

Preface

The Police and Criminal Evidence Act 1984 (PACE) is undoubtedly the most important piece of legislation regulating police investigation and the procedural rights of suspects since the creation of ‘modern’ policing in the 19th century. Not only did it introduce a statutory right for those held in police custody to consult a lawyer, with a non-means-tested legal aid scheme to give it practical effect, but it created a detailed and comprehensive scheme for regulating the major investigative powers of the police. PACE also provided legislative recognition of the need for transparent and accountable policing, and of the rights of those detained by the police, more than two decades before incorporation of the European Convention on Human Rights by the Human Rights Act 1998. In many ways, PACE has been at the forefront of attempts around the world to ensure a fair pre-trial process, and that the police are subject to the rule of law.

During the three decades since PACE was introduced, the character of policing and of the criminal justice process has significantly changed. Globalisation and technological developments have meant that crime, and crime investigation, have become more complex and more transnational. Successive governments have given the police ever-increasing powers. It may surprise many readers to be reminded that when PACE was first enacted, the police required the authority of a superintendent to take the fingerprints of a person arrested but not charged. Now, fingerprinting is routine, as is the taking of photographs and DNA samples. The police have powers to take x-rays and ultrasound scans, and to require a person to undergo drug-testing following arrest, in addition to extensive powers to conduct personal and property searches. The only major limitation has been the restrictions on police bail introduced by the Policing and Crime Act 2017 – bail can only be imposed if it is necessary and proportionate, and is subject to an initial limit of 28 days. However, this period can be extended, initially by a superintendent and subsequently by a magistrates’ court, and it has to be doubted whether the complex provisions will make much difference to those involved in serious or complex investigations. The availability and use of out-of-court disposals, having rapidly expanded during the first decade of this century, has decreased in recent years, but the increasing pressure on defendants to plead guilty at an early stage places even greater emphasis on what happens during the investigative stage of the criminal process.

However, whilst the need for good quality and adequately funded legal advice and assistance at police stations has increased, the ability of criminal defence lawyers to meet those challenges has been weakened by successive governments and the Legal Aid Agency. Fixed fees for police v

station work, and a reduction in fees in actual terms, has meant that many law firms and lawyers do not feel able, and are certainly not encouraged, to carry out their work to a high standard. The instability resulting from repeated attempts to introduce various forms of competitive tendering has resulted in a fall in the number of firms engaged in police station work, an inability of those firms still doing legal aid work to plan for the future, and a blight on recruitment. The introduction of the Criminal Defence Direct scheme has meant that suspects arrested for less serious offences have had to accept an inferior, telephone-only, service and a limit on client choice. The Legal Aid Agency appears intent only on doing the government's bidding, and neither the Agency nor the Ministry of Justice demonstrate a commitment to good quality, effective, criminal defence as an essential element of a fair and effective criminal justice process.

There is something of an irony in all of this. The European Court of Human Rights has recognised, in a series of judgments, that the right to fair trial requires that a suspect has access to a lawyer both before and during police interrogations. Whilst many European governments accepted that they had to introduce a legal right to advice and assistance at the investigative stage, in some countries it was resisted – especially the right to a lawyer during police interrogations. However, the European Union Directive on the right of access to a lawyer, which came into effect in 2016, meant that all EU member states had to introduce such a right, although in some countries there are still severe restrictions on what lawyers can do in police interrogations. At the global level, the United Nations adopted principles and guidelines on access to a lawyer in criminal proceedings, including at the police station, in 2012 and whilst they are not binding, a number of governments are introducing laws and schemes giving suspects the right of access to a lawyer. PACE led the way, but at the very time that governments and agencies in many countries are looking to see how it is done here, the provision of good quality legal advice at police stations in England and Wales is under threat as never before.

My original purpose in writing this book was to help criminal defence lawyers to be clear about their role at the police station, and to give them the information – law, guidance, procedures, strategies – to enable them to perform it effectively. The role of defence lawyers in the criminal justice process, especially at the investigative stage, is often undervalued, especially by governments and others who want to be seen to be ‘tough on crime’, and who want to reduce spending on legal aid without, apparently, caring about the underlying values of respect, fairness and justice. Despite the many challenges, I hope that this book continues to fulfil its purpose.

As always, a book of this kind inevitably relies on the ideas and contributions of many others. In particular, I am indebted to Jawaid Luqmani who, as in previous editions, wrote the chapter on advising immigration detainees and whose task, as a result of successive governments' determination to be seen to be deterring immigration, becomes ever more complex. I remain grateful for the work done by Gareth Peirce, Roger Ede and Simon Hillyard in reading and commenting upon part or all of the original script. I also thank the many criminal defence lawyers with whom I have worked over the years, those who have attended courses that I have presented, and those who have contacted me directly, for sharing their experiences and

helping me to better understand the issues and challenges confronted in practice. My thanks also go to my publisher, Esther Pilger, and the staff at the Legal Action Group who continue to demonstrate, often in difficult circumstances, their commitment to improving access to justice. Finally, as they know, none of this would be possible without the joy and support of a lovely family.

The law is stated as at 1 May 2017.

Ed Cape
May 2017