The Attorney-General and the Solicitor-General

The Attorney-General and the Solicitor-General are known as the Law Officers. The appointments are political and change with the government. As a rule, the Law Officers are not members of the Cabinet.

The Attorney-General

The Attorney-General is appointed by Letters Patent under the Great Seal, and is usually a member of the House of Commons. He represents the Crown in civil matters and can prosecute in important criminal cases. He is the Head of the English Bar, and points of professional etiquette are referred to him. He also advises government departments on legal matters, and advises the court on matters of parliamentary privilege. He can institute litigation on behalf of the public, e.g. to stop a public nuisance or the commission of a crime and to enforce or regulate public charitable trusts, because he acts on behalf of the public as a whole. Individuals do not have sufficient interest (or *locus standi*) to bring actions in these cases.

Where a person does not have sufficient *locus standi* to initiate proceedings himself, he may ask the Attorney-General to take proceedings. If the Attorney-General does act at the relation of a private individual, the action is known as a 'relator action' and the relator is responsible for the costs incurred. If the Attorney-General refuses to act, no court can compel him to do so.

The Solicitor-General

The Solicitor-General is the subordinate of the Attorney-General, and sometimes gives a joint opinion with him when asked by government departments. In spite of his title, he is a member of the Bar and he need not, strictly speaking, be in the House of Commons. His duties are similar to those of the Attorney-General and he is in many ways his deputy. Both Law Officers are precluded from private practice. The Law Officers Act 1997 provides that any functions authorised or required to be discharged by the Attorney-General may be discharged by the Solicitor-General.

The reason that the Solicitor-General is a barrister is merely a constitutional convention based on the fact that formerly only barristers had a right of audience in the higher courts. Since this is no longer the case, a future appointment may be of a solicitor with advocacy rights.

Gouriet v *Union of Post Office Workers*, 1977 – Law Officers: Attorney-General's enforcement of the law in the public interest (**19**)

Masters

Many matters arise for decision between the time of issue of the claim form and the trial of the action, e.g. what documents must be shown by one side to the other; what time should be allowed for putting in the statements of case and defences. In summary, a master is concerned with the management of a case pre-trial. Case management matters are, under the Civil Procedure Rules 1998, conducted at the appropriate Civil Trial Centre (see Chapter 5). These conferences are generally dealt with by a master (or district judge) particularly in multi-track cases (see further Chapter 5).

Taxing officers

These are salaried officers of the Supreme Court. They fix the costs which one party is directed to pay to the other. 'Taxation' of costs is an old expression, and the function of the taxing officer is described in the Civil Procedure Rules as the detailed assessment of costs. The title of taxing officer is retained.

The Official Solicitor and Public Trustee

The Official Solicitor is an officer of the Supreme Court who acts in litigation to protect the interests of persons suffering under mental disability. He is also concerned to protect the interests of children in adoption matters and those of persons imprisoned for contempt of court.

As the title suggests, the Official Solicitor and Public Trustee will also act as a trustee for those wishing to set up trusts during their lifetime or after death by will.

The Official Solicitor must have a 10-year general advocacy qualification but the right to act as a litigator is preserved by s 90(3A) of the Supreme Court Act 1981 (as inserted by the Courts and Legal Services Act 1990). Section 54 of the 1990 Act also makes clear that the Official Solicitor can apply for probate.

Circuit Administrators

The Royal Commission on Assizes and Quarter Sessions (Beeching Commission) recommended the appointment of a Circuit administrator in each of the six Circuits (now Regions) into which England and Wales is divided. A legal qualification is not essential. Their function is to a large extent managerial and they took over from Clerks of Assize, Clerks of the Peace, and other officers of the numerous different courts who previously had to try to provide the public and the legal profession with a court service. There is now one person entitled Regional Director at each High Court and Crown Court Centre to whom all involved can turn in respect of administrative problems.

Presiding Judges

Under s 72 of the Courts and Legal Services Act 1990 the Lord Chief Justice with the agreement of the Lord Chancellor appoints 12 High Court judges, known as Presiding Judges, who are assigned to each of the six Circuits (now Regions) in England and Wales. They spend substantial periods of time in the area and have general responsibility for the local High Court and Crown Court Centre. They see to the convenient and efficient distribution of judges in the area, and give support and guidance to the Circuit administrator on these matters.

