide the bare minimum, including why the suspect had been arrested, but not much more. Secondly, there were some who stated

19. Hobbs (1988) and McConville and Hodgson (1993) argue that the management of information is seen as an important part of a police officer's job, as it is necessary to the maintenance of their authority and control over situations and is an essential part of their prosecuting 'armoury'.

that they were now reluctantly providing fuller disclosure than in the past, and in some instances were even giving witness statements to legal advisers. Third, there were officers who stated that they were happy to give legal advisers extensive details about a case, as this assisted interviews. Some argued that suspects were more likely to talk if they knew the case against them. The more cynical felt that suspects would lie to interviewing officers regardless of whether or not they had been told the case against them.

To put these developments into context, it should be noted that the majority of suspects had not obtained legal advice and did not have the benefit of having someone with legal expertise to request pre-interview disclosure on their behalf. They could, therefore, face police questions while being unsure of the case against them or of the legal implications of exercising silence.

> *'I cannot see a client having the confidence or the wherewithal, to say to police officers before an interview: "All right officer, I would like to see your notebook, I'd like to discuss with you what evidence you've got against me". The interview will start, the officer will start introducing whatever he wants to introduce and the unrepresented client is going to start volunteering all sorts of information.'* [Legal adviser]

> *'If a legal adviser isn't there, a client in those circumstances is almost certainly in my view going to be under more pressure to talk than they ever were before, because a police officer will be seeking to persuade them that it really isn't in their interest to stay silent.'* [Legal adviser]

Legal consultations with suspects

The views of legal advisers differed on what effect the inferences from silence provisions had had on the task of advising clients. While some stated that there had been no impact on the way they carried out their work, others believed that their jobs were now more difficult because of the complexity of the provisions and the serious implications attached to the advice they gave.

> *'Certainly a lot of the concepts surrounding the right of silence are quite difficult to grasp, particularly for lay people. Even some solicitors I know have problems getting their head round the provisions.'* [Legal adviser]

> *'On the basis of the information disclosed you have to advise the client whether you think it's in his best interest to say anything at this stage or not. But you also have to warn the client of the*

implications in not doing so and that in itself is sometimes very difficult for a client to understand.' [Legal adviser]

'Solicitors, solicitors' clerks and accredited people are very concerned that at the end of the day some barrister at the Crown Court is going to say: "What the hell did you advise him to make no comment for? Look at the inferences now being drawn against him". It's a terrible concern when you are faced at the police station with information you've got from both sides, having to make a very, very important decision at that stage.' [Legal adviser]

'It's a balancing exercise between looking after his interests at that stage and, at the back of your mind, thinking, "How is this going to play at trial?" You have to think, "What is going to happen? Is this going to trial. If it is going to trial how is this going to look?"' [Legal adviser]

Legal advisers differed in terms of the kind of advice they gave suspects in the light of the right of silence provisions. Some felt that after an initial period of confusion, legal advisers had reverted to much the same situation as before the provisions were introduced. In general, advisers stated that they were still prepared to counsel silence if there was insufficient disclosure by officers, a lack of evidence, or their client was vulnerable due, for example, to a mental condition. Nevertheless, a strong theme emerging from interviews was that legal advisers were now more likely to advise their clients to answer police questions than to remain silent. If the client had a defence for the allegations in question, then he or she was now more likely to be advised that it should be given to the police.

'I will tell that person what I think the strength of the evidence will be in due course. I will explain to them the consequences of answering or not answering questions. I will explain to them that this is a case that really, if there's a defence, it will have to be put forward. Or, "this is a case where it's unlikely the prosecution will proceed. So you can put forward your defence, but if you don't have a defence, then I'd advise you not to answer any questions".' [Legal adviser]

'It's worrying, so you err on the side of safety: you answer questions. That is erring on the side of safety isn't it? It's a bolder decision to advise no comment.' [Legal adviser]

'It's changed the emphasis a little more, so that you do start on the premise that you are going to say something.' [Legal adviser]

'I've got absolutely no doubt that solicitors are now more likely to advise their clients to talk in interview.' [Legal adviser]

Because the presence of a legal adviser could actually facilitate the interview, there was little evidence of reluctance on the part of interviewing officers to have an adviser there. This contrasts with the situation which was reported to exist prior to the introduction of the Police and Criminal Evidence Act 1984. Research for the Royal Commission on Criminal Procedure suggested that officers considered that the presence of a lawyer could often render interviews fruitless (Softley, 1981).

However, certain legal advisers were alive to ways of mitigating the impact of the new provisions. Some described how, in some cases, they had prepared written statements with their clients during consultations. These were used to protect their clients from police questioning, since they would be read out at the start of a interview and were followed by a refusal to answer officers' questions. Such statements might be used when legal advisers thought sufficient evidence already existed for a decision to be made on a case, or when their client was willing to admit to a lesser offence.

> *'We have an opportunity to consider any disclosure, take instructions from our clients, and, if it is considered that the appropriate way to respond to the allegations in interview is by way of a written statement under caution, that will be prepared by the client with the advice of myself, or whichever solicitor is dealing with the matter, prior to the interview with a view to it being submitted in the course of that interview – usually at the beginning. It's then followed by "no comment" responses.'* [Legal adviser]

> *'It's all or nothing and the only mid-way course of action I've ever followed is assisting the client to prepare a statement for them to read at the beginning and thereafter to answer 'no comment' for whatever reason. In the particular matter I dealt with at the weekend, he was arrested for two house burglaries, I had full disclosure. The disclosure didn't show me any link to either burglary, but it did show me two 'handlings'. He accepted two handlings. He prepared a statement with me which admitted the two handlings, thereby getting the maximum credit if that's what we end up with at the end of the day, but not answering any questions on the burglaries and asking for ID parades.'* [Legal adviser]

Legal advisers also mentioned how a written statement could be presented when their client was charged, rather than at the start of any interviews and prior to any refusal to answer questions. This avoided officers using the document as a basis for their questions during interview. Finally, when a client was going to refuse to answer police questions, some legal advisers described how they would make a statement at the start of the interview stating that this was going to happen and providing reasons for this course of action. However,

they differed in relation to how much explanation they thought should be given: some were wary of the possibility that providing reasons to investigating officers could amount to a waiver of professional privilege.

The research found that the length of legal consultations had increased when compared to other studies carried out before the CJPOA was introduced. McConville and Hodgson (1993) found that only around a third of legal consultations lasted more than 15 minutes, while the present study found that just over half exceeded this time. The heightened importance of the advice which is now given, coupled with the task of explaining the provisions to clients and the need to decide on a strategy for responding to police questions, almost certainly explain this increase.

The new police caution

Under the PACE Codes of Practice, at the start of police interviews and before any questions about their involvement in an offence are asked, suspects must be cautioned by the interviewing officer that:[20]

> *'You do not have to say anything. But it may harm your defence if you do not mention when questioned something which you later rely on in court. Anything you do say may be given in evidence.'*

Police officers and legal advisers both expressed doubts about the extent to which suspects understand the content and implications of this statement. Some officers differentiated between 'professional criminals' or 'regular villains' who, through word of mouth or regular arrests, were familiar with the caution, and those suspects who were likely to be hearing it for the first time.

> *'Hardened criminals are sick to death of hearing it and perhaps understand it maybe a bit more than others.'* [Police officer]

> *'People who are coming in every month, or people who have been doing this for a living for quite some time, I don't think they even listen to the caution. They just know that everything they say after that time is going to be used as evidence.'* [Police officer]

Because of the perceived complexity and importance of the caution, interviewing officers commonly asked suspects if they understood it and whether they could explain it.[21] However, even if police officers explained the caution in lay terms, they expressed a degree of scepticism about whether suspects fully comprehended it.

20. Code of Practice C, 10.1. The same caution is given to suspects on arrest.
21. For a discussion of suspects' understanding of the caution and police explanations of it see Tully and Morgan (1997).

'I doubt if suspects understand the full implication in interviews. You always ask don't you. "The caution, do you understand that?" I don't know how many times anyone has tried to explain it to a juvenile. They are probably not listening anyway, to be quite honest with you. No matter how slowly you try and spell it out for them.' [Police officer]

'I mean they always say 'yes' they understand because it makes them look foolish to say: "no, I haven't a clue what you're are talking about".' [Police officer]

'Most suspects say that they understand it, but when asked what it means, most are unable to say.' [Police officer]

'It is not uncommon for suspects to interpret the 'new' caution as meaning that they must talk to the police. We disabuse them of this notion, telling them that the right of silence still exists, but find that they still want to talk.' [Police officer]

'You try and explain to them over and over again and they ultimately grasp it but they manage to still say 'no reply' because they don't understand the caution. They don't understand the consequences and so you go through it stage by stage and explain it to them so the penny suddenly drops.' [Police officer]

A number of officers expressed unease about probing the suspect's understanding of the caution or explaining what it meant in lay terms. This was because a clear lack of understanding on behalf of the suspect or an incorrect description by an officer could undermine the admissibility of anything that was then said during the interview. As one officer stated: 'perhaps you don't want to ask them what it means either'. This issue had apparently led to some officers being told during investigative interview training simply to give the caution and no more.

Opinions varied about the effect of the caution on the exercise of silence. While some officers felt that it had had no effect, others described how discussing the caution's meaning with suspects was a good way of 'warming them up' to respond to police questioning. Furthermore, reiterating the caution during the interview was described as an effective way of getting suspects to answer questions.

'We were all given lots of laminated cards with it on when it came out. We all stumbled around but we got the hang of it. It hasn't made a single impact on the investigation of the cases that I have ever been involved in. It has no effect.' [Police officer]

'In some respects it's to our benefit to spend time talking about the caution. I am not actually talking about the offence for which he has been arrested, so you actually, when that conversation is taking place, you are building up a bit of a rapport and they are actually talking. It is actually great for starting an interview off.' [Police officer]

'Sometimes, repeating the caution can have a salutary effect on suspects. Sometimes it can be more appropriate than using a special warning. But there's the danger of overdoing it too much and having the legal adviser having a go for oppressive questioning.' [Police officer]

A number of legal advisers complained about repeated cautioning by officers. In particular the practice of re-emphasising the implications of the new wording was described as being oppressive.

'We never used to get a repeat caution, everybody knew what a caution was in fact. As far the police officer was concerned it was a bit of an inconvenience having to say the caution at the beginning of the interview, but now I get it repeated quite often. So, I get it halfway through an interview, we've got "no comment" and I get: "Now you are aware this interview is being conducted under the provisions of the new caution?" And they go on and on really as a means of oppression. It makes them look a bit silly quite frankly.' [Legal adviser]

Some legal advisers also complained of suspects being re-cautioned, having refused to answer questions which were irrelevant to the case, and of officers attempting to persuade suspects to talk by stating that the legal advice they had received concerning the right of silence was incorrect.

'There was an interview recently I've done where the police kept on explaining the caution throughout continually. They just kept on saying: "If you don't answer this question it will be held against you in court you know. The jury will be able to draw a proper inference if you don't answer these questions". And some of them had nothing to do with the case, you know, just sort of mundane questions. Totally inappropriate. And it's a very good weapon, to expect people to talk, to keep reiterating that theory.' [Legal adviser]

'The police turned round and said that: "the advice that you've been receiving is incorrect and an inference can be drawn". That really gets your back up when that happens. I know why they do it, I realise that they can try and influence a suspect. But provided

you've got somebody who knows what they're about in the interview room, you should have sufficient authority to tell the police you're the one who's advising him, not them. They can caution as much as they want but in your view this is the position, and my client will remain silent.' [Legal adviser]

Frequency of silence in police interviews

Prior to the introduction of the new provisions, over a dozen research studies had produced widely varying figures on the use of the right of silence in police interviews. The lowest estimate was produced by Leng (1993) who found only five per cent of suspects remained silent during police questioning. Leng arrived at this figure using a strict 'legally significant' definition of silence which excluded, for example, refusals to answer questions which were irrelevant to the investigation and initial refusal of questions which were later answered. At the other end of the spectrum, the highest estimate comes from a survey conducted on behalf of the Association of Chief Police Officers (ACPO) in response to the 'unrealistically' low estimates resulting from academic research. This study found 22 per cent of suspects exercised the right of silence, with ten per cent of these remaining completely silent throughout interviews (ACPO, 1993).[22]

Differences in the definition of silence used and in the research methodologies adopted probably account for the wide variations in estimates of the use of silence. Taking these into account, Brown's (1994) review of studies prior to the CJPOA suggests that no more than five per cent of suspects outside the Metropolitan Police refused to answer all questions. Within London this figure was probably between seven and nine per cent. In terms of those exercising the right of silence selectively, Brown suggests that this group in provincial forces was around five per cent of suspects, while in the capital it was seven per cent. These estimates take into account that some suspects selectively answer questions, but later admit offences or make damaging statements (Moston et al., 1992). They therefore could not be said to have exercised their right of silence in any meaningful sense. The estimates also exclude those cases in which the questions refused were unrelated to the offence for which the suspect was arrested. Combining estimates for complete and partial refusal to answer questions, Brown suggests that the right of silence was exercised in up to 10 per cent of cases outside of London and in up to 16 per cent in the Metropolitan Police area.

22. While the ACPO research received a great deal of attention, some viewed it as inflating the extent to which the right of silence was exercised, partly due to the use of a broad definition of what amounted to silence (Leng, 1994). The findings were also viewed with some suspicion as no information was available about the study's research methodology (see Brown, 1994; Leng, 1994).

A direct comparison of suspects' use of the right of silence before and after the introduction of the new provisions was possible by drawing on the study by Phillips and Brown (1998). Both their research and the present study included the same eight police stations and used the same research methodology. Phillips and Brown's study was conducted just over a year before the provisions were introduced, while the present study began five months afterwards.[23] In defining suspects' use of silence, both studies distinguished between those instances in which suspects refused all police questions and those where only specific questions were refused. The cases in which questions were selectively refused included those in which silence was not 'legally significant', as defined by Leng.

Table 3.2 presents figures on suspects' use of silence from the two studies for the eight police stations. In Phillips and Brown's study 10 per cent of suspects gave complete 'no comment' interviews; in the present study this figure had fallen to six per cent. Thirteen per cent of suspects selectively answered police questions in Phillips and Brown's study, while in the present study this had fallen to ten per cent. Therefore, when the figures for 'no comment' interviews and those where the suspect selectively answered questions are combined, the Phillips and Brown study gives a total of 23 per cent and the present study a figure of 16 per cent (a drop of just under a third). Reductions were found for each of the eight stations in relation to suspects selectively answering questions, and for the majority of stations in relation to suspects refusing all questions.

Table 3.2: Suspects' use of the right of silence during police interviews

	Refused all questions %	Refused some questions %	Answered all questions %	Total %
Phillips and Brown's study	10	13	77	100
Present study	6	10	84	100

Note: sample size: Phillips and Brown, 1,785; present research, 1,227.

Changes in the use of silence among specific groups of suspects

Previous research has shown that the right of silence was most likely to be exercised by particular groups of suspects: for example, those arrested in London,[24] those who have received legal advice, black people and those

23. The fieldwork period in Phillips and Brown's study was from September 1993 to March 1994.
24. Why this difference should exist is unclear. Brown (1994) suggests that it may reflect greater sophistication among the capital's criminals, differences in the provision of legal advice, more hostile attitudes towards the police, or a combination of all three.

arrested for serious offences (Willliamson, 1990; Moston et al., 1992; Phillips and Brown, 1998). The largest drop in the use of silence was found among these groups.

