



PACE (The Police and Criminal Evidence Act 1984): Past, Present, and Future

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PACE (The Police and Criminal Evidence Act 1984): Past, Present, and Future

Michael Zander, QC, FBA *

Abstract: The article traces the 25-year history of PACE from its origins in the Report of the Philips Royal Commission on Criminal Procedure, through its Parliamentary stages and the two major governmental Reviews of PACE in 2002 and 2007, and considers whether the Act provides the balance envisaged by the Philips Commission.

The Police and Criminal Evidence Act 1984 (known as PACE) came into force on 1 January 1986. The 25th anniversary is therefore only a few months away. In March 2007 the Government launched a major review of PACE. Although that process has so far had little result, the review itself is complete. It is therefore a good moment to look back and consider this piece of legislation with which I have had some involvement since its beginnings – indeed from before its beginnings.

The Act was the result of the report in 1981 of the Royal Commission on Criminal Procedure chaired by Sir Cyril Philips.¹ Sir Cyril asked me to conduct a preliminary seminar for the members of the Commission as part of their introduction to the subject, but my involvement in fact preceded the establishment of the Commission. In May 1977, one month before the setting up of the Royal Commission was announced, the *Criminal Law Review* published an article I had written entitled ‘The Criminal Process – A Subject Ripe for a Major Enquiry’. I

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¹ Royal Commission on Criminal Procedure, Report Cmnd 8092 (1981).

sent it, in advance of publication, to Roger Darlington, Special Adviser at the time to Merlyn Rees, the Home Secretary. I followed this up with a meeting over lunch with Roger Darlington on 4 April. He liked the idea and took it forward with Merlyn Rees, and within a short while the question was under active consideration by Ministers and senior officials. Elwyn Jones, the Lord Chancellor, and Sam Silkin, the Attorney General, I am informed were both initially doubtful, but the Home Office prevailed. The establishment of the Royal Commission was announced by Jim Callaghan, the Prime Minister, on 23 June 1977. The idea had moved from proposal to reality in a matter of a few weeks.²

Why was the time ripe? The topic had been a running sore ever since the publication in 1972 of the ill-fated 11th report of the CLRC (the Criminal Law Revision Committee). The Committee's 11th Report³ was eight years in gestation, but all that work had apparently been in vain. The entire report had foundered as a result of the furore created by just one of its recommendations – that adverse inferences could be drawn from a suspect's silence in the police station. When the report was debated in parliament this single issue dominated almost all the speeches made. The report stood condemned to such an extent that the Home Office came to the conclusion that it was impossible to implement even the uncontroversial recommendations of a report so widely regarded as fatally flawed.⁴

That was 1972. By 1977 there had been three other major reports on the same area – the Report of the Thompson Committee on Criminal Procedure in Scotland, the Report of the Law Reform Committee of Australia on Criminal Investigation, and the American Law Institute's Model Code of Pre-Arraignment Procedure. The crucial difference between those three reports and that of the CLRC was that they all tackled criminal procedure, whereas the CLRC's terms of reference limited it to considering only the rules of evidence.

In my *Criminal Law Review* article I canvassed a longish list of pre-trial, trial, and post-trial issues that required attention. I urged that the proposed inquiry should be given terms of reference similar to those of the Thompson Committee which was charged with considering whether changes were required in both law and practice. The terms of reference of the Philips Royal Commission expressly asked it to consider both criminal procedure and evidence.

The central message of the CLRC's report was that the criminal justice system was tipped too far in favour of the defence. Virtually every one of the Committee's recommendations was aimed at strengthening the position of the prosecution. By contrast, the central message of the Philips Report was the need for what it called a 'fundamental balance' between the positions of the prosecution and the defence. The need for this balance had been emphasised by the Prime

² Regrettably, there is nothing in the Public Record Office about the discussions between Ministers and civil servants leading to the decision to set up the Royal Commission.

³ *Evidence (General)*, Cmnd 4991 (1972).