Under the same section the Lord Chief Justice also appoints a Lord Justice as a Senior Presiding Judge to oversee all the Circuits. His function is to provide the Presiding Judges with a Senior Lord Justice to whom they can turn for advice rather than to the Lord Chief Justice himself, and to relieve the Lord Chief Justice of some of the administrative work in which he would otherwise be involved both in and out of London.

4

CRIMINAL PROCEDURE

Having described the system of major criminal courts and tribunals existing in England and Wales, we shall now consider the procedure in the major courts which leads to a prosecution and conviction for crime.

Criminal procedure – generally

The system of trial in this country is accusatorial in that a trial is a contest between two persons. As regards crime, these persons are normally the Queen (on behalf of the community) and the person accused of the crime.

Advocates representing the prosecution and the defence each put forward evidence to the court so that a decision may be made on the question before the court which is, did the accused commit the offence with which he is charged?

It should also be noted in particular that a person accused of crime is presumed innocent until proved guilty and is given certain protections in regard to the proof of his guilt as follows:

(a) The Code of Practice on the Detention, Treatment and Questioning of Suspects by the Police (Code C). This code is prepared by the Home Office under powers given by s 66 of the Police and Criminal Evidence Act 1984 (PACE). The codes are revised from time to time, the latest version came into force on 1 January 2006. The code ensures that a person cannot be trapped by questioning into an admission of guilt. A main safeguard of the code is the caution. A caution must be given to a suspect by a police officer as follows:

> 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.

Where a person is questioned without a caution where one should have been given, any admissions made by that person are likely to be inadmissible in evidence.

Basically, a caution has to be given to a person in respect of whom there are grounds to suspect of an offence before any questions or further questions are put. In addition a caution is required:

- on or immediately before arrest;
- when detention is authorised by a custody officer;
- before an interview; and
- following a break in questioning if there is any doubt as to whether the suspect realises that he or she is still under caution.

At any subsequent trial, anything said by a suspect or indeed his or her silence may be used for or against his or her case.

A person need not be cautioned if the questions are just to establish the ownership of a vehicle or the person's identity or in the furtherance of a proper and effective conduct of a search, provided that the questions do not relate to the person's involvement in a criminal offence.

Under the revised code it is not now generally permissible to conduct interviews and questioning except at a police station or other authorised place of detention *once a decision to arrest has been taken*. Tape recording of interviews is then a requirement under s 60 of PACE, except in cases concerning purely summary offences, e.g. driving without insurance. In practice, it is usual for all interviews to be tape recorded, even though it is not technically required. If an interview is conducted at a place other than a police station, which it may be on the ground of 'necessity' (mainly on the ground of non-co-operation), the suspect must be asked to verify the notes of the interview 'unless it is impracticable'. The police also have a duty to keep a record of any unsolicited comments and ask the suspect to verify these as well. The suspect should write his agreement on the relevant record as soon as is practicable. Where legal advice has been requested, verification should await the arrival of a solicitor.

In addition, where legal advice has been asked for by a suspect, he or she may not be interviewed or continue to be interviewed until he/she has received legal advice. Following charge, no further questions relating to the offence may be put except, e.g. if these are necessary to clear up an ambiguity in a previous answer or statement.

The above matters are considered in further detail later in this chapter.

(b) The Human Rights Act 1998. The Human Rights Act 1998 makes it even more important to comply with PACE and its codes of practice. The ruling in *R* v *Aspinall* [1999] 2 Cr App R 115 is to the effect that a breach of Code C is fundamental in affecting the fairness of any evidence obtained.

(c) The burden of proof. Once in court, the prosecution must prove its case beyond all reasonable doubt. The magistrates or jury need not be *certain* of the accused's guilt, but they must in effect be *sure* that he has committed the crime (and see *Woolmington* v *DPP* (1935) (Case **506**)).

The prosecutor

Here we are concerned in effect with the parties to the prosecution of a criminal offence.

Attorney-General

We have already considered the part played by the Attorney-General in Chapter 3. In particular, he/she appoints the Director of Public Prosecutions (see below) who acts under the superintendence of the Attorney-General. He/she can also bring prosecutions where no member of the public would have *locus standi* (no right to be heard) (see *Gouriet* v *Union of Post Office Workers* (1977), Case **19**)).