Table 3.3 compares the use of silence before and after the introduction of the provisions according to whether suspects were held at a London police station or elsewhere. This shows that the gap between the two groups of suspects has narrowed. When refusals to answer all questions and selective refusals are combined, the proportion of suspects exercising their right of silence in London fell from 32 per cent to 21 per cent, while elsewhere the fall was from 21 per cent to 14 per cent. The largest fall was in relation to 'no comment' interviews in the two London stations – down from 20 to 10 per cent.

Table 3.3: Use of the right of silence by police force

	Refused all questions %	Refused some questions %	Answered all questions %	Total %
Metropolitan Police				
Phillips and Brown's study	20	12	68	100
Present study	10	11	79	100
Other forces				
Phillips and Brown's study	7	14	79	100
Present study	5	9	86	100

Note: sample size: Phillips and Brown (Metropolitan Police: 399, other forces: 1386); present study (Metropolitan Police: 326, other forces 901).

Table 3.4 examines the link between legal advice and the use of silence.[25] Among suspects receiving legal advice, the proportion refusing all questions fell from 20 to 13 per cent, and among those refusing some questions from 19 to nine per cent. Prior to the introduction of the provisions, the exercise of silence among suspects not legally advised was rare. However, a decline was found among this group too: the proportion refusing all questions went down from three to two per cent and those refusing some questions fell from nine to six per cent. Combining partial and complete refusals to answer questions, the use of silence among legally advised suspects fell from 39 to 22 per cent and among those not advised from 12 to eight per cent. These figures lend some support to the finding, noted above, that legal advisers are now more likely to counsel their clients to provide the police with an account if they can.

25. Those receiving legal advice formed 40 per cent of those interviewed.

Table 3.4: Legal advice and exercise of the right of silence

	Refused all questions %	Refused some questions %	Answered all questions %	Total %
Legally advised				
Phillips and Brown's study	20	19	61	100
Present study	13	9	78	100
Not legally advised				
Phillips and Brown's study	3	9	88	100
Present study	2	6	92	100

Note: sample size (suspects interviewed): Phillips and Brown, 1,785; present research, 1,227.

The use of silence fell uniformly across the sexes and different age groups, but not among those from different ethnic groups (see Table 3.5). Both whites and Asians exercised silence less often but the steepest fall was found among black suspects. The proportion refusing all police questions fell sharply from 21 to seven per cent. The effect of the decline in 'no comment' interviews among black suspects is to bring them much closer to whites and Asians in terms of their use of silence. In Phillips and Brown's study only 66 per cent of black suspects answered all police questions compared to 79 per cent of both whites and Asians. In the present study 81 per cent of black suspects answered all questions, compared to 86 per cent of both whites and Asians.

Table 3.5: Exercise of the right of silence by ethnic group

	Refused all questions %	Refused some questions %	Answered all questions %	Total %
White				
Phillips and Brown's study	8	14	78	100
Present study	5	9	86	100
Asian				
Phillips and Brown's study	13	8	79	100
Present study	6	8	86	100
Black				
Phillips and Brown's study	21	13	66	100
Present study	7	12	81	100

Note: sample size (suspects interviewed): Phillips and Brown, 1,785; present research, 1,227.

The use of silence declined among suspects arrested for very or moderately serious offences and among those arrested for less serious offences, but the fall was greater for the former group.

Selective 'no comment' interviews

Suspects selectively answering police questions fell into two groups: those refusing questions about their own involvement in an offence and those refusing questions about the involvement of others. A comparison with Phillips and Brown's study shows a slight decline in refusal to answer questions among both groups: down from six to five per cent among the former, and from seven to five per cent among the latter.

Confessions

Commentators on the provisions, whether opposed to or in favour of them, have viewed them as being likely to encourage more confessions by suspects (Leng, 1994; Zander, 1994; Neyroud, 1995). This does not appear to have occurred. Phillips and Brown found that 55 per cent of suspects made confessions during police interviews; in the present study the figure was exactly the same. Therefore, while suspects may be talking more to officers

during police questioning, it would appear that they are no more likely to make admissions than in the past. Some officers described this development as an increase in 'the flannel factor'.

> *'Well, I would say there has been a vast change in the number of people who normally remain quiet in interview – it has in the main diminished statistically. What we tend to get now is a pack of lies, given as an explanation initially as opposed to people saying "no reply" to every question.' [Police officer]*

> *'They always give you a story now, they always give you a story no matter how cock-and-bull it is. In fact they probably lie a little better now, instead of saying "no comment".'* [Police officer]

> '*Yeah, suspects are talking more, but more talk just means more untruthful accounts.*' [Police officer]

> *'I've not noticed the confession rate going up, but the flannel factor has. Suspects may be talking to us more, but they are just coming out with cock-and-bull stories. They often admit enough to place them near the scene of the crime, but not enough to establish their involvement with it.*' [Police officer]

However, officers saw accounts provided by suspects, even if they were 'cock-and-bull stories', as being better than 'no comment' interviews, since they at least gave the police something to investigate. If these accounts could be proven to be false, then this evidence strengthened the case against the suspect and was seen as much more valuable than the drawing of adverse inferences at court. Alternatively, if the suspect gave a 'cock-and-bull story' at interview but raised another defence at trial, inferences could be drawn, and might have more impact than those drawn merely from a suspect's refusal to provide any account at all. However, some officers complained that the increase in 'stories' meant more work, as they now had to spend time establishing whether these were true or false.

> *'The majority of them now will answer your questions in the interview, it is probably a pack of lies, but a pack of lies on the first tape is as good for the enquiry as a witness who has identified somebody. If you could prove that that man is telling lies and you have got the evidence to go with it, it only serves to strengthen your case at the end of the day.*' [Police officer]

> *'I've found it creates a little more work because when they start to lie they create a long series of lies which you've then got to go out and disprove. Whereas in the past you may have actually been*

happy for him to give a 'no comment' interview, go to court, offer an explanation and let the jury sit and think: "This man has already been interviewed by the police, why didn't he answer the questions then?"' [Police officer]

Impact on 'professional' criminals

A recurring issue in the right of silence debate has been the use of the right by 'professional criminals' and the extent to which they could successfully evade charges by refusing to answer police questions (Moston et al., 1992; ACPO, 1993; Neyroud, 1995; Leng, 1994). Legal advisers and police officers were sceptical about the impact of the provisions on this group, who were described as continuing their traditional policy of not answering police questions, or as using a range of tactics to circumvent the new legislation.

'I'd say the inexperienced and vulnerable, really they are more likely to be susceptible to it than the professional, well experienced criminal who knows the law and has a good brief.' [Legal adviser]

'I think it's quite hard on first time offenders who've never been in a police station before, terrified out of their wits and your advice may well be to remain silent . But you explain this to them and they think, "Oh, Christ, no I'm not having this". And in terms of, if you like, the hardened criminal who's got away with it in the past. If they're so hardened they'll do the same. They're not going to buckle.' [Legal adviser]

In addition to pointing out that these suspects still exercised silence as before, officers described a number of 'tactics' used by professional criminals to enable the suspect to remain silent and avoid police questions without risking inferences being drawn later on. Officers included among these the reading out of written statements at the start of an interview by suspects or legal advisers. As described above, these were followed by a refusal to expand upon the content of the statement or answer other police questions. Such statements were allegedly constructed during consultations with legal advisers and might involve alibis, full defences or partial admissions. Alibis were sometimes described as being prepared in such a way as to be impossible to disprove. In some cases legal advisers apparently read out a statement at the start of the interview, stating that their clients would like to talk to officers but, since they were in fear of their lives, to do so would mean that they and their families would suffer 'reprisals'. Officers also described the 'bad brief' defence, in which a client, on the advice of his or her legal adviser, refused to answer any police questions. At court the defendant would be represented by a different legal firm who stated that the

advice given at the police station was poor and that their client now wished to submit a defence.

In addition, there appeared to be some evidence that professional criminals used such statements to avoid police questions with little prompting from legal advisers.

> 'Again to make a comparison pre and post the provisions. I can think of two or three particular villains that I regularly used to represent and they were always 'no comment' pre the Act. Since the Act one of them has moved from being a professional burglar to the drug scene and on the two occasions where he's been interviewed in my presence, he has given a limited interview, he has given an explanation for items being in his possession to avoid the special warning and he has given an explanation for his general conduct. But the pros in this area tend to give a statement, if you follow me, on tape, rather than submit themselves to questions. "I've told you all I am going to tell you, I've dealt with all the issues you have asked me and that is all I am proposing to say."' [Legal adviser]

Impact on vulnerable groups

In the debate leading up to the new legislation, the possible impact upon vulnerable suspects aroused some concern (Leng, 1994; Gudjonsson, 1994). In the present study, legal advisers expressed similar misgivings, referring particularly to alcoholics, drug addicts, juveniles and those with mental health problems and learning difficulties. As well as having a poor understanding of the provisions and their implications, these suspects were considered to be highly suggestible to police questioning.

> *'If you've got a police officer who is well trained as a inquisitor, he's got skills over and above someone who has just been pulled off the street and who is vulnerable. That officer will be very influential in the way the interview goes, particularly if there isn't a legal adviser there. So a client in those circumstances is almost certainly in my view going to be under more pressure to talk than they ever were before because a police officer will be seeking to persuade them that it really isn't in their interests to stay silent.'* [Legal adviser]

> *'There's no question that the pressures are real and the special caution pressures are real and a vulnerable defendant is certainly going to be very frightened by the wording. I think there's a danger, but if I do my job properly I will protect them away. I think there's a worry about the unrepresented ones.'* Legal adviser]

> *'They are at the bottom end of the intellectual scale and it's not surprising that they often feel tied up by police officers' questions. And is it reasonable that they should be advised not to answer questions because they are not as intellectually capable as the interrogators? I mean you just know some people are going to make appalling witnesses and that they can basically be encouraged to say anything. And that's not by the use of leading questions, it's just the fact they can't think round what they're being asked.'* [Legal adviser]

It is not possible to say to what extent these concerns were well-founded because respondents did not draw attention to specific cases in which vulnerable suspects had demonstrably been disadvantaged by the new provisions. Nor have any cases of miscarriage of justice come to light in which the provisions are considered to have played a part. It might be argued that the provisions are unlikely to have had an adverse impact on vulnerable suspects. This is because, in the past, this group was the least likely to have benefited from having a right of silence because they were least likely to have exercised it. Some past miscarriages of justice were indeed attributable to vulnerable suspects failing to remain silent, when this may have been the best course, but instead providing false confessions.

The use of 'special warnings'

Under ss.36 and 37 of the CJPOA, inferences may in certain circumstances be drawn from a suspect's failure to answer police questions about incriminating circumstances. Unlike s.34 these provisions do not require a defence to be raised at court which had not been raised earlier. The failure to provide a satisfactory account at the time of interview is enough to allow inferences to be drawn. The provisions relate to cases where a suspect interviewed after arrest fails to account for incriminating objects, marks or substances (s.36) or his or her presence at a particular place (s.37). For example, in a case of violent assault officers might wish to question a suspect about his or her cut hands or torn clothing; or, in a case of criminal damage, a suspect might be asked what he or she was doing outside a shop at about the time its windows were broken. In order for inferences to be drawn later at court, the PACE Codes of Practice stipulate that the interviewing officer must give the suspect what is termed a 'special warning' (C 10.5B and E 4.3D). Such a warning requires officers to explain the following:

- the offence being investigated
- what fact the suspect is being asked to account for

- the officer's belief that the fact may be due to the suspect's participation in the commission of that offence

- that a court may draw proper inferences if a suspect fails or refuses to account for that fact

- that a record is being made of the interview and it may be given in evidence if the suspect is brought to trial.

Thirty-nine per cent of suspects exercising their right of silence (either in full or selectively) were given a special warning (amounting to five per cent of all suspects). A wide range of offences was involved, but those arrested for burglary, violence, drugs and robbery offences were most likely to be given a warning.[26] Table 3.6 shows that, of those given a special warning, the majority of suspects refused to provide an account (s.36: 70 per cent; s.37: 77 per cent) or gave one which was considered unsatisfactory by officers (s.36: 11 per cent; s.37: 10 per cent). In a relatively small proportion of cases special warnings resulted in a satisfactory account being given (s.36: 19 per cent; s.37: 13 per cent). These figures do not necessarily imply that special warnings were of limited utility. A failure to give a satisfactory account might be valuable evidence in any subsequent proceedings.

There was some degree of confusion among police officers about the giving of special warnings.[27] This perhaps reflected a lack of training.[28] Some officers stated that they gave warnings at the start of an interview and some at the end; others stated that they gave them before a specific question had been asked and others when it had been refused. Officers were also unclear whether a single warning could be given collectively for marks, objects or substances, or whether one needed to be given for each piece of evidence. Furthermore, there was some uncertainty about whether giving repeated warnings might be interpreted by the courts as oppressive.

26. Special warnings were given to 11 per cent of suspects arrested for burglary, seven per cent arrested for violence offences, seven per cent arrested for drug offences, and six per cent arrested for robbery.
27. This was also reflected in a series of letters published in the Police Review during the summer of 1996.
28. The extent of training reported by officers varied widely. Some had attended one or two day courses specifically on the new provisions, some had touched on the provisions as part of wider investigative training, while others had only been given a handout about them. Some officers stated that they had received no training at all at the time the research was carried out and had only learned about the provisions by acquiring a copy of the legislation. The extent of training was not related to whether officers were in the uniformed or detective branches of the police.

Table 3.6: Result of s.36 and s.37 special warnings

	S.36 special warning (marks, objects, substances) %	S.37 special warning (presence at scene) %
No account given	70	77
Unsatisfactory account given	11	10
Satisfactory account given	19	13
Total	100	100

Note: sample size: 176 suspects given s.36 special warning; 134 suspects given s.37 special warning.

Legal advisers criticised police officers for not understanding how to use special warnings. They cited instances of them administering warnings for circumstances unrelated to marks, objects, substances or a suspect's presence in a particular place. In one case an investigating officer had apparently given out a warning at the start of an interview, leaving a suspect who had already agreed to answer all questions 'utterly confused'. Officers were also described as not understanding what constituted a 'satisfactory' or 'unsatisfactory account' and applying their own subjective interpretations. Here, instead of simply labelling fanciful, silly or flippant responses as unsatisfactory, officers were including accounts which simply conflicted with the available evidence. While the use of special warnings appeared to have little impact on suspects, legal advisers stated that they could exert considerable pressure on clients, but that the police did not necessarily deploy them as much as they could.

Silence and the charging of suspects

At trial, a prima facie case must exist independently of any inferences from silence. However, it appears that this distinction between silence and other evidence does not exist at earlier stages (see Card and Ward, 1994). Therefore, while silence cannot be the sole basis of a case, it can contribute to the evidence upon which a decision whether to charge is made. For example, a refusal to answer questions following a special warning may be added to the evidence upon which a custody officer decides whether or not to charge a suspect.