In addition, some criminal charges require the consent of the Attorney-General before a prosecution can be commenced. Examples are:

- conspiracy; and
- contempt of court where the contempt is in a publication such as a newspaper.

Director of Public Prosecutions

The duties of the Director (DPP) are to be found in s 3 of the Prosecution of Offences Act 1985. Major duties are:

- to institute and conduct criminal proceedings because of the importance or difficulty of the case;
- to appear for the prosecution if the court so directs in appeals from the Crown Court to the Court of Appeal (Criminal Division) and from there to the House of Lords and appeals from the High Court to the House of Lords in criminal cases;
- to consent or refuse consent to a prosecution where an Act of Parliament states that a prosecution may not proceed without it.

Some offences requiring the consent of the DPP are:

- under s 38 of the Health and Safety at Work etc. Act 1974 prosecutions relating to health and safety offences, e.g. by employers: an inspector of the Environment Agency may give consent instead of the DPP; and
- child abduction under the Child Abduction Act 1984.

Crown Prosecution Service

The CPS was set up by the Prosecution of Offences Act 1985. The DPP is its head. The Service is divided into areas coinciding with the boundaries of the various police forces. The CPS London covers the Metropolitan Police and the City of London Police. The CPS is not subject to instruction by the police but takes over prosecutions from the police by deciding whether proceedings should be instituted or, if already instituted, discontinued. The CPS also determines what charges should be preferred.

Serious Fraud Office

The Serious Fraud Office was put in place by the Criminal Justice Act 1987. Its head is the Director who is appointed by and works under the superintendence of the Attorney-General. The SFO's functions are to investigate suspected offences appearing to involve serious or complex fraud and to initiate and conduct criminal proceedings that relate to such fraud. The SFO may also take over existing prosecutions. The major difference between the SFO and the DPP is that the former has investigatory powers whereas the CPS has not. In addition, the staff of the SFO includes fraud investigators and accountants in contrast to the CPS which is staffed by lawyers only.

Other bodies involved in prosecutions

The following are important in terms of business:

- the Department of Trade and Industry, for breaches of company legislation;
- the Inland Revenue for cases of tax evasion;
- Customs and Excise for VAT frauds; and
- the Information Commissioner for breaches of data protection legislation.

Private prosecutions

Individuals may bring private prosecutions but the DPP may take these over and having done so may discontinue them but not where there is evidence to support the prosecution. Where

in a private prosecution the accused is committed for trial the police can be required to make available all statements and exhibits which they have.

Getting the accused into court

It is obviously necessary to the success of a criminal prosecution that the law provides a method for getting the accused before the court. The following materials are relevant:

Arrest

The accused may be arrested without a warrant and charged with the offence at the police station and released on police bail to attend a magistrates' court on a specified date to answer to the charge. Where there is no bail the defendant comes before the court to answer the charge while still in police custody.

Laying an information

If there is no arrest, the prosecution is currently initiated by the laying of an information before a magistrate or a magistrates' clerk. The information must be laid by a named person who disclosed his or her identity. Often informations are laid by the police in the name of the Chief Constable or a senior officer. The information will ask for a summons to be issued requiring the attendance of the defendant to appear before magistrates to answer the charge or a warrent for arrest so that the defendant can be brought before the magistrates to answer the charge.

The information process differs from the arrest and charge because the individual against whom the information is laid is at liberty and is not detained at a police station while the charge is investigated and drawn up. The information is to secure the attendance of the individual at court. An information is laid when it is received by the justices' chief executive for the relevant area.

Issue of summons

The magistrate before whom the information was laid has power to issue a summons which is usually served upon the defendant by post.

Issue of a warrant

The magistrate before whom an information is laid has power to issue a warrant for the arrest of the person named in it provided in this case that the information is made on oath and the offence is an indictable offence or punishable by imprisonment or the defendant's address is not well enough established to serve a summons.

Since many offences carry a power of arrest without warrant, it is not usual to issue warrants in the way described above.

Reform

A major reform effected by s 4 of the Criminal Justice Act 2003 is to enable the immediate grant of bail from the scene of arrest if there is no immediate need to deal with the person

arrested at a police station. The police have a discretion to decide when and where an arrested person should attend a police station for interview. This type of bail is referred to as 'street bail'.