A comparison between Phillips and Brown's research and the present study gives some indication of whether the provisions have had an effect on the rate at which those exercising silence or answering police questions are charged (see Table 3.7).[29] In Phillips and Brown's study 70 per cent of

29. The present study was unable to follow through all cases in which suspects were summonsed or bailed for enquiries to establish whether these cases resulted in prosecution. Estimates were made of the outcome of those cases, based on the outcome of similar cases in Phillips and Brown's study.

suspects exercising their right of silence were charged; the comparable proportion in the present study was 64 per cent. There was little change in the proportion exercising their right of silence who were cautioned.[30] Why the charge rate among silent suspects should have dropped is unclear. One explanation might be that, prior to the CJPOA, the likelihood of the suspect remaining silent was not strongly related to the strength of the evidence. Now, if the perceptions of police and legal advisers are correct, silence would only tend to be used where the evidence is weak. If so, it would be expected that charges would be less likely against those suspects who continue to exercise their right of silence.[31]

The charge rate among those answering all questions remained the same at 50 per cent in both studies. There was a slight drop in the proportion cautioned (down from 20 to 17%). Overall, the proportion of suspects answering all questions who were dealt with officially in some way (i.e. charged or cautioned) remained at broadly the same level in both studies (Phillips and Brown: 70%; present study: 67%).

Table 3.7: Case outcome by exercise of the right of silence

	Charge	Caution	No further action	Other outcome	Total
	%	%	%	%	%
Refused some/all questions					
Phillips and Brown's study	70	5	17	8	100
Present study	64	6	20	10	100
Answered all questions					
Phillips and Brown's study	50	20	23	7	100
Present study	50	17	21	12	100

Note: sample size (suspects interviewed): Phillips and Brown, 1,785; present research, 1,227.

30. A prerequisite of a caution is that the suspect must have admitted the offence. Those exercising their right of silence who were cautioned include some suspects who had initially refused to answer questions, but subsequently provided an admission. Evans (1993) notes that cautions are sometimes issued where it is doubtful whether the suspect has provided a clear admission. It was not possible to check whether this was so in any of the cases included here.
31. It was not possible to verify this explanation in the present study because data on the strength of evidence was not collected.

4 Prosecution and trial

This chapter looks at the impact of the inferences from silence provisions on the preparation of cases for prosecution and at court. It draws primarily upon interviews conducted with CPS staff (both lawyers and caseworkers) and barristers, but also includes material from interviews with legal advisers. It was often apparent that respondents' opinions of the provisions depended upon their particular professional viewpoint. For example, CPS staff and barristers who mostly prosecuted tended to have a much more positive view of the provisions than those legal advisers and barristers who mainly defended.

Impact on the decision to prosecute

CPS respondents considered that the provisions had affected the decision to prosecute in two ways. Firstly, nearly all thought that there had been an increase in the number of suspects answering police questions since the introduction of the provisions. Consequently, they felt that there would now often be more information available upon which to base the decision whether to proceed with a prosecution. In some instances, this might increase the likelihood of prosecution: for example, if a suspect had given an account to the police which was subsequently shown to be false, or had clearly failed to rebut the evidence against him or her. Against this, some said that by giving the police a full and clear account, suspects might sometimes successfully exonerate themselves.

Secondly, in cases in which suspects still remained silent, the provisions meant that silence could now play a role in establishing the prosecution case. While a suspect's silence at the police station cannot alone prove guilt (see section 38(3)), it can now be treated as evidence by the court when deciding whether the accused has a case to answer (see sections 34(2)(c), 36(2)(c), and 37(2)(c)).

In the general run of cases, however, CPS respondents considered that silence would play only a marginal role (if any) in the decision to prosecute. This view was partly based on the fact that other evidence was still needed to mount a successful prosecution, but also on an apparent preference for other types of evidence.

'Basically, I would prefer to run the case on the basis of the positive evidence I can put forward.' [CPS]

This preference seemed to stem from a view that 'positive evidence' (e.g. witness statements or forensic evidence) was a sounder way of establishing the prosecution case. Although a defendant's silence does have probative value and can form part of the prosecution case, some Crown Prosecutors still viewed it essentially as something which aided the prosecution more indirectly by undermining the defence case.

'It's a classic dilemma: inferences under the new Act weaken the defence case rather than strengthen the prosecution.' [CPS]

The decision to proceed with a prosecution is based, among other factors, upon an assessment of the likelihood of success.[32] This will entail a consideration of what sort of evidence and case presentation will 'play well' at court. Some CPS respondents expressed a fear that reliance on silence evidence made the prosecution case look weak, thereby lowering its chance of succeeding at court.

'I think what we found is that if a case is weak, even if the defendant doesn't talk [to the police], we are reluctant to rely on that failure to talk to make the case one capable of proof.' [CPS]

Some of the concern among CPS respondents that silence evidence could hinder rather than help the prosecution case was based on a view that certain barristers and judges and, possibly, juries did not like the implications of the provisions.

'Their [the judges'] attitude [to use of the provisions] was: 'if you have to rely on that your case is ropey in any event and so why are you here?'. I think that some counsel take the same sort of attitude towards the inferences.' [CPS]

Other CPS respondents were openly cautious about according too much weight to silence evidence and were aware of the potential dangers of doing so.

'I can't think of any cases where it has led to any [miscarriages].... I think they [critics of the provisions] were frightened that the Crown would rely upon the inference almost if there was one shred of evidence and the inference would then drag it over the line into prosecution but that's not the way it's been used – rightly so. I think a judge would say, 'that's not what it's there for." [CPS]

32. The Code for Crown Prosecutors (CPS, 1994) states that for a case to be prosecuted there must be enough evidence to constitute a "realistic prospect of conviction".

Nonetheless, CPS respondents were keen to stress that silence may still tip the balance in favour of prosecution in borderline cases, not least because in cases where suspects are silent they have made no attempt to refute or explain away the allegations made against them.

At the time that the interviews were conducted, some Crown Prosecutors were uncertain about whether silence evidence could play any part in committal proceedings. This issue has been clarified by the Criminal Procedure and Investigations Act 1996, which came into force in spring 1997. The Act effectively precludes magistrates from drawing adverse inferences in committal proceedings by abolishing the giving of live evidence at these proceedings (see Branston, 1998).

Views varied on whether a suspect's silence under police questioning might affect the level of the offence charged. Some CPS respondents thought that silence could be used to support a higher level of charge. For example, a suspect arrested with a substantial quantity of a controlled drug, who remained silent when questioned by police, might be more rather than less likely to be charged with intent to supply (as well as possession). Others thought that, in practice, silence had no effect on the level of charge preferred.

Some CPS respondents remarked that, while 'no comment' interviews could now have significant evidential value for the prosecution case, this did depend on how the interview was conducted. They said (and this was reiterated by barristers who prosecuted) that if such interviews were to have a useful impact in court, all relevant questions had to be put to the suspect and the prosecution needed a full transcript of all the questions and all the (no comment) answers. Because, under s.34, inferences from a failure to answer police questions can only be drawn in relation to specific facts which are later relied upon at trial,[33] the court or jury has to be able to see that the defendant has indeed failed to mention such facts when explicitly asked about them. There was some concern that the police did not always take account of this fact when conducting an interview in which a suspect declined to speak.

Use of the provisions at magistrates' courts

The prosecution

Most CPS respondents said that they were happy to draw upon the CJPOA provisions in prosecuting a case in the magistrates' courts, although they often emphasised that it would not be appropriate or desirable to do so at every opportunity. For example, one felt that seeking to have inferences drawn at trial could distract from the main issues in the prosecution case.

33. Under ss.36 and 37, however, inferences can be drawn at court simply from the accused's failure during a police interview to account for objects, marks or his or her presence near the scene of crime.

Crown Prosecutors' views on when it was appropriate to deploy the provisions varied. On the one hand, some thought that the provisions would only ever play a secondary role and saw them being used only "as a last resort scenario", when the rest of the prosecution evidence seemed weak. The accused's silence was seen as secondary evidence and thought unlikely to play a central role in the presentation of the prosecution case. The provisions might be used just as 'icing on the cake'.

On the other hand, some CPS respondents thought it was important for tactical reasons to make use of the provisions wherever possible.

> *'I think I would always use it [the legislation] for this reason: if you only use it when you think you need to use it, the magistrates will soon learn that you've got a weak case, while if you've got a good solid case, good eye witnesses, good identification, and you don't use it, they could think, well, you didn't need to use it then because you had a good case.'* [CPS]

Most respondents were at pains to stress that, even though there may be a presumption in favour of using silence evidence, the final decision about whether or not to use the provisions will be case-dependent. There was some concern that making an issue of a defendant's silence when the prosecution case was already strong risked overkill.

> *'I always use it as a piece of evidence at our disposal, [but] we don't have to over-egg the pudding.'* [CPS]

> *'I didn't want to waste half an hour of the court's time dealing with an inference from silence when the evidence was so overwhelming he was going to be convicted anyway I thought.'* [CPS]

In cases where Crown Prosecutors did feel that the use of the provisions was appropriate, they highlighted not only the value of any adverse inferences that might be drawn against the defendant but also the fact that talk of inferences could put defendants under pressure. This pressure could then be increased by cross-examination of defendants about their silence (if they testified).

The defence

In common with many CPS respondents, defence solicitors did not consider that silence was a major issue in magistrates' court cases. Firstly, this was because contested cases in magistrates' courts were relatively rare. Secondly, where trials did occur, defendants were now generally testifying (although defendants have rarely refused to testify at magistrates' courts in the past).

Thirdly, the nature of magistrates' court cases was an important factor. Many cases were motoring ones, in which there would not usually have been a police interview. And, lastly, when silence issues did arise at magistrates' courts, they tended to be relatively straightforward.

Many solicitors noted that the advice given at the police station could now have significant repercussions for the defence position at court and possibly the final outcome of the case. Because of this, some stressed the value of continuity and of a specific solicitor (or their firm) seeing a case right through from advice at the police station to trial. The possible consequences of police station advice also led legal advisers to stress the value of keeping full and contemporaneous notes of exactly what happened at the police station (e.g. what advice was given; and what disclosure was received from the police). If necessary they would then be able to brief counsel in detail or give evidence at court (see Wright, 1998).

Because represented suspects are now more likely to answer police questions (and legal advisers more likely to advise them to do so), it was not thought common for the defence to be in a position of trying to justify a client's silence. Where this did happen, solicitors said that the defence line was usually to argue that a suspect was advised not to answer police questions because of insufficient disclosure of the police case or perhaps because of some characteristic of the suspect, such as drug addiction or other vulnerability. Some said that it felt on occasions as though they needed to disprove the prosecution case, and that magistrates appeared to have become more sceptical towards silent defendants.

> *'We sometimes wonder [at magistrates' court] who has to prove guilt or innocence. Certainly, sometimes I've felt that I'm the one who's having to do all the work – whereas really it should be the prosecution who are proving all the elements, rather than the defence having to disprove the elements of the offence.'* [Legal adviser]

Use of the provisions in the Crown Court

The prosecution

While the use of the provisions at magistrates' courts was seen as largely straightforward, their role in the Crown Court was portrayed by respondents as a more complex matter. Prosecuting cases at the Crown Court is undertaken by barristers on behalf of the CPS. Barristers who often prosecuted welcomed the provisions[34] as a useful tool and another weapon

34. Most of the barristers' comments referred to silence at the police station. In this situation the prosecution have the opportunity to decide whether or not to utilise this as part of their case. Section 35 of the provisions, which governs silence at trial, is triggered automatically by a defendant refusing to testify, which can only occur after the prosecution have presented their case.

in their armoury, although they generally did not feel that the provisions had markedly changed their approach to prosecuting. Most said that they would use them, where appropriate. For example, if a defendant had been silent in police interview, the prosecuting barrister could make reference to this in his or her opening speech. According to one barrister, this could have the effect of planting a kind of 'landmine', with the court left waiting for the defendant's testimony (if forthcoming) and an explanation for the silence. Whereas, before the provisions were introduced, prosecuting counsel could not question the accused about their silence, now they could rigorously cross-examine on the issue. However, barristers often added that they were not prepared to push the silence aspects of a case too hard, especially if the defendant had been silent at the police station on legal advice.

Barristers demonstrated how the use of the provisions varied greatly. In some instances prosecuting counsel was described as really 'hammering home' the defendant's use of silence, going though the transcript of a 'no comment' police interview line by line and strongly seeking the drawing of inferences.[35] In other cases prosecuting counsel was said to have made reference to the defendant's silence, but in a very even-handed or neutral way, or even not to have pursued the issue.

It was therefore clear that there were situations in which some barristers might decide not to deploy the provisions. They gave a number of reasons for taking such a decision.

- *Presentational reasons:* prosecuting counsel might prefer to concentrate on other aspects of the evidence, which they consider to have greater probative value or be more persuasive. Counsel might be unwilling to complicate the prosecution case and risk diverting the jury from the main thrust of it by seeking to introduce the provisions. This might lead to trials on the 'voir dire'[36] and extended courtroom argument.

- *Tactical reasons:* some barristers mentioned that the provisions can seem harsh on a defendant, which may attract the jury's sympathy. A display of fairness by not pushing the use of the provisions against a silent defendant might actually benefit the prosecution case. For similar reasons, others echoed a point that Crown Prosecutors had made: that sometimes they did not wish the prosecution to look as though it were engaging in overkill.

35. In *R. v. Griffin* (1998) the Court of Appeal stated that, while the general principle should be that it was inappropriate for the prosecution to spend much time going through the questions asked in police interviews, this was not a binding rule or injunction.
36. Also known as a 'trial within a trial', this procedure takes place between judges and both counsel only (the jury is excluded) to resolve questions of law, including the admissibility of evidence. Counsel for either side can call witnesses and the defendant may testify.

- *Personal reasons:* many barristers indicated they personally felt that the provisions could seem unfair on a defendant – particularly if it seemed that the defendant did have a plausible reason for silence. Explaining their reluctance to make use of the provisions, some commented to the effect that 'old habits die hard'. Others indicated that the provisions ran counter to what they thought was jurisprudentially proper.

In cases where the provisions were applicable, the CPS clearly wanted prosecuting barristers to ensure that the issue of inferences was raised. However, many CPS respondents expressed concern at what they saw as reluctance on the part of some prosecuting counsel to employ the provisions when the opportunity arose. A number of reasons for this perceived reluctance were suggested (some of which chimed with the reasons that barristers themselves gave).

- Some barristers were described as not liking the provisions. This dislike was said to stem from the fact that many barristers undertake both prosecution and defence work and can be reluctant to use provisions, when prosecuting, which they feel can be harsh on the defence. Barristers who solely prosecuted (such as Treasury counsel) were seen as exempt from this.

- Barristers were believed to see the provisions as not relevant, except as supporting evidence in weak cases. Alternatively, CPS respondents thought barristers might avoid using the provisions out of a fear that to do so would make the prosecution case look weak.

- It was thought that there was a lack of preparation, concern or even courage on the part of some prosecuting barristers.

- Some barristers were felt to be concerned (either for tactical or personal reasons) that the provisions are unfair on the defendant.

Crown Prosecutors at one branch said that if they had rights of audience[37] in the Crown Court they hoped that they would be less coy about making use of the provisions. However, one added that he would not seek to do so if he thought it might alienate the judge or jury in that particular case.

Some barristers were quick to reject any general charge of reluctance:

> *'Prosecutors prosecute. You don't, unless there are very powerful grounds, give away any part of your armoury.'* [Barrister]

37. The right to represent either the defence or the Crown in court. At the Crown Court this principally applies to the independent Bar (as opposed to employed barristers) but no longer solely: the Courts and Legal Services Act 1990 provided a framework for the extension of rights of audience to certain solicitors.

While some barristers stated that they had not used – and would not use – the provisions when prosecuting, the comments of most did not indicate any widespread unwillingness to use them. A prosecuting counsel's role is not to win the case at all costs: as Sprack (1997) puts it, 'the principle is that the prosecution should be scrupulously fair to the accused, but need not be quixotically generous'. Although a few CPS respondents clearly suspected some barristers of being 'generous' to the defendant when prosecuting, overall it seemed that most barristers were concerned simply to be 'fair'. Notwithstanding the personal qualms that a number of them expressed about the provisions, the approach of most barristers to the provisions when prosecuting seemed guided primarily by pragmatism rather than principle.

Some barristers thought that the perception of prosecuting counsel being reluctant to utilise the provisions might have been true when they were first introduced. Now, however, they believed that using silence evidence was a matter of routine for prosecuting barristers.

The defence

Aside from objections in principle to the provisions, barristers who mainly carried out defence work thought that they created another obstacle – and potentially a very tricky one – for the defence. In particular, the consequences of silence at the police station could cause significant problems for the defence case, as barristers felt that they then inherited a situation about which they could do little. One barrister gave an example of a case in which she had defended a man who had stayed silent on legal advice while his co-defendant had not. The prosecution had strongly sought to have inferences drawn against her client. She commented:

> *'I said to the solicitor, "if you're ever in that situation again, think very carefully about advising a no comment interview because this is the sort of problems that you get into". Solicitors need to think very carefully about the kind of advice that they give their clients.'* [Barrister]

Where the issue arises of the accused claiming to have refused to answer police questions on legal advice, some barristers thought that they might still be able to use this as a convincing reason why inferences should not be drawn. They would attempt either to persuade the judge not to put the question of inferences to the jury, or persuade the jury not to draw adverse inferences against the defendant.

> *'If you were advised not to answer by your solicitor.... it's going to be a very hard jury, it seems to me, that does not regard that as a perfectly adequate explanation. If he [the defendant] is told by his lawyer, even if it was the wrong advice, how can he be held responsible for his solicitor's bad advice?'* [Barrister]

'Quite often I think juries will accept... that if you have a solicitor present and he advises you to say nothing, because from what he has heard from the police they have enough evidence already without questioning you, if you follow that advice jurors will understand that sometimes defendants do follow that advice not because they are trying to hide anything.' [Barrister]

However, the Court of Appeal decision in *R. v. Condron and Condron* (1997) has underlined that simply stating that the defendant was silent on legal advice is unlikely to be a sufficient basis for inferences not being drawn. The Court of Appeal added that it was the reason for the accused accepting that advice which was the crucial factor. While there might be good reasons, to give these may well require waiving legal professional privilege.[38] This could result in the details of any conversation between the accused and his or her legal adviser being revealed in open court. Both barristers who defended and legal advisers were troubled by the effect that the provisions may have upon privilege. In particular, there was a concern that the relationship between legal adviser and suspect, one which depends upon openness and trust, might be adversely affected. Some barristers thought that, provided legal advisers had a good reason for advising silence, they could avoid problems of privilege being compromised by going on tape at the start of the police interview with the details of the advice given to their client and the reasons for it.

The provisions also introduce the possibility of adverse inferences if the accused does not testify at trial. Previously, a defendant could elect not to testify in court and no critical comment could be made about that decision. Section 35 of the CJPOA now enables the prosecution to comment explicitly on any failure to testify and a court or jury to draw proper inferences from any such failure. As before, a defendant cannot be *compelled* to give evidence. Some barristers stressed that, in cases where the risks associated with the defendant testifying and being cross-examined appeared to outweigh the risks of inferences being drawn from a failure to testify, defence counsel might still think it best to advise the defendant not to give evidence. However, as others noted, this could raise another difficulty, for the defence may then lose the opportunity to put important evidence in front of the jury. This is particularly likely in cases where the defence is a 'positive' one (rather than just a denial), such as self-defence, which requires an explanation from the defendant. The effect of the provisions on defendants testifying is discussed in more detail in the next section.

In the event of either pre-trial silence or silence at trial, the preferred approach of barristers who defended was, if possible, to prevent the issue of

38. Any communication between a legal adviser and client is protected by legal professional privilege. In R. v. Condron and Condron the Court of Appeal held that, while the accused saying that he was silent on legal advice did not amount to a waiver of this privilege, this statement alone was unlikely to constitute a sufficient defence. The accused will need to state the reasons for that advice, but if he gives evidence of this nature, he will be deemed to have waived privilege.

inferences being put to the jury at all. However, many thought this was now more difficult to achieve in the light of recent Court of Appeal decisions (e.g. *R. v. Condron and Condron* (1997)) which have held that, ordinarily, the question of whether inferences should be drawn must go to the arbiters of fact (i.e. juries or magistrates). Consequently, where a defendant was silent at any stage in proceedings, in court the defence would typically try and dissuade the jury from drawing adverse inferences. They would either encourage the jury to concentrate on other aspects of the case or try to persuade them that the defendant could have been silent for any number of innocent reasons. As counsel themselves are prohibited from saying why a defendant remained silent (as that would constitute counsel giving evidence), their tactic would usually be to suggest a number of possible reasons why the defendant might have acted in this way, without stressing the actual one. Some barristers thought, particularly in cases where a defendant had been silent in police interview on the basis of legal advice, that this approach might well work with an open-minded jury. Others were less sanguine:

> *'I think although you could do it [suggest possible reasons for silence] it could be very unsatisfactory if it has the reverse effect of what you want. Because, if you are saying to the jury, 'of course, there are many reasons why he may not want to give evidence', the jury may look at you straight back and think, well, one of them is because he's guilty and doesn't want to be cross-examined about it!'* [Barrister]

Furthermore, the Court of Appeal has insisted (see *R. v. Cowan, Gayle and Ricciardi* (1996) and *R. v. Argent* (1997)), for example) that the jury should not consider any explanation for silence that is not backed by evidence.

Some barristers mentioned how the provisions were making cases with co-defendants more complicated, particularly if one defendant was silent at any stage while the other was not. In one case involving two defendants, both had blamed each other during police questioning. As a result, neither had testified because of their respective counsel's concern about the consequences of cross-examination. He wondered if, in such cases, 'cut throat' defences (where each defendant seeks to exculpate himself or herself by blaming the other) would now be more likely.

The decision whether to testify

Virtually all respondents – barristers, CPS staff and defence solicitors – agreed that fewer defendants are declining to testify since the introduction of the provisions.[39] This was due, it was thought, not so much to changing

39. One barrister thought that this trend pre-dated the provisions, prompted by juries apparently viewing silent defendants in an increasingly negative light. However, he added that juries may have been influenced by the widespread publicity given to the provisions before their introduction.

attitudes among defendants themselves (some barristers who mostly defended remarked how defendants are usually keen to testify) as to changing attitudes among the lawyers who advise them. As one barrister put it:

> *'As a defence counsel I have to say, I can think of very few circumstances now where I can properly advise a client not to give evidence. You know, if the client says 'I don't want to'.... if he doesn't want to, he doesn't want to. But by and large, the rule is now, you go in the box.'* [Barrister]

However, opinions varied as to the extent of the change, largely depending on whether respondents were speaking of magistrates' courts or the Crown Court. At the former the increase was seen as very slight:

> *'Perhaps there's slightly more [testifying at magistrates' courts], perhaps slightly fewer refusing to give evidence as a result. It's always been a fairly small number, at least in my experience, who have refused to give evidence.'* [CPS]

> *'It has made a difference with regard to whether you call your client or not. I think the biggest difference is actually the advice you give rather then the end result because in most cases they [defendants] want to give evidence anyway. Even if you advised against it, they would still want to do it.'* [Legal adviser]

However, in the Crown Court the increase in defendants testifying was seen by many (although not all) respondents as being particularly marked:

> *'The proportion of people who don't give evidence at the Crown Court now is minuscule.'* [CPS]

> *'Since the change in the law.... then they [defendants] will nearly always now give evidence..... A lot of defendants in the past wouldn't give evidence. They would just sit quietly and see if the prosecution could prove its case. Now many more feel compelled to go into the witness box.'* [Barrister]

There are no centrally collected statistics on the numbers and proportions of defendants testifying to support or refute these perceptions.[40] However, research in Northern Ireland by Jackson, Wolfe and Quinn (forthcoming), which looked at similar changes to the right of silence there,[41] lends some

40. In a study for the Royal Commission on Criminal Justice Zander and Henderson (1993) found that between 70 per cent and 74 per cent of defendants testified in the Crown Court. In the magistrates' courts, the anecdotal evidence is that few defendants refuse to testify.
41. Changes to the right of silence, which allowed inferences to be drawn from the accused's silence, were introduced in Northern Ireland under the Criminal Evidence (Northern Ireland) Order 1988. The terms of the Order are essentially the same as those enacted by ss. 34 to 38 of the CJPOA.

support to the view that more defendants are testifying as a result of the provisions. They found that, among scheduled defendants (i.e. those charged with terrorist offences), the proportion refusing to testify declined from 64 per cent in 1987 to 46 per cent in 1991. For non-scheduled (i.e. non-terrorist) defendants, the proportion fell from 23 per cent in 1987 to 15 per cent in 1991. Furthermore, their analysis of figures for subsequent years up to 1995 indicated that the decline in defendants refusing to testify continued. Thus, in 1995, 25 per cent of scheduled defendants and just 3 per cent of non-scheduled defendants refused to give evidence.

Many CPS respondents commented on, and gave examples of, the advantages that more defendants testifying brought for the prosecution. Skilful cross-examination could probe and expose weaknesses in the defendant's account and defendants might trip themselves up in the witness box. Indeed, it was frequently remarked that defendants can make the best prosecution witness. On the other hand, some noted that a defendant testifying might strengthen the defence case, if he or she came across well.

For their part, there is no doubt that defending barristers thought that the provisions had significantly limited the strategy of not calling defendants to testify. One commented that, having seen the result of the section 35 provisions being invoked against his client, he would now be very much more hesitant about not calling clients in the future. Others said that if an accused had been silent in police interview, they would feel compelled to advise them strongly to testify.

However, there are still situations in which a defendant might be advised not to enter the witness box. Respondents gave the following examples:

- when the balance of risks suggests that testifying may do more harm than good: for example, when the defendant's account is dubious or inconsistent, or the defendant is an unsympathetic character upon whom the jury are unlikely to look favourably

- when the defendant does not want to testify, for reasons unconnected with guilt or innocence. For example:

    - the defendant is vulnerable and because of this would make a poor witness

    - the defendant is unwilling to testify because of the sensitivity of the subject matter (especially in sexual offence cases)

    - the defendant genuinely does not recall the incident in question, because he or she was too drunk or it was too long ago

- ❍ the defendant has not testified at previous court appearances and out of habit does not want to do so now

- in multi-defendant cases, one defendant may stay silent out of fear that testifying may undermine another defendant's case or simply from fear of reprisals.

It was suggested the next generation of barristers might evolve different attitudes to calling clients. One respondent said that junior barristers were now being schooled with the advice that, unless the defendant refused to do so or there are exceptional circumstances, the assumption should be that it was best for them to testify. Based on the comments made by a number of respondents, this position is arguably the opposite of the approach taken by many practising barristers before the change in the law.

The decision whether to call a client into the witness box involved weighing up a number of factors. These included barristers' personal experience of the provisions, the circumstances of each case and the extent to which they had called clients previously. Some barristers said that, as they had nearly always advised clients to testify, the provisions had had little effect on their practice. Others believed that the dangers of not testifying and inferences being drawn could still be outweighed by the dangers of a defendant testifying and being subjected to a fierce cross-examination. Some said that they were more prepared to take the risk of advising defendants not to testify if they had given full and detailed accounts to the police.

For the most part, however, defence barristers felt that, unless they had very good reason for not calling the accused, the contrary pressures were too great to resist:

> *'Juries like to hear from defendants. You might have very good reasons for keeping a defendant out of the witness box but its got to be sufficient to overcome the jury saying, 'when do we hear from the defendant, then? What is he going to say about it?'. You've got to overcome that. Also, defendants like to give evidence ..... 'I want to go and give evidence' [says the defendant], well, okay: it's not the best idea but you don't want him to go down, not having given evidence, and say, 'I'd have got off if I'd gone in the box'.'* [Barrister]

A major area of concern to defence barristers was the possibility that vulnerable or less articulate defendants were disadvantaged by the provisions:

> *'The thing which really concerns me about the changes in the law is that it prejudices people who are not very easily able to put forward their case.'* [Barrister]

Respondents considered that defendants who were clearly mentally disordered were adequately protected.[42] However, some were worried about less extreme or obvious cases, where the defendant's vulnerability either may not become apparent or will not be considered to warrant protection. Yet there was apprehension that such defendants, having been effectively forced into the witness box, may come across poorly to the jury and damage their case, in turn raising the possibility of wrongful convictions. One barrister suggested that any person who could not give reliable evidence should be exempt from the provisions.

However, a number of respondents were not opposed to vulnerable defendants testifying. Firstly, they argued that both judges and juries are likely to be sympathetic to vulnerable defendants and that judges were perfectly able to protect such defendants from over-hostile or unfair cross-examination. Indeed, some barristers thought that, on occasions, a vulnerable defendant's position might even be strengthened by their giving evidence. Secondly, some Crown Prosecutors said that it was in the interests of justice for even vulnerable defendants to be cross-examined, as the evidence had to be tested. They also noted that vulnerable witnesses and victims routinely have to stand up in the witness box and be subjected to cross-examination. Finally, a few barristers commented that, taken to its extreme, the above argument would mean that counsel should only call their clients if they happened to be particularly articulate and charismatic.

If defending counsel does not want the defendant to testify on grounds of vulnerability, they may be able to obtain expert medical evidence to this effect. This evidence could be adduced as the reason for keeping their client out of the witness box (or to account for why the accused was silent in police interviews). However, even this may not be sufficient to avoid the possibility of inferences. One barrister referred to a case in which she had defended a very disturbed teenager. She had obtained expert medical evidence on the teenager's condition and decided not to call her to testify, using the expert evidence to justify this. The judge, however, allowed the question of inferences to go to the jury, although he did caution them about the defendant's condition.[43]

If expert evidence is not available, then counsel may be faced with the difficult choice of advising a client not to testify and running the risk of inferences being drawn, or putting them in the witness box in order to show the court (and jury) how vulnerable they really are.

42. For example, inferences under s. 35(1)(b) of the CJPOA do not apply if the accused's mental condition makes it "undesirable" for him or her to testify.
43. The Court of Appeal upheld a similar decision by the trial judge in the case of *R. v. Friend* (1997).

The burden of proof

In any criminal case, the burden of proof lies upon the prosecution to establish beyond reasonable doubt that the accused is guilty of the offence charged. The accused is presumed innocent and does not have to prove anything. A central part of the presumption of innocence is that the accused has a privilege against self-incrimination. The accused cannot be required to supply evidence of his or her own guilt.

While these fundamental legal principles are unaltered by the provisions, some barristers (mainly ones who concentrated on defence work) thought that in practice, if not in law, they had been affected by the change to the right of silence:

> *'I think it has reversed the burden of proof ..... It's no longer a case of [the defendant] being able to say, 'the evidence is insufficient, I will say nothing'. You must get in the witness box and persuade the jury .... You need only say enough to create doubt but if you say something which does not create doubt then you fail to discharge the procedural burden which the law now places on you – which to my mind is a reversal of the burden of proof.'* [Barrister]

In having to account for their silence, defendants were thus viewed as having to demonstrate their innocence. One barrister thought that it was the tactical rather than the legal burden which had shifted, since if a trial proceeded beyond the halfway stage[44] the evidential burden had effectively shifted to the defence.