At the time of writing, s 4 of the 2003 Act was not in force.

New method of instituting proceedings

Section 29 of the Criminal Justice Act 2003 provides for a new method of instituting criminal proceedings which is available to a public prosecutor as defined in subsection (5). This method replaces the laying of an information and issue of a summons. Public prosecutors include the police, the CPS and the Director of the Serious Fraud Office. In practice, prosecuting lawyers from the CPS are taking over the job of charging suspects because of evidence that this reform could reduce the number of trials that collapse. The procedure consists in the issue to the person to be prosecuted of a *written charge together with a written requisition* for him or her to appear before a magistrates' court to answer to the charge. The written charge and the requisition must be served on the person named and copied to the court. Subsection (4) prohibits public prosecutors from laying an information for the purpose of obtaining the issue of a summons. They may still do so, however, for the purpose of obtaining the issue of a warrant (see above). Section 31 removes the need for warrants to be substantiated on oath.

At the time of writing, ss 29 and 31 were not in force.

Procedure at the police station

At the beginning of criminal proceedings a person is a suspect and this section deals, among other things, with the law relating to the detention, treatment and questioning of a suspect by the police. References in this section are, unless otherwise indicated, to the Police and Criminal Evidence Act 1984 (PACE).

Arrestable and serious arrestable offences: abolition

This text up to the 14th edition used to refer to arrest without warrant for an arrestable or a serious arrestable offence. An arrestable offence was one punishable with a maximum of five years' imprisonment or more. It became a serious arrestable offence if it led to the death of any person or serious injury or serious financial loss and that which was done was intended or likely to lead to the relevant result. Sections 24 and 116 of PACE applied.

Radical changes have been made to PACE by the Serious Organised Crime and Police Act 2005 and new PACE Code G. Powers of arrest have been completely overhauled to give the police the power to arrest for any offence subject only to a necessity requirement. Additionally, the concepts of 'arrestable offence' and 'serious arrestable offence' have been abolished. The effective date for the abolition of these pre-conditions for the exercise of police powers was 1 January 2006.

Thus, all offences are arrestable and certain other police powers other than arrest which applied only where a serious arrestable offence had taken place (e.g. the power to set up road blocks) now apply only to the committal of indictable offences.

The above powers do represent, as Code G states, an obvious and significant interference with the right to liberty guaranteed by the Human Rights Act 1998 and the Convention on Human Rights Art 5. The Code does, however, stress that the use of the power must be fully justified and those exercising the power should consider if the necessary objectives can be

achieved by other less intrusive means and that arrest must never be used simply because it can be used.

Attendance at a police station

Let us now follow the progress of John Doe through the relevant procedures. He has stolen £500 from an elderly pensioner who was leaving a building society having threatened her with a knife. He is known to the police for this kind of street crime. There are two ways in which John may arrive at a police station:

- *As a volunteer*, assisting the police with their inquiries following a call at his home by police: in this situation s 29 applies and John must be allowed to leave at will unless he is arrested and informed that this is so. Arrest may occur if police questioning gives rise to a reasonable suspicion that John may be guilty of the offence.
- *By being arrested* away from the police station, in which case, under s 30 he must be taken to a police station as soon as is reasonably practicable after arrest. The 1984 Act requires that prisoners who will be detained, or are likely to be detained, for more than six hours must be taken to a 'designated' police station. Such a police station is one designated by the Chief Officer of Police as having enough facilities to detain arrested persons. Those who come to the police station following arrest must be taken before a custody officer who must hold at least the rank of sergeant. Under s 37 the custody officer is required to see whether there is enough evidence to charge John, and he may detain him for such period as is necessary to be able to make that decision. Except, perhaps, in those cases where a suspect has been caught in the act before witnesses, which is not the case here, there is unlikely to be enough evidence to charge John at this stage.

Incidentally, in *DPP* v *L* [1999] Crim LR 752 the Divisional Court of Queen's Bench ruled that a custody officer is not required to inquire into the legality of the arrest and if it is found subsequently to have been unlawful the decision to detain will not be invalidated. Where the custody officer knows that the arrest has been unlawful he or she should consider whether detention can be justified especially in view of the Human Rights Act 1998.