Other barristers and CPS respondents challenged the contention that the provisions have, in law or in practice, affected the burden of proof (as have others – see Pattenden, 1995). They argued that the prosecution still has to prove its case beyond reasonable doubt and a defendant cannot be convicted on the basis of silence alone:

> *'The burden of proving guilt is still on the prosecution – it's just that they can prove it in a slightly different way ..... It doesn't alter the burden of proof, it just makes it easier to prove he's guilty. The burden is still there.'* [Barrister]

Respondents who thought that the provisions had affected the burden of proof probably had two things in mind. Firstly, they felt that the privilege against self-incrimination (rather than the burden of proof itself) seemed diminished by the provisions. These barristers argued that, unless they could

44. A judge has the power to stop a trial and direct an acquittal after the prosecution's evidence on the grounds that there is no case to answer: i.e. that the prosecution has failed to adduce evidence on which a jury could properly convict (see *R. v. Galbraith* (1981)).

account for the defendant's silence, it might weigh heavily against the defence. Secondly, they considered that the provisions allowed weaker prosecution cases to pass the 'case to answer' test (see footnote 14, above). In particular, they had in mind that an accused's silence at the police station could be used cumulatively with other evidence to satisfy a judge that the defendant did have a case to answer (the court is empowered to do this by section 34(2)(c)). Some respondents objected to the notion that a defendant's silence (although this now constituted prosecution evidence) could make the difference:

> '*You can't use it [silence evidence] unless there's a prima facie case and then that evidence of itself shouldn't really tip the balance – yet what, ultimately, is its value unless it does tip the balance?*' [Barrister]

However, as the comments from respondents (both CPS and barristers) who prosecuted suggested, the prosecution was unlikely to use silence evidence in this way.

It was clear that the issue of the provisions' impact on the burden of proof split the respondents on ideological lines. For example, those who felt that the burden of proof had been affected were more likely to be of the view that reliance on silence evidence was not a jurisprudentially proper way of the prosecution proving its case. Even some of those who thought that the burden of proof had not been affected considered that to allow inferences to be drawn from silence sat rather uneasily with a presumption of innocence and with statements that the right to silence had been expressly preserved under the provisions (see Lord Taylor CJ in *R. v. Cowan, Gayle and Ricciardi* (1996), for example).

Respondents also mentioned the impact of the provisions on other aspects of the legal process. The appropriate use of trials on the 'voir dire' to resolve disputes about whether it would be admissible for inferences to drawn from silence caused some uncertainty. One barrister, who primarily defended, said that although the 'voir dire' procedure was intended for the defence's benefit, it could be tactically inadvisable as it could prematurely expose the detail of the defence argument to the prosecution.

Other respondents thought that the provisions were making trials more lengthy and complex. This was because, with more defendants testifying, there was a greater likelihood of 'voir dire' hearings and the need for judicial directions.

'Ambush' defences

One of the stated objectives of the provisions was to prevent the use of 'ambush' defences.[45] These are defences raised for the first time at trial and of which the prosecution had no prior notice. By raising a defence so late in the day, the prosecution is denied the opportunity of refuting it. Under the terms of the provisions, any defence raised in this way might run the risk of attracting inferences under section 34, as the prosecution could argue that it was something the defendant should have mentioned before.

Some CPS respondents thought that the provisions had helped reduce the use of such defences:

> *'When they [the defence] come up with a completely new defence – well, before we obviously couldn't comment at all about that and so they could come with any new defence that could catch the prosecution unawares.....[but] now you can, so that's a major impact. It's becoming much more rare now, a completely new defence. So it's [the change in the law] effectively stopped that arising and jeopardising the prosecution.'* [CPS]

> *'If you've got a sophisticated criminal who's come up with a defence or explanation for his conduct very late in the day – in other words, a surprise defence – catching the prosecution completely unawares, I think that's where the provisions are really useful.'* [CPS]

However, some barristers and Crown Prosecutors thought that the problem of ambush defences had previously been exaggerated,[46] primarily in attempt to secure the passage of the CJPOA. One barrister said that, in her estimation, the prosecution should be able to predict what the defence would be in all but a very few cases.

Other legislative changes were also thought to have decreased the chance of the prosecution being completely surprised at court by a new defence. Thus, under s.5 of the Criminal Procedure and Investigations Act 1996, in certain circumstances[47] the defence is required, following primary disclosure by the prosecution, to provide a written statement to the court and to the prosecutor setting out in general terms the nature of the accused's defence. Under s.11 faults in defence disclosure may result in proper inferences being

45. See the comments of Mr Maclean, then Home Office minister, reported in Hansard: House of Commons Standing Committee B, Session 1993-1994, Vol.II, col 362.
46. Zander and Henderson's (1993) Crown Court study indicated a rate of ambush defences among a sample of Crown Court trials of seven to ten per cent. Of these, about two-fifths were said by the police or CPS to have caused the prosecution no problems. Leng (1993) found that, of a sample of 59 contested trials, ambush defences were raised at most in just five per cent of them. He found that unanticipated defences were more of a problem to the prosecution. No figures are available for the incidence of ambush defences since the introduction of the provisions.
47. The circumstances are that: the case is to be tried in the Crown Court; the prosecutor has given the accused certain information about the prosecution case; and the prosecutor has made primary disclosure of any previously undisclosed material which might undermine the prosecution case.

drawn in deciding whether the accused is guilty. Also, under s.31(6) of the same Act, at pre-trial preparatory hearings in complex and lengthy cases a judge may order the accused to provide the court and prosecution with a written statement outlining the general nature of the defence, without necessarily divulging details such as the identity of defence witnesses. The Act again allows adverse inferences to be drawn from an accused's failure to comply with such an order (s.34, CPIA).

Nevertheless, a few respondents thought that defendants with weak or suspect defences may still be inclined to reveal them in detail only at the last minute, irrespective of the threat of inferences being drawn.

Decision-makers and inferences from silence

Respondents were asked about the perceived effect of the provisions upon judges, magistrates and juries and the way in which they appeared to have been interpreted.[48]

Judges

Many respondents – particularly barristers – thought that there seemed to be two clear camps of judicial opinion. On the one hand, there were judges, seen as more prosecution-minded, who agreed with the provisions and were receptive to their use. They reported instances where they felt that the judge had weighted the summing-up against the defendant because of the latter's silence. On the other hand, there were those who apparently had concerns about the provisions. They gave examples of cases in which they had felt that judges had either made clear their distaste for the provisions or had summed up very sympathetically towards the defendant.

Respondents were not necessarily concerned that judges' views on the provisions should be made apparent, but that different attitudes among the judiciary might result in variable or inconsistent application of the provisions. However, it was acknowledged that this could apply equally to the implementation of any new statutory provision. It was acknowledged that, as time passed, more of the judiciary would have experience of the provisions and more case law to refer to, which would be likely to standardise their application.

Many respondents described attempts by the defence, either in open court or in a 'voir dire', to persuade the judge to rule out the possibility of inferences being drawn. Such attempts are unlikely to be successful in the light of recent Court of Appeal decisions (see Chapter 2) stating that the

48. Although some of the barristers interviewed did sit as Recorders, the information given here was mostly second-hand and that should be borne in mind. However, it is still important because practitioners' views of sentencers and juries seemed to affect their own view of the provisions and their application.

question of whether inferences are to be drawn should ordinarily be one for the jury and not the judge. The limited exceptions would include situations in which it was manifestly unreasonable to allow inferences to be drawn (e.g. where there had been a significant breach of PACE).

Although judicial discretion in relation to the provisions was seen as tightly circumscribed, some respondents commented on how a judge could still exert influence through the delivery of directions and the final summing-up. Judges have a duty to direct juries on matters of law. The Judicial Studies Board issued specimen directions for judges to use in the event of any silence on the defendant's part, which falls within ss.34-37 of the CJPOA. These directions offer guidance and a form of words to cover the various situations that might arise.

CPS respondents were broadly content with the directions given by judges. Most barristers also thought that the model direction was satisfactory. Respondents said that judges tended to stick to the suggested script, although a number of them recalled occasions when a judge had expanded upon it. One barrister referred to a case in which the judge had highlighted all the points of evidence that the defendant might have dealt with, had he testified. Barristers who mainly defended were the most critical of the direction. Those who had seen it deployed against their clients were probably the most negative. Some mentioned how judges could influence juries simply by the tone with which they delivered the direction:

> *'It [the direction] is quite a complex piece of verbiage for a jury to take on board in the summing-up and so...they are going to take on board the general tenor of what the judge is saying – and it can be easily slanted one way or the other.'* [Barrister]

However, the fact that the direction could sound so damning for the defendant might well say more about the defendant's circumstances than the direction itself. Some barristers thought the impression of some judges as 'prosecution-minded' in this respect was more apparent than real.

A more trenchant criticism was that the direction itself was inadequate because it failed to explain sufficiently to juries what kind of inferences they could draw. However, an alternative view was sometimes put that too detailed a direction ran the danger of being over-prescriptive and influencing the jury too much. One respondent felt that, apart from what judges did or did not say in their direction to the jury, the earlier homily that judges are required to give to the jury at the close of the prosecution's evidence[49] could influence the jury against the defendant.

49. Although some of the barristers interviewed did sit as Recorders, the information given here was mostly second-hand and that should be borne in mind. However, it is still important because practitioners' views of sentencers and juries seemed to affect their own view of the provisions and their application.

Magistrates

CPS respondents, who had the most to say about magistrates, generally considered that they had been more receptive to the provisions than judges and juries. However, in view of the relative rarity of contested trials in the magistrates' courts, it was felt that the provisions played a lesser role here than in the Crown Court.

Some CPS respondents and defence solicitors thought that the impact of the provisions upon magistrates may have been restricted for another reason, namely, that magistrates may have looked on silent defendants unfavourably even before the provisions were introduced:

> *'It may well be very difficult psychologically...in any event not to have put some construction on someone's silence [even] before the new laws, so maybe nothing's really changed.'* [CPS]

Some of the defence solicitors who presented cases in court thought that magistrates sometimes found it hard to understand the pressures and difficulties of providing legal advice or being detained at the police station. In contrast, others said that they had found magistrates to be sympathetic to the defence position.

Juries

Without being able to question jurors directly, much of what was said about them by respondents was clearly speculative and impressionistic. Nevertheless, a number of viewpoints were expressed. Both barristers and CPS respondents tended to believe that juries wanted to hear from defendants and took the view that, if defendants had nothing to hide, they would be prepared to give evidence.

> *'Juries have always wanted to know what you had to say.....There are certain things which influence a jury massively and not hearing an explanation in a compelling case is one of the things that affects them.'* [Barrister]

They felt that jurors tended to have the same view about silence at the police station.[50] Some barristers speculated that juries might sometimes have drawn inferences from a defendant's silence even prior to the provisions.[51]

50. Recent evidence suggests that the public are increasingly supportive of the changes contained in the provisions. The 1994 British Social Attitudes Survey revealed that only 31 per cent of respondents thought that someone should have a right to remain silent under police questioning – down from 42 per cent in the 1990 survey (Social and Community Planning Research, 1995).
51. In a study conducted prior to the CJPOA, Zander and Henderson (1993) showed that a clear majority of prosecution and defence barristers believed that juries did learn when the defendant had been silent in response to police questions. The authors commented: "If jurors hear evidence to the effect that the defendant was silent in response to police questions they may draw adverse inferences whether they are instructed to do so or not. No-one can prevent them from doing so".

They suspected that juries might have done this in cases where the prosecution case was already very strong. The possibility that juries may frequently have been aware of a defendant's silence and have taken a dim view of it prior to the CJPOA raises questions about the extent of the provisions' impact.

For other reasons, many barristers and CPS respondents had doubts about the impact of the provisions. One view was that relatively subtle changes in the law do not have a great impact on jurors. Jurors may tend to regard the judge's summing-up on the issues of silence and inferences as simply another instruction for them to note (or, alternatively, may not truly understand it). Those who held this view thought that, whatever judicial directions the jury received, all were subservient to the 'beyond reasonable doubt' stricture which would stay uppermost in their minds:

> *'It's the first thing they hear at the start of a trial, that the prosecution must prove its case and must prove it so they're sure. If they're not sure, whether the defendant gives evidence or not, I don't think they will change their minds.'* [CPS]

Others thought that, although juries did like to hear from defendants, they were also very sensitive to issues of fairness and might react against the prosecution using silence evidence if they felt it was unfair to do so. Some CPS lawyers felt that it was especially difficult to persuade juries to draw inferences when a defendant had been silent at the police station but had testified in court (i.e. the silence had not taken place in front of them).

A number of respondents stressed that it was a defendant's credibility, rather than whether or not he or she was silent, which influenced juries. However, issues of silence are inevitably bound up with issues of credibility. If more defendants are testifying, this will mean more cases in which juries have the opportunity to assess a defendant's character and credibility at first hand.

A contrasting view was that juries have been receptive to the provisions to the point that they may even now ascribe too much weight to silence evidence. In particular, respondents who thought this (mostly defence barristers) were concerned that jurors might be unsure about the kind of inference they are allowed to draw. For example, they were worried either that juries might neglect the fact that there has to be a prima facie case under section 35, or that under section 34 they might draw straightforward inferences of guilt from silence rather than ones of fact.

Type of inferences

The provisions allow for different types of inference to be drawn, depending upon the stage at which the silence occurred. For example, under section 34, the court or jury may draw adverse inferences relating to the particular fact which the accused 'could reasonably have been expected to mention when questioned'. Inferences under section 35, on the other hand, are more general: the section simply states that the court or jury can draw inferences from an accused's failure to testify.

One of the respondents' principal concerns related to the type of inferences that could be drawn. Many (especially defence barristers) felt that juries would not know what sort of inference to draw. For example, when is it 'reasonable' for a defendant not to mention something? What exactly is a 'proper' inference?[52]

> *'Although the law says that you mustn't infer guilt, I'm not sure juries can go through those sorts of gymnastics in their minds and will say to themselves, 'well, we can draw proper inferences but we aren't told what a proper inference is. We mustn't say he's guilty, but what then is the point of drawing an inference?'* [Barrister]

Others disagreed (usually barristers who mostly prosecuted and CPS respondents), saying that juries were perfectly well equipped to do this and were readily able to assess the reasonableness (or otherwise) of a defendant's silence. Some added that, like many other legal concepts, inferences have a readily understandable and 'common sense' interpretation. Nevertheless, the weight of opinion was that juries might have some trouble in knowing what sort of inference they were allowed to draw. As one barrister (who also sat as a Recorder) stressed, judges tend to be reluctant to give juries examples of what an appropriate inference might be for fear of pushing them too far in one direction.

Inferences from silence and case outcome

Doubts have been expressed about whether curtailing the right of silence would lead to an incremental rise in convictions (Leng, 1993; O'Reilly, 1994). Indeed, the research evidence suggests, at the least, that silence does not raise a defendant's chances of acquittal (e.g. Zander and Henderson, 1993; Moston et al., 1992) or that it actually increases the likelihood of conviction (Leng, ibid.; Williamson, 1990; Phillips and Brown, 1998).

52. One barrister thought that the problem stemmed from the provisions being a copy of those operating in the judge-only 'Diplock' courts in Northern Ireland. He argued that judges are readily able to determine questions of admissibility and whether inferences should be drawn at the same time. If inferences are not admissible, judges, with their legal training, are then able to exclude any further consideration of a defendant's silence. Juries were thought to be far less well equipped to do this.

Any attempt to assess whether the new provisions have had an effect on the level of convictions faces several major difficulties. Firstly, the proportion of offences which result in a contested trial is very small and the proportion of these which involve silence evidence in a salient way is much smaller still (Leng, 1993). Secondly, in those cases which do go to trial, the verdict can be influenced by a wide range of factors. To try and isolate the effect of just one of those factors – in this case, the CJPOA provisions – would be very problematic. Thirdly, even in cases where silence evidence plays a significant part in the trial, it is impossible to know whether juries or magistrates do actually draw inferences in coming to their verdict.

For these reasons, the study did not collect quantitative data about the outcome of cases in which silence issues were raised. However, it did examine the official statistics on convictions and plea to see whether any trends were discernible which might be linked to the provisions. Those interviewed were also asked about their perceptions of the impact of the provisions in these respects.

Statistics on convictions and plea

The following tables show the conviction rates for magistrates' courts and Crown Courts over the past six years (the provisions came into force in April 1995).

Table 4.1(a): Convictions and dismissals at magistrates' courts 1992-1998

	1992	1994	1996	1998
Percentage of hearings resulting in conviction	98	98	98	98
Percentage of contested hearings resulting in dismissal	23	23	24	26

Table 4.1(b): Convictions and acquittals in the Crown Court 1992-1998

	1992	1994	1996	1998
Percentage of hearings resulting in conviction	91	90	91	89
Percentage of contested hearings resulting in dismissal	44	43	40	43

Notes: 1. Source (both tables): CPS data.
2. Tables relate to prosecutions by the CPS only.

Tables 4.1(a) and (b) show that the proportion of contested cases in the magistrates' courts resulting in dismissal increased slightly between 1992 and 1998. In the Crown Court the level of acquittals has remained about the same over the same period (albeit there was a drop in 1996). But, in magistrates' courts the overall rate of convictions (i.e. convictions after trial plus guilty pleas) has remained constant. There has been a slight decline in the Crown Court. These changes are relatively small. None of them point to any increase in convictions during the period since the CJPOA was introduced. They are likely to be due to important procedural changes in the handling of court business. In particular, the introduction of 'plea before venue' in October 1997 means that many defendants who used to be directed to the Crown Court for trial, where they ended up pleading guilty, now plead guilty in the magistrates' court and are convicted there. This has had the effect of increasing the not guilty plea rate and decreasing the conviction rate in the Crown Court (Home Office, 1999). The increase in 1998 in the percentage of contested hearings resulting in an acquittal may also reflect the abolition of oral committals in new cases from April 1997 (Home Office, ibid.).

Some respondents mentioned a possible effect of the provisions in increasing the level of guilty pleas (see below). However, in the previous chapter it was reported that the rate at which suspects provided admissions during police interviews had not increased. In so far as admissions are precursors to later guilty pleas, it would not therefore be expected that guilty pleas would have increased. Indeed, Tables 4.2(a) and (b) show that the level of guilty pleas at magistrates' courts has remained broadly the same and that in the Crown Court has dropped slightly since the CJPOA provisions were introduced. The change in the Crown Court figures is likely to be attributable to the causes mentioned in the previous paragraph.

Table 4.2(a): Guilty pleas in magistrates' court cases 1992-1998

	1992	1994	1996	1998
Percentage of cases in which a guilty plea was entered	82	81	81	81

Table 4.2(b): Guilty pleas in Crown Court cases 1992-1998

	1992	1994	1996	1998
Percentage of cases in which a guilty plea was entered	80	76	77	74

Notes: 1. Source (both tables): CPS data.
2. Tables relate to prosecutions by the CPS only.
3. Guilty pleas include both timeous and late guilty pleas.

The fact that the figures show no significant change in rates of convictions, acquittals and guilty pleas indicates only that the provisions are not having a national, aggregate effect. This does not rule out the possibility (suggested by some respondents – see below) that the provisions are leading to more convictions in those trials which involve issues of silence, although this will be a very small proportion of all cases.

The lack of change in the conviction rate since the introduction of the provisions mirrors the findings of Jackson, Wolfe's and Quinn's (forthcoming) study of equivalent legislation in Northern Ireland. Both their own survey and official statistics indicated no impact in terms of more convictions. Indeed, for non-scheduled defendants (i.e. those not charged with terrorist offences) at least, they found a *decline* in convictions.

Jackson, Wolfe and Quinn concluded that trial judges are not so much interested in the issue of whether or not a defendant remains silent than in the strength of the prosecution case. It appeared, therefore, that the change in the law had not altered the emphasis upon the fundamentals of due process.

In contrast, a study of the impact of similar change to the right of silence in Singapore (Khee-Jin Tan, 1997) indicated that the Singaporean courts were growing increasingly keen on drawing inferences from silence. The author concluded that this reflected a cultural shift in the courts and in wider society away from 'pro-accused rules and standards' and towards tougher attitudes on crime.

The views of practitioners

Given the difficulty of untangling the factors that influence a verdict, it is not surprising that respondents were often uncertain about what effect the provisions may have had upon conviction rates. CPS respondents generally thought that it was difficult to establish whether the provisions had led to more convictions (although a few respondents thought that there had been some increase):

> *'I'm not sure it's made very much difference to the actual amount of guilty verdicts we get.'* [CPS]

A more commonly held view was that by adding to the available evidence, the provisions had made securing convictions more likely where the prosecution case was already sound:

> *'It won't prove cases that we otherwise wouldn't prove .... but what it does do is make sure that we can get more convictions on cases which are proved by other evidence.'* [CPS]

In addition, some CPS respondents thought that more people were pleading guilty since the introduction of the provisions.

Barristers' views varied. Some thought that the pressure the provisions put on defendants to testify and their subsequent performance in the witness box were leading to more convictions:

> *'Unquestionably they [the provisions] lead to more people being convicted. I don't see how anyone could argue otherwise because so often defendants convict themselves.'* [Barrister]

However, others felt that the provisions had probably had little effect:

> *'There are too many aspects to a conviction, you just don't know what affects a jury's decision.'* [Barrister]

A few respondents suggested that, by encouraging suspects and defendants to give an account, the provisions might even have led to greater numbers of acquittals.

Some respondents expressed concern about the possibility of the provisions leading to more wrongful convictions. No-one mentioned any cases in which they thought this had already happened but some respondents referred to other well-known miscarriages of justice, such as the 'Tottenham three' case, arguing that these had occurred despite the right of silence still being intact. In speculating what would happen in a similar situation now, they suggested that the chances of a wrongful conviction might now be even higher. This opinion was partly based on a view that the provisions made it easier for the prosecution to prove its case, even if it was weak. It was also based on the view that the provisions, along with other measures introduced by the Criminal Procedure and Investigations Act 1996, represented a shift in balance away from the defence and towards the prosecution. However, other respondents expressed a contrary view. They pointed out that, because the question of inferences could only supplement the prosecution case, the influence of the provisions was necessarily limited.

5 Conclusions

It is clear from the findings presented in the preceding chapters that the right of silence provisions in the CJPOA have had a marked impact on both pre-trial and trial practices. For example, the report has shown that there has been a notable reduction in the exercise of silence among suspects in police custody and that the police are making regular use of the 'special warning' provisions in ss.36 and 37. There also appear to be clear changes in practice by legal advisers in the way in which they advise clients who are held for questioning and in the preparedness of police officers to disclose information prior to interview. There is also fairly clear consensus that more defendants are now testifying at trial. For their part, CPS lawyers and prosecution barristers are ready, where appropriate, to invite courts to draw inferences from defendants' refusals to answer police questions, explain incriminating circumstances or to testify. It also appears that defence barristers are more frequently advising defendants to enter the witness box. And judges are including the issue of appropriate inferences when summing up.

However, it is much less clear whether the effect of these changes in practice has been to increase to any noticeable extent the likelihood of defendants being charged and convicted. There is also considerable debate about the implications of the provisions in terms of their fairness towards the defendant. Some have argued that they affect the onus of proof and that the burden is now effectively upon the defence to prove innocence in cases where the defendant has exercised his or her right to silence. There are also concerns about the fairness of the provisions for vulnerable defendants and those who have received no legal advice or only poor advice.

This chapter takes up and discusses the three issues raised above: changes in practices and their significance; the impact on charges and convictions; and fairness to the defence. It concludes by considering what further work might be undertaken in this area.

Changes in practice among defendants and criminal justice practitioners

It is a common feature of research on the criminal justice system that it is relatively easy to identify the impact of statutory reforms on activities or processes but harder to pinpoint their effects on outputs. This sometimes

results in 'process oriented' research being denigrated. But, it may be argued that it is vital to understand how statutory changes have impacted on activities and processes if we are to be able to assess whether any changes in outputs might also be expected and to what they might be attributed. The point also needs to be made that changes in activities and processes may, in themselves, bring benefits not in terms of a change in the outcome but in terms of a result achieved more efficiently.

It is important to keep these considerations in mind when examining the impact of the CJPOA provisions. In particular, the end-products in question – charges and convictions – are subject to such a range of influences, which do not remain stable over time, that identifying the impact of this particular legislation in isolation from other factors is complex. For example, changes in the law on disclosure contained in the Criminal Procedure and Investigations Act 1996 may have had an impact by reducing the number of 'ambush' defences at court.

It might, in any event, be expected that any resulting changes in charges and convictions stemming from the right of silence provisions would be slight. Firstly, only a relatively small minority of suspects exercised their right of silence either at the police station or at trial before the provisions were introduced. Secondly, the main target of the legislation was 'professional' criminals, who form a minority of a minority.

Judged in these terms, what is the significance of the changes in activities and processes which the research has identified? There are strong grounds for arguing that the provisions have led to greater efficiencies in the investigative and prosecution process. Although not universal practice, it seems that it has become more common for investigating officers to disclose the salient features of the evidence against suspects to their legal advisers prior to a first interview. This enables legal advisers to provide better advice as to whether refusal to answer police questions is a viable tactic. Thus, where the evidence is already strong, the adviser may suggest that there is little point in refusing to answer. But, where it is weak and the possibility of charges is slight, silence may still be an appropriate response.

Without such disclosure, the adviser may well initially counsel silence while waiting to learn the nature and strength of the evidence from the direction of police questions. Alternatively, if the suspect does answer questions, the adviser may seek to stop the interview if the police adduce evidence which has not previously been disclosed, in order for a legal consultation to take place. Although the apparent increase in pre-interview disclosure may not ultimately affect the outcome in terms of whether the suspect is charged or not, it may mean that this decision is arrived at more efficiently.

There is a second respect in which the provisions may have helped the investigation and prosecution process. Many officers interviewed during the study pointed out that the fact that more suspects were now answering questions meant that they could proceed with checking the stories provided. While, in the immediate term, this could involve them in more work, it could lead to efficiencies further down the line. Thus, weak cases could be stopped earlier, but the prosecution's hand could be strengthened in cases which proceeded to court. In some instances, it might have prevented 'ambush' defences being raised at trial. Again, the eventual outcome of the case might not necessarily have been different, but would have been arrived at more efficiently.

The third area in which the new law may have been of assistance is in increasing the certainty of convictions. Thus, some CPS lawyers and barristers who were interviewed noted that it was not unusual to draw the court's attention to the issue of inferences from silence, notwithstanding that the other available evidence against the defendant was probably already sufficient to secure a conviction. Without them labouring the point, the fact that defendants had refused to answer police questions, explain incriminating circumstances or testify at trial, could be presented by the prosecution as an additional plank of the evidence. Some prosecution barristers were at pains to point out that they did not restrict reference to silence to situations in which they felt it might tilt the balance in a weak case. They were, in fact, uneasy about using the provisions in this way since they felt that to do so would come to be interpreted as flagging up that the case was weak.

Charges and convictions

The right of silence provisions were not introduced in the expectation that they would lead to large-scale increases in successful prosecutions. Indeed, the statistical data presented in this study tend to suggest that there have not been changes in the proportions of suspects charged, the level of guilty pleas or the proportion of defendants who are convicted, which can be related to the introduction of the provisions. The rate at which suspects provide admissions during police interviews also appears to have remained static.

The hope was that the provisions would: (a) prove to be an additional weapon against 'professional' criminals who were alleged to evade justice by hiding behind a wall of silence; and (b) that they would help to secure convictions in 'appropriate' cases. It is difficult to say for certain whether and, if so, to what extent the first of these benefits has accrued. Because of the practical difficulties involved, the observational study did not seek to identify a sub-sample of those who might be termed 'professional' criminals

or to track their progress through the courts. There was some evidence of a particularly steep decline in exercise of silence among more serious offenders (although these do not necessarily equate to 'professional'). However, the police view, reinforced by conversations with defence legal advisers, was that 'professional' criminals sometimes maintained their previous strategy of non-response, which could prove effective if there were insufficient evidence to charge. Alternatively, they deployed a range of tactics to counter the new provisions (see Chapter 3). They were sceptical about whether the new law had had a significant impact upon this group.

In terms of whether the provisions have helped to secure convictions in 'appropriate' cases, the evidence is slightly more positive, albeit not conclusive. As noted above, CPS lawyers and prosecution barristers were not necessarily averse to making use of the provisions and saw them as a useful weapon in their armoury. However, the theme which comes through from interviews with them is that silence evidence would rarely tip the balance in favour of prosecution or securing a conviction. In effect, it was unlikely that the provisions resulted in many more cases being successfully prosecuted than before, although they were used in support of the existing evidence in cases which would probably have been successfully prosecuted previously. One reason for this is that prosecutors tended to favour evidence which they considered had greater probative value (for example, eyewitness accounts or forensic evidence). The value of silence was often seen more in terms of undermining the defendant's credibility than directly strengthening the prosecution case. There was a fear that over-reliance upon it might be taken to indicate that the rest of the case was weak. There were also other sensitivities which worked against over-playing the silence issue: for example, the wish not to be seen by the jury as being unfair to the defendant.

Of course, while it is possible to infer what impact the provisions may have had on convictions from the use made of them in court, it is not possible to know for certain because key aspects of decision-making in the criminal justice system are hidden from view. Thus, it is not known to what extent – if any – defendants elect to plead guilty because, for example, they now consider it hopeless to raise a defence at a late stage which they failed to mention earlier.[53] Nor is it known to what extent magistrates are influenced in their decision making, because they do not provide reasons for their verdicts. And, most crucially, what goes on in the jury room is not open to scrutiny and it is not known what weight jurors attach to the defendant's silence and what kinds of inferences they draw.

53. Those in receipt of legal advice would almost certainly have been advised to raise such a defence during the police interview – see Chapter 3.

Fairness to the defendant

The burden of proof

A number of issues were raised during the research, which might broadly be categorised as relating to the fairness to the defendant of the inferences from silence provisions. One concern was that the provisions went against the central tenet of the law that the burden of proof rests upon the prosecution. The defendant is presumed innocent until proven guilty. It is up to the prosecution to prove their case beyond reasonable doubt and the defendant has no obligation to answer police questions or enter the witness box. Those who argued that this situation had changed, maintained that while legally the burden of proof remains upon the prosecution, in practice there was now an obligation on defendants to account for their silence and that this was tantamount to requiring them to demonstrate their innocence.