John will, therefore, be released with or without bail, though the custody officer may keep him at the police station without being charged in order to get more evidence, e.g. (1) by searching John's premises, or (2) to take samples in, e.g., alleged sex offences or, (3) as is most often the case, to carry out further questioning. John may, therefore, be detained for the first or third reasons in the circumstances of our case. A custody record must be kept by the custody officer and a legal representative attending the suspect can inspect it and a copy must be given to the suspect or his legal representative, on request, when the suspect goes before a court or is released from the police station.

Detention without charge

The basic detention periods without charging John are as follows:

- The general maximum period is 24 hours from arriving at the police station or from arrest whichever is the earlier.
- Where there is an indictable offence, as John's offence would seem to be, further detention of up to 36 hours from arrival can be authorised by a superintendent under s 42.

  Section 7 of the Criminal Justice Act 2003 (as amended by the Serious Organised Crime and Police Act 2005, Sch 7) extends the time for which a person may be detained without charge under the authority of a superintendent, from 24 to 36 hours for *any* indictable

offence. This will assist the police in dealing effectively with offences such as robbery (seemingly robbery under s 8 of the Theft Act 1968) from a bank or building society with or without the use of a firearm or imitation firearm. These cases are sometimes extremely difficult or impossible to complete in terms of the necessary investigation processes within 24 hours.

- Detention beyond 36 hours requires that the offence is an indictable offence and the grant of a warrant of further detention by a magistrates' court under s 43. The grounds for granting an extension up to and beyond 24 hours – either by a superintendent or the magistrates – are that detention is necessary to secure or preserve evidence or obtain evidence through questioning (which is the most common ground) or that the investigation is being conducted diligently and expeditiously.
- A magistrate's warrant may initially be granted for a period not exceeding 36 hours, but can be extended by further periods until 96 hours from arrival at the police station have expired. *This is the maximum period for detention without charge* except in cases of terrorism.
- A different regime applies to terrorism investigations. The periods of time differ, i.e. 48 hours instead of 36 hours for initial detention, 14 days instead of 96 hours for the maximum period, and the authority for detention beyond the initial period is given by a 'designated judicial person', e.g. a district judge (magistrates' courts), rather than by magistrates (Terrorism Act 2000). The above periods are changed by the Terrorism Act 2006. The initial period becomes seven days from arrest, the period of 14 days becomes 28 days, but any extension beyond 14 days must be authorised by a High Court judge and the detention must be supervised by a High Court judge.

Detention review

An inspector (or a rank above) must carry out a detention review within six hours of the first authorisation and thereafter at intervals of nine hours. The purpose is to ensure that the grounds for initial detention still apply. The custody record must give details of these reviews.

Bail after charge

We will assume that John has been charged. If there are no reasons relating to the investigation for detaining him further, s 38 provides that he be released from police detention either on police bail or without bail, unless there are grounds for detention after charge. These are, e.g., that the suspect's name and address have not been ascertained or it is reasonably thought that he may have given a false name and address or that he may not be at that address long enough for a summons to be served or that he may not answer to bail or may commit an offence while on bail (s 38). The bail decision is taken by the custody officer.

Section 25 of the Criminal Justice and Public Order Act 1994 provides that bail cannot be granted where a person is charged with murder, manslaughter, rape or attempted rape, *if he/she has been convicted of any of these offences,* unless there are exceptional circumstances.

Rights in connection with legal advice

The position is as follows:

- ***Volunteers***. These have an absolute right to legal advice in private or to get in touch with anyone outside the station at any time. These rights are conveyed to the suspect by a notice which is given to him on arrival. The duty solicitor can give this advice if the suspect requires it.

- ***Those under arrest***. The basic provision is to be found in s 58 of PACE, which states that a person arrested and held in custody at a police station or other premises is entitled, if he so requests, to consult a solicitor privately at any time. Code C para 6 states that detainees may consult and communicate with a solicitor in person or in writing or by telephone and that free independent legal advice is available from the duty solicitor. A revision of the Code adds a Note 6J, which states that this right to consult or communicate in private is fundamental. These suspects then are informed by the custody officer that they have a right to free legal advice and to have a person informed of the arrest and of the right to consult the PACE codes of practice. These rights are set out in a notice given to the suspect.

The suspect then signs the custody record to indicate whether or not he requires advice. Advice may be from his own solicitor if available or alternatively the duty solicitor.