It is difficult to refute such suggestions on the basis of this research. It might be argued that whether one regards the onus of proof as effectively having shifted depends on the ideological standpoint adopted. Those who maintain that there has not been a change point out that the prosecution still has to prove its case beyond reasonable doubt and that a defendant cannot be convicted on the basis of silence evidence alone. Critical to the debate is the way in which such evidence is viewed and whether it should be seen as qualitatively different from other forms of evidence. At one extreme are those who would argue that a defendant's silence in response to questioning or at trial provides no substantial form of evidence at all. At the other are those who maintain that it is no different in kind from other forms of evidence and places no greater burden on the defence. To take a concrete instance, juries have always been able to draw inferences from incriminating circumstances: for example, where a suspect is found close to the scene of a night-time burglary, trying to hide from the police. The facts demand an explanation. Going a stage further by stipulating that the failure to give such an explanation also provides the basis for inferences could be argued to be a logical extension.

Whatever philosophical standpoint is adopted, it seems clear that the change in the law has not led to undue practical disadvantage to defendants. Firstly, there is little evidence of prosecutors using the provisions to tilt the scales in weak cases to bring them to court, thereby putting the defence on the back foot in having to deal with the matter of the defendant's silence as a central issue in the case. Secondly, as already noted, the conviction rate has not shown any consistent rise which might suggest that the tide has turned against defendants. Thirdly, while it seems that more defendants are testifying, this is not necessarily indicative of a shift in the onus of proof. The great majority of defendants already testified prior to the change in the law.

The reason for the increase is probably strategic decisions by defence lawyers to put their client in the witness box in order to account for their earlier silence. This might be regarded as qualitatively little different from a decision to put a defendant on the stand in order to account for other incriminating evidence. It is a calculated decision based on the nature and extent of the evidence and on the client's likely performance in court.

Vulnerable defendants

In situations in which their clients were vulnerable in some way – for example, through age or learning disability – defence barristers sometimes expressed concern that they felt under pressure to put them in the witness box. If they failed to do so, the jury might question why. Defence barristers are not able to make statements explaining the reasons why their clients have chosen not to testify. Rather than risk inferences adverse to their client being drawn, the decision was sometimes taken to put defendants in the witness box and run the risk of them coming across poorly and damaging their case.

These fears clearly raise the spectre of miscarriages of justice. As yet, no such cases are known to have come to light. The research suggests grounds for optimism that the risk is minimal. Firstly, the CJPOA provides that inferences under s.35 do not apply if the accused's mental condition makes it 'undesirable' for him or her to testify. Secondly, defence counsel may adduce expert medical evidence of their client's vulnerability in order to explain why they are not giving evidence. This may not necessarily preclude inferences being drawn, but judges may warn juries to exercise caution in doing so. Thirdly, where the defendant's vulnerability was obvious when they testified, this might elicit sympathy from the judge and jury. Judges are able, where required, to protect defendants from overly hostile or unfair cross-examination. Lastly, where the defendant has remained silent at the police station, the Act limits the drawing of inferences to situations in which it was reasonable to expect him or her to mention facts later relied on in his or her defence. It is open to defence counsel to adduce evidence of circumstances which made it unreasonable to expect their client to have answered police questions. As yet, however, there is relatively little case law to help in defining the kinds of circumstances in which it would be reasonable for a defendant to refuse to answer questions.

Legal advice and silence at the police station

Although around 40 per cent of suspects interviewed by the police receive legal advice while in police custody, the remainder do not. The issue therefore arises of whether it is fair that the provisions should apply in cases where the suspect has not had the benefit of expert advice. While every

suspect is now given ample opportunity to obtain advice and is told that this is a free service, some may not realise that they would benefit from it. Police officers interviewed during the course of the study pointed to a certain lack of understanding of the new caution among those unfamiliar with arrest.

The issue of potential unfairness has arisen in the limited context of the delay of access to legal advice under s.58 of the Police and Criminal Evidence Act. In the European Court of Human Rights judgement in the *Murray* case, it was held to be in contravention of the European Convention on Human Rights for adverse inferences to be drawn in circumstances in which access to legal advice had been temporarily denied after it had been requested. Legislative effect to this judgement has now been given.[54] However, this case relates only to situations in which legal advice has actually been requested by the suspect. Where it has not been, it is open to the court to draw inferences from the suspect's silence in appropriate circumstances.

The research was unable to answer the question of whether suspects were disadvantaged in cases in which they did not request legal advice. Certainly, suspects who are not legally advised tended to answer police questions more frequently but this may be related less to lack of advice than to the less serious nature of the offences for which they were typically arrested. One way of responding to the concerns about this issue would be to prohibit the drawing of inferences in situations in which suspects were not legally advised or to allow this only with a warning to the jury about doing so. However, this would probably be too sweeping a response. Among those who do not seek legal advice there may be many – including 'professional' criminals and regular offenders – who fully realise the implications of their decision and understand the basic message of the caution. It would be difficult to differentiate those cases in which it might be reasonable for inferences to be drawn because there was this level of understanding from those in which it was lacking. The best compromise might be to take steps through appropriate police training or provision of adequate documentation to ensure that those who did not request a lawyer in custody were as fully informed as possible about the meaning of the caution.

A somewhat different issue is whether it is fair that inferences should be capable of being drawn where the suspect has received legal advice but that advice is poor. It is clear from the decided cases that this would not be sufficient to prevent a judge putting the issue of inferences to the jury. The key factor for the jury to consider is the reason for the accused accepting the legal advice which he or she was given. In other words, it is not enough for defendants to argue that it was reasonable for them to exercise their right of silence simply because their solicitors told them to. This approach, which regards defendants as rational decision-makers, appears to be a fair one. It is

54. Section 57 Youth Justice and Criminal Evidence Act 1999. This provision will be implemented once an appropriate change has been made to the caution in PACE Code C.

designed to prevent unscrupulous offenders from evading justice by resorting to the 'bad brief' defence, while allowing the vulnerable or naive the opportunity to appeal to the sympathy of the court. It was argued by some of those interviewed that providing reasons for following a solicitor's advice would mean revealing details of private conversations between lawyer and client and amount to a waiver of legal professional privilege. This might have adverse effects for the relationship of professional trust between solicitor and client. While there is this risk, it might be argued that the interests of justice may sometimes override such considerations. And, a way of overcoming the problem, suggested by some respondents, was for legal advisers to state on tape at the start of police interviews the advice they had given and the reasons for it.

Further work

The research described in this report has provided considerable insight into the way that the new provisions are working. It also points towards issues which it is worthwhile exploring further. These include:

- decision-making by suspects and defendants: how do suspects and defendants decide whether or not to exercise their right of silence under the new provisions? How do such decisions vary between legally advised suspects and others and how do they relate to the disclosure of information by the police?

- the extent to which the provisions affect vulnerable groups

- the impact of the provisions on those who could be described as 'professional' criminals

- developments in case law on inferences from silence after the implementation of the Human Rights Act 1998 in October 2000.

Perhaps the most significant outstanding question to be addressed is the way in which juries treat silence evidence. In particular, it would be important to know what weight is attached to such evidence in relation to other evidence and the nature of the inferences drawn. For example, to what extent do juries disregard silence evidence, or treat it as undermining the defendant's credibility, as controverting particular facts which are asserted at trial or as directly indicative of guilt? Examining such issues could usefully be done in the context of a broader look at the way in which juries come to their decisions. Currently, due to the present prohibition on jury research, there is little scope to explore these issues but they would form an important agenda for research if this situation changed.

Appendix

Criminal Justice and Public Order Act 1994: sections 34-38

Inferences from accused's silence

Effect of accused's failure to mention facts when questioned or charged

34.(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 under caution by a constable 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 the accused could reasonably have been expected to mention when so questioned, charged or informed, as the case may be, subsection (2) below applies.

(2) Where this subsection applies –

(a) A magistrates' court, in deciding whether to grant an application for dismissal made by the accused under section 6 of the Magistrates' Courts Act 1980 (application for dismissal of charge in course of proceedings with a view to transfer for trial);

(b) A judge, in deciding whether to grant an application made by accused under –

(i) Section 6 of the Criminal Justice Act 1987 (application for dismissal of charge of serious fraud in respect of which notice of transfer has been given under section 4 of that Act); or

(ii) paragraph 5 of Schedule 6 to the Criminal Justice Act 1991 (application for dismissal of charge of violent or sexual offence involving child in respect of which notice of transfer has been given under section 53 of that Act);

(c) the court, in determining whether there is a case to answer; and

(d) 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.

(3) Subject to any directions by the court, evidence tending to establish the failure may be given before or after evidence tending to establish the fact which the accused is alleged to have failed to mention.

(4) This section applies in relation to questioning by persons (other than constables) charged with the duty of investigating offences or charging offenders as it applies in relation to questioning by constables; and in subsection (1) above "officially informed" means informed by a constable or any such person.

(5) This section does not –

(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 this section; or

(b) preclude the drawing of any inference from any such silence or other reaction of the accused which could properly be drawn apart from this section.

(6) This section does not apply in relation to a failure to mention a fact if the failure occurred before the commencement of this section.

(7) In relation to any time before the commencement of section 44 of this Act, this section shall have effect as if the reference in subsection (2)(a) to the grant of an application for dismissal reference to the committal of the accused for trial.

Effect of accused's silence at trial

35.(1) At the trial of any person who has attained the age of fourteen years for an offence, subsections (2) and (3) below apply unless –

(a) the accused's guilt is not in issue; or

(b) it appears to the court that the physical or mental condition of the accused makes it undesirable for him to give evidence;

but subsection (2) below does not apply if, at the conclusion of the evidence for the prosecution, his legal representative informs the court that the accused will give evidence or, where he is unrepresented, the court ascertains from him that he will give evidence.

(2) Where this subsection applies, the court shall, at the conclusion of the evidence for the prosecution, satisfy itself (in the case of proceedings on indictment, in the presence of the jury) that the accused is aware that the stage has been reached at which evidence can be

given for the defence and that he can, if he wishes, give evidence and that, if he chooses not to give evidence, or having been sworn, without good cause refuses to answer any question, it will be permissible for the court or jury to draw such inferences as appear proper from his failure to give evidence or his refusal, without good cause, to answer any question.

(3) Where this subsection applies, the court or jury, in determining whether the accused is guilty of the offence charged, may draw such inferences as appear proper from the failure of the accused to give evidence or his refusal, without good cause, to answer any question.

(4) This section does not render the accused compellable to give evidence on his own behalf, and shall accordingly not be guilty of contempt of court by reason of a failure to do so.

(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 any enactment, whenever passed or made, or on the ground of privilege; or

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

(6) Where the age of any person is material for the purposes of subsection (1) above, his age shall for those purposes be taken to be that which appears to the court to be his age.

(7) This section applies –

(a) in relation to proceedings on indictment for an offence, only if the person charged with the offence is arraigned on or after the commencement of this section;

(b) in relation to proceedings in a magistrates' court, only if the time when the court begins to receive evidence in the proceedings falls after the commencement of this section.

Effect of accused's failure or refusal to account for objects, substances or marks..

36.(1) Where –

(a) a person is arrested by a constable, 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

(a) that or another constable investigating the case 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 an offence specified by the constable; and

(b) the constable 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 so specified, evidence of those matters is given, subsection (2) below applies.

(2) Where this subsection applies –

(a) a magistrates' court, in deciding whether to grant an application for dismissal made by the accused under section 6 of the

Magistrates' Courts Act 1980 (application for dismissal of charge in course of proceedings with a view to transfer for trial);

(b) a judge, in deciding whether to grant an application made by the accused under –

(i) section 6 of the Criminal Justice Act 1987 (application for dismissal of charge of serious fraud in respect of which notice of transfer has been given under section 4 of that Act);

or

(ii) paragraph 5 of Schedule 6 to the Criminal Justice Act 1991 (application for dismissal of charge of violent or sexual offence involving child in respect of which notice of transfer has been given under section 53 of that Act);

(c) the court, in determining whether there is a case to answer: and

(d) the court or jury, in determining whether the accused is guilty of the offence charged,

may draw such inferences from the failure or refusal as appear proper.

(3) Subsections (1) and (2) above apply to the condition of clothing or footwear as they apply to a substance or mark thereon.

(4) Subsections (1) and (2) above do not apply unless the accused was told in ordinary language by the constable when making the request mentioned in subsection (1) (c) above what the effect of this section would be if he failed or refused to comply with the request.

(5) This section applies in relation to officers of customs and excise as it applies in relation to constables.

(6) This section does not preclude the drawing of any inference from a failure or refusal of the accused 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.

(7) This section does not apply in relation to a failure or refusal which occurred before the commencement of this section.

(8) In relation to any time before the commencement of section 44 of this Act, this section shall have effect as if the reference in subsection (2)(a) to the grant of an application for dismissal was a reference to the committal of the accused for trial.

Effect of accused's failure or refusal to account for presence at a particular place.

37.(1) Where –

(a) a person arrested by a constable was found by him at a place at or about the time the offence for which he was arrested is alleged to have been committed; and

(b) that or another constable investigating the offence 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 constable informs the person that he so believes, and requests him to account for that presence; and

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

then if, an any proceedings against the person for the offence, evidence of those matters is given, subsection (2) below applies.

(2) Where this subsection applies –

(a) a magistrates; court, in deciding whether to grant an application for dismissal made by the accused under section 6 of the Magistrates' Courts Act 1980 (application for dismissal of charge in course of proceedings with a view to transfer for trial);

(b) a judge, in deciding whether to grant an application made by the accused under –

(i) section 6 of the Criminal Justice Act 1987 (application for dismissal of charge of serious fraud in respect of which notice of transfer has been given under section 4 of that Act);

or

(ii) paragraph 5 of Schedule 6 to the Criminal Justice Act 1991 (application for dismissal of charge of violent or sexual offence involving child in respect of which notice of transfer has been given under section 53 of that Act);

(c the court, in determining whether there is a case to answer; and

(d the court or jury, in determining whether the accused is guilty of the offence charged,

may draw such inferences from the failure or refusal as appear proper.

(3) Subsections (1) and (2) do not apply unless the accused was told in ordinary language by the constable when making the request mentioned in subsection (1)(c) above what the effect of this section would be if he failed or refused to comply with the request.

(4) This section applies in relation to officers of customs and excise as it applies in relation to constables.

(5) This section does not preclude the drawing of any inference from a failure or refusal of the accused to account for his presence at a place which could properly be drawn apart from this section.

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

(7) In relation to any time before the commencement of section 44 of this Act, this section shall have effect as if the reference in subsection (2)(a) to the grant of an application for dismissal was a reference to the committal of the accused for trial.

38.(1) In sections 34, 35, 36 and 37 of this Act –

"legal representative" means an authorised advocate or authorised litigator, as defined by section 119(1) of the Courts of Legal Services Act 1990; and

"place" includes any building or part of a building, any vehicle, vessel, aircraft or hovercraft and any other place whatsoever.

(2) In sections 34(2), 35(3), 36(2) and 37(2), references to an offence charged include references to any other offence of which the accused could lawfully be convicted on that charge.

(3) A person shall not have the proceedings against him transferred to the Crown Court for trial, have a case to answer or be convicted of an offence solely on an inference drawn from such a failure or refusal as is mentioned in section 34(2), 35(3), 36(2) or 37(2).

(4) A judge shall not refuse to grant such an application as is mentioned in section 34(2)(b), 36(2)(b) and 37(2)(b) solely on an inference drawn from such a failure as is mentioned in section 34(2), 36(2) or 37(2).

(5) Nothing in sections 34, 35, 36 or 37 prejudices the operation of a provision of any enactment which provides (in whatever words) that any answer or evidence given by a person in specified circumstances shall not be admissible in evidence against him or some other person in any proceedings or class of proceedings (however described, and whether civil or criminal).

In this subsection the reference to giving evidence is a reference to giving evidence in any manner, whether by furnishing information, making discovery, producing documents or otherwise.

(6) Nothing in sections 34, 35, 36 or 37 prejudices any power of a court, in any proceedings, to exclude evidence (whether by preventing questions being put or otherwise) at its discretion.

Table of cases

R. v. Kavanagh, unreported, February 7, 1997, Court of Appeal.

R. v. McGarry, 1999 CLR, 316.

R. v. McGuinness, 1999 CLR, 318.

R. v. Melville, The Times, March 17, 1997, Court of Appeal.

R. v. Moshaid, 1998 CLR, 420.

R. v. Mountford, 1999, CLR, 575.

R. v. Murray, Court of Appeal, October 28, 1991, unreported.

R. v. Nickolson, 1999 CLR, 61.

R. v. Odeyemi, 1999 CLR, 828.

R. v. Pointer, 1997 CLR, 676.

R. v. Roble, 1997 CLR, 449.

R. v. Taylor, 1999 CLR, 77.

References

Association of Chief Police Officers. (1993). *ACPO Right of Silence Survey.* (Unpublished.)

Bentham, J. (1825). *Rationale of Judicial Evidence.* Garland reprint (1978): New York.

Birch, D. (1997). Commentary on *R. v. Roble* in *Criminal Law Review*, pp. 449-450.

Birch, D. (1999a). Commentary on *R. v. Odeyemi* in *Criminal Law Review*, pp. 829-830.

Birch, D. (1999b). Commentary on *R. v. Birchall* in *Criminal Law Review*, p. 313.

Birch, D. (1999c). 'Suffering in silence: a cost-benefit analysis of section 34 of the Criminal Justice and Public Order Act 1994'. *Criminal Law Review*, pp. 769-788.

Bottomley, K., Coleman, C., Dixon, D., Gill, M. and Wall, D. (1989). *The Impact of Aspects of the Police and Criminal Evidence Act 1984 on Policing in a Force in the North of England.* Final report to ESRC. Unpublished.

Branston, G. (1998). 'The drawing of an adverse committal from silence'. *Criminal Law Review*, pp.189-193.

Bridges, L. and Choongh, S. (1998). *Improving Police Station Legal Advice.* Research Study No. 31. London: The Law Society.

Brown, D. (1989). *Detention at the Police Station under the Police and Criminal Evidence Act 1984.* Home Office Research Study No. 104. London: HMSO.

Brown, D. (1994). 'The incidence of right of silence in police interviews: the research evidence reviewed'. *Research Bulletin*, No. 35, pp.57-75. London: Home Office Research and Statistics Department.

Card, R. and Ward, R. (1994). *The Criminal Justice and Public Order Act 1994*. Bristol: Jordans.

Criminal Law Revision Committee. (1972). *Eleventh Report, Evidence.* Cmnd. 4991. London: HMSO.

Crown Prosecution Service. (1994). *The Code for Crown Prosecutors.* London: CPS.

Dennis, I. (1995). 'The Criminal Justice and Public Order Act 1994 – The Evidence Provisions.' *Criminal Law Review,* pp. 4-18.

Dixon, D. (1991). 'Common sense, legal advice and the right of silence'. *Public Law,* pp. 233-254.

Dodds, M. D. (1995). 'Inferences from the accused's silence: sections 34-39 Criminal Justice and Public Order Act 1994'. *Justice of the Peace and Local Government Law,* August, pp. 567-571.

Easton, S. (1991). *The Right to Silence.* Aldershot: Avebury.

Easton, S. (1998). 'Legal advice, common sense and the right to silence'. *The International Journal of Evidence and Proof,* pp. 109-122.

Evans, R. (1993). *The Conduct of Police Interviews with Juveniles.* Royal Commission on Criminal Justice Research Study No.8. London: HMSO.

Greer, S. (1990). 'The right to silence: a review of the current debate'. *Modern Law Review,* 53, pp.709-730.

Gudjonsson, G. (1994). 'Psychological vulnerability: suspects at risk', in Morgan, D. and Stephenson, G.S., (Eds), *Suspicion and Silence.* London: Blackwell.

Hobbs, R. (1988). *Doing the Business.* Oxford: Clarendon Press.

Home Office. (1989). *Report of the Working Group on the Right to Silence.* (Unpublished.)

Home Office. (Quarterly each year). Criminal Justice Business *Quarterly Report. Home Office Research,* Development and Statistics Directorate.

Hurd, D. (1996). 'Annual Police Foundation lecture', in: Zander, M, *Cases and Materials on the English Legal System*. London: Weidenfeld and Nicolson.

Jackson, J.D. (1991). 'Curtailing the right to silence: lessons from Northern Ireland'. *Criminal Law Review,* pp. 404-415.

Jackson, J., Wolfe, M. and Quinn K. (forthcoming). *The Operation and Effect of the Criminal Evidence Order 1988*. Northern Ireland Office Research Report.

Leng, R. (1993). *The Right to Silence in Police Interrogation: a study of some of the issues underlying the debate.* Royal Commission on Criminal Justice Research Study No. 10. London: HMSO.

Leng, R. (1994). 'The Right to Silence Debate', in Morgan, D. and Stephenson, G.S., (Eds), *Suspicion and Silence*. London: Blackwell.

McConville, M., Sanders, A. and Leng, R. (1991). *The Case for the Prosecution*. London: Routledge.

McConville, M. and Hodgson, J, with the assistance of Jackson, M. and Macrae, E. (1993). *Custodial Legal Advice and the Right to Silence.* Royal Commission on Criminal Justice Research Study No. 16. London: HMSO.

Moston, S., Stephenson, G. and Williamson, T. (1992). 'The incidence, antecedents and consequences of suspects' use of the right to silence'. *Criminal Behaviour and Mental Health.*

Neyroud, P. (1995). 'What can be inferred?' *Police Review,* pp.18-20.

O'Reilly, G.W. (1994). 'England limits the right to silence and moves towards an inquisitorial system of justice'. *The Journal of Criminal Law and Criminology,* 85(2), pp.402-452.

Pattenden, R. (1995). 'Inferences from silence'. *Criminal Law Review,* pp. 602-611.

Phillips, C. and Brown, D. (1997). 'Observational studies in police custody areas: some methodological and ethical issues considered'. *Policing and Society,* 7, pp.191-205.

Phillips, C. and Brown, D., with the assistance of Goodrich, P. and James, Z. (1998). *Entry into the Criminal Justice System: a survey of police arrests and their outcomes.* Home Office Research Study No. 185. London: Home Office.

Royal Commission on Criminal Justice. (1993). Chairman: Viscount Runciman of Doxford, CBE, FBA. *Report*. Cm.2263. London: HMSO.

Royal Commission on Criminal Procedure. (1981). Chairman: Sir Cyril Philips. *Report*. Cmnd. 8092-1. London: HMSO.

Sanders, A., Bridges, L., Mulvaney, A. and Crozier, G. (1989). *Advice and Assistance at Police Stations under the 24 Hour Duty Solicitor Scheme*. London: Lord Chancellor's Department.

Social and Community Planning Research. (1995). *British Social Attitudes: the 12th report*. Aldershot: Dartmouth.

Sharpe, S. (1998). *Judicial Discretion and Criminal Investigation*. London: Sweet and Maxwell.

Softley, P., with the assistance of Brown, D., Forde, B., Mair, G. and Moxon, D. (1981). *Police Interrogation: an observational study in four police stations*. Home Office Research Study No. 61. London: HMSO.

Sprack, J. (1997). *Emmins on Criminal Procedure*. London: Blackstone Press.

Tan, A. K-J. (1997). 'Adverse inferences and the right to silence: re-examining the Singapore experience'. *Criminal Law Review*, pp. 471-481.

Tully, B. and Morgan, D. (1997). 'Fair warning?' *Police Review*, pp. 24-25.

Williamson, T.M. (1990). *Strategic Changes in Police Interrogation: an examination of police and suspect behaviour in the Metropolitan Police in order to determine the effects of new legislation, technology and organisational policies*. PhD thesis: Faculty of Social Science, University of Kent at Canterbury. Unpublished.

Wright, D. (1998). 'The solicitor in the witness box'. *Criminal Law Review*, 44-47.

Yeo, M-H. (1983). 'Diminishing the right to silence: the Singapore experience'. *Criminal Law Review*, pp. 89-101.

Zander, M. (1994). 'Abolition of the Right of Silence 1972–1994', in Morgan, D. and Stephenson, G.S. (Eds), *Suspicion and Silence*. London: Blackwell.

Zander, M. and Henderson, P. (1993).). *Crown Court Study*. Royal Commission on Criminal Justice Research Study No. 19. London: HMSO

Publications

List of research publications

The most recent research reports published are listed below. A **full** list of publications is available on request from the Research, Development and Statistics Directorate, Information and Publications Group.

Home Office Research Studies (HORS)

190. **Trespass and protest: policing under the Criminal Justice and Public Order Act 1994**. Tom Bucke and Zoë James. 1998.

191. **Domestic Violence: Findings from a new British Crime Survey self-completion questionnaire.** Catriona Mirrlees-Black. 1999.

192. **Explaining reconviction following a community sentence: the role of social factors.** Chris May. 1999.

193. **Domestic Violence Matters: an evaluation of a development project**. Liz Kelly. 1999.

194. I**ncreasing confidence in community sentences: the results of two demonstration projects**. Carol Hedderman, Tom Ellis and Darren Sugg. 1999.

195. **Trends in Crime Revisted.** Simon Field. 1999.

196. **A question of evidence? Investigating and prosecuting rape in the 1990s**. Jessica Harris and Sharon Grace. 1999.

197. **Drug Misuse Declared in 1998: results from the British Crime Survey**. Malcolm Ramsay and Sarah Partridge. 1999.

198. **Modelling and predicting property crime trends in England and Wales.** Sanjay Dhiri, Sam Brand, Richard Harries and Richard Price. 1999

Research Findings

78. **A review of classification systems for sex offenders.** Dawn Fisher and George Mair. 1998.

79. **An evaluation of the prison sex offender treatment programme.** Anthony Beech et al. 1998.

80. **Age limits for babies in prison: some lessons from abroad.** Diane Caddle. 1998.

81. **Motor projects in England & Wales: an evaluation.** Darren Sugg. 1998

82. **HIV/Aids risk behaviour among adult male prisoners.** John Strange et al. 1998.

83. **Concern about crime: findings from the 1998 British Crime Survey**. Catriona Mirrlees-Black and Jonathan Allen. 1998.

84. **Transfers from prison to hospital - the operation of section 48 of the Mental Health Act 1983.** Ronnie Mackay and David Machin. 1998.

85. **Evolving crack cocaine careers**. Kevin Brain, Howard Parker and Tim Bottomley. 1998.

86. **Domestic Violence: Findings from the BCS self-completion questionnaire.** 1999. Catriona Mirrlees-Black and Carole Byron. 1999.

87. **Incentives and earned privileges for prisoners – an evaluation.** Alison Liebling, Grant Muir, Gerry Rose and Anthony Bottoms. 1999.

88. **World Prison Population List.** Roy Walmsley. 1999.

89. **Probation employment schemes in inner London and Surrey – an evaluation**. Chris Samo, Michael Hough, Claire Nee and Victoria Herrington. 1999.

90. **Reconviction of offenders sentenced or released from prison in 1994.** Chris Kershaw. 1999.

91. **Domestic violence matters: an evaluation of a development project.** Liz Kelly. 1999.

92. **Increasing confidence in community sentences.** Carol Hedderman, Tom Ellis and Darren Sugg. 1999.

94. **The Prison Population in 1998: a statistical review.** Philip White. 1999.

95. **Using Mentors to Change Problem Behaviour in Primary School Children.** Ian St James Roberts and Clifford Samial Singh. 1999.

96. **Meeting Need and Challenging Crime in Partnership with Schools.** Graham Vulliamy and Rosemary Webb. 1999.

97. **The role of social factors in predicting reconviction for offenders on community penalties.** Chris May. 1999.

98. **Community penalties for fine default and persistent petty offending.** Robin Elliott, Jennifer Airs and Stefan Webb. 1999.

99. **Demanding physical activity programmes for young offenders.** Peter Taylor, Iain Crow, Dominic Irvine and Geoff Nichols. 1999.

100. **The admissibility and sufficiency of evidence in child abuse prosecutions.** Gwynn Davis, Laura Hoyano, Caroline Keenan, Lee Maitland and Rod Morgan. 1999.

101. **Reconviction of offenders sentenced or released from prison in 1995.** Chris Kershaw, Joanne Goodman and Steve White. 1999.

102. **Jury excusal and deferral.** Jennifer Airs and Angela Shaw. 1999.

103. **The cost of Criminal Justice.** Richard Harries. 1999.

104. **Predicting reconvictions for sexual and violent offences using the revised offender group reconviction scale.** Ricky Taylor. 1999.

105. **Making the tag fit: further analysis from the first two years of the trials of curfew orders.** Ed Mortimer, Eulalia and Isabel Walter. 1999.

106. **Drug treatment and testing orders – interim evaluation.** Paul J Turnbull. 1999.

107. **The Victims Charter – an evaluatin of pilot projects.** Carolyn Hoyle, Rod Morgan and Andrew Sanders. 1999.

108. **The Milton Keynes Youth Crime Reduction Project.** Alan Mackie and John Burrows. 1999.

Occasional Papers

Monitoring and evaluation of WOLDS remand prison and comparisons with public-sector prisons, in particular HMP Woodhill. A Keith Bottomley, Adrian James, Emma Clare and Alison Liebling. 1997.

Evaluation of the 'One Stop Shop' and victim statement pilot projects. Carolyn Hoyle, Ed Cape, Rod Morgan and Andrew Sanders. 1998.

Restorative Justice: an overview. Tony Marshall. 1999.

Step 3: an evaluation of the prison sex offender treatment programme. Anthony Beech, Dawn Fisher and Richard Beckett. 1999.

The Impact of the National Lottery on the Horserace Betting Levy: Fourth Report. Sam Brand. 1999.

An assessment of the admissibility and sufficiency of evidence in child abuse prosecutions. Gwynn Davis, Laura Hoyano, Caroline Keenan, Lee Maitland and Rod Morgan. 1999.

Violence at work: findings from the British Crime Survey. Tracey Budd. 1999.

Demanding physical activity programmes for young offenders under probation supervision. Peter Taylor, Iain Crow, Dominic Irvine and Geoff Nichols. 1999.

Requests for Publications

Home Office Research Studies, Research Findings and *Occasional Papers* can be requested from:

Research, Development and Statistics Directorate
Information and Publications Group
Room 201, Home Office
50 Queen Anne's Gate
London SW1H 9AT
Telephone: 020 7273 2084
Facsimile: 020 7222 0211
Internet: http://www.homeoffice.gov.uk/rds/index.htm
E-mail: rds.ho@gtnet.gov.uk