Duty solicitor

The duty solicitor scheme operates throughout all areas of the country and ensures that a solicitor is available on a 24-hour basis to go to police stations to advise suspects who are being detained. The advice is free, regardless of the suspect's means, and the solicitor is paid at a fixed hourly rate by the Criminal Defence Service, which is an arm of the Legal Services Commission.

As regards competence, this is a matter for the Legal Services Commission's accreditation scheme. In broad terms, accreditation requires that duty solicitors must be competent to do the relevant work and have relevant experience. In addition, they must have attended both an advocacy course and a course for police station advisers.

The LSC has introduced a new method of delivering police station duty solicitor services through CDS (Criminal Defence Service) Direct. Under the scheme, a request for a duty solicitor goes to CDS Direct unless the offence is indictable only or the time at which the suspect will be interviewed is known. The CDS will give initial advice and decide whether attendance by a duty solicitor is required. If so, the case goes to a solicitor providing criminal defence services. In addition, where the service is for telephone only advice, all duty solicitor services are handled by CDS Direct.

Denying access to advice

Where the suspect is in detention for an indictable offence, the right to legal advice may be suspended for up to 36 hours if a superintendent authorises it. The period in the case of terrorism is 48 hours. Those who have not committed such offences have an unqualified right to advice (s 58). A superintendent may authorise suspension where, for example, there are reasonable grounds to believe that the suspect or another person has benefited from the criminal conduct (aimed mainly at drug trafficking) and the recovery of the value of the property constituting that benefit will be hindered (as where, perhaps, the pensioner's money has not been recovered). There are also grounds for delay with terrorism suspects, where, for example, there are reasonable grounds for believing that it will interfere with the gathering of information relating to terrorist activities. The right to have a friend or relative notified of the arrest may be delayed for the same reason.

Interviews – generally

All interviews at police stations other than those relating to purely summary offences, e.g. driving without insurance, should be tape-recorded. Two tapes are used. One is sealed and

signed by the suspect or interviewing officer. The other tape is a working copy to which the defence has a right of access. Interviews other than at the police station may be off-tape. Normally the suspect must be given the chance to read the record and to sign it as correct or to indicate any parts which he thinks are incorrect.

The 2006 revision of Code E alters all references to 'tape' to 'recording' and adds a new definition of recording media as 'any removable, physical audio recording medium (such as magnetic tape, optical disc or solid state memory) which can be played and copied'. It would now be permissible to refer to this procedure as audio recording.

Interviews – suspect protection

There are the following main safeguards for the suspect:

- the suspect must be reminded of the availability of free legal advice;
- a caution must be given. This is set out at the beginning of this chapter;
- the suspect must not be unfit through drink or drugs so that he cannot appreciate the significance of the questions;
- a juvenile, i.e. a person under 17, must have an 'appropriate person' at the interview. This may be a parent or guardian of the juvenile or if one is not available or is unsuitable, as where that person is also involved in the offence, a social worker, solicitor or duty solicitor at the station may act.

The right to silence restricted

Section 34 of the Criminal Justice and Public Order Act 1994 deals with the failure by a suspect to mention facts when questioned or charged. Provided the suspect was under caution, charged or officially informed that he/she may be prosecuted at the time, the court at his subsequent trial can draw adverse inferences from the failure to disclose. So in John's case, if he does not answer a question relating to his whereabouts at the time of the offence but at the trial raises a defence of alibi, i.e. that he was at home at the relevant time, the court can draw adverse inferences from the fact that John did not mention this in answer to the question. Essentially, it means that the court may not believe John and think that the alibi has been made up after the event.

Under s 58 of the Youth Justice and Criminal Evidence Act 1999 inferences from silence are not permissible where the defendant has not had prior access to legal advice.

The trial of criminal proceedings

There are some preliminary considerations as follows.

Time-limits

- ***Summary offences***. The magistrates cannot deal with the prosecution of a case if the information (see below) is laid more than six months after the alleged offence was committed. An information is laid when it is received at the court office by an authorised officer (s 127, Magistrates' Courts Act 1980).
- ***Indictable offences*** (including offences triable either way). There are no statutory time limits for commencing criminal proceedings (s 127, MCA 1980). Defendants have, however,