⁴ M. Zander, 'The CLRC Evidence Report - A Survey of Reactions' (7 October 1974) *Law Society's Gazette*.

Minister in his statement announcing the establishment of the Royal Commission. (There was 'a balance to be struck here between the interest of the whole community and the rights and liberties of the individual citizen'. The Government had decided that the time had come for the whole criminal process to be reviewed 'with the fundamental balance in mind'.) The Commission developed the theme of the concept of a fundamental balance in the Introduction to the report:

At first sight the notion of a fundamental balance of the kind specified may appear unarguable, almost axiomatic, a matter of common sense, but further consideration of the matter raises a number of difficult, and perhaps in the last analysis, insoluble questions. Can there be in any strict sense an equation drawn between the individual on one side and society on the other?⁵

Having canvassed some of the questions, the Commission ended this passage:

What is clear is that in speaking of a balance between the interests of the community and the rights of the individual, issues are being formulated which should be the concern not only of lawyers or police officers but of every citizen.⁶

The CLRC consisted solely of lawyers. The 15-strong Philips Royal Commission was composed of the usual mixture of professionals and amateurs. Sir Cyril Philips was an oriental historian and university administrator who had had no previous involvement with criminal justice. He proved to be a highly effective chairman.

The CLRC had neither money nor resources for research. Philips commissioned and published 12 research studies. The CLRC undertook no consultation. The Royal Commission engaged in elaborate consultation, receiving 447 submissions, and devoted twenty half or full-day sessions to oral evidence, as well as visiting Holland, the USA, and Australia in addition to Scotland, Ireland, and Northern Ireland.

Where the CLRC's Report had been received with almost universal condemnation, the Philips Commission's report was generally well received, though not by the civil liberties lobby led by the National Council for Civil Liberties (now known as Liberty) and the Legal Action Group (LAG). They declared that the report was too pro-prosecution – a view that was taken up vociferously by the Labour Opposition.

The Home Office quickly decided that the Royal Commission's report was a basis for legislation. It set up internal working parties and issued a long list of examination-type specific questions for comment by interested groups and individuals. In November 1982, only 20 months after publication of the report, William Whitelaw, the then Home Secretary, introduced the first version of the

⁵ Royal Commission on Criminal Procedure, n 1 above, 5, para 1.12.

⁶ *ibid.*

Police and Criminal Evidence Bill into the House of Commons. Although it was broadly based on the Commission's Report, it by no means followed all of its recommendations.

Willie Whitelaw's Bill proved highly controversial. It was subjected to fierce criticism during its passage through the House of Commons in the winter of 1982 and the spring of 1983. The great issue of the suspect's right of silence in the police station, which had caused the downfall of the CLRC's report, hardly figured in the debate. The Royal Commission rejected the CLRC's view that the right to silence should be modified by the possibility of adverse inferences. This provoked little controversy. In 1982-1983 the furious debate over the Bill centred mainly around whether the police should have a right to see a doctor's files or the priest's notes of what transpired in the confessional or the records of a citizen's advice bureau. The number of instances when the police would actually want to exercise such a power must be rather small, but it was the focus of heated exchanges. Even the bishops weighed in. The onslaught caused the Government to retreat and to introduce the concept of 'excluded material'.

In May 1983, Margaret Thatcher called a General Election, and the first Bill had to be abandoned. The Mark II Bill introduced in October 1983 by the new Home Secretary, Leon Brittan, though different in some respects from that of his predecessor, was equally controversial. The Committee stage in the Commons was the longest on record for number of sittings.

Both Bills were extensively amended. In a few instances the amendments were the result of political tides the government was unable to resist. In the first Bill that was the case with access for the police to confidential material. In the second Bill it happened over the right of the police to have legal representation on serious disciplinary charges, where the Police Federation formed an unholy but successful alliance with the Law Society and the National Council for Civil Liberties. The vast majority of amendments made were moved, however, by the government itself because it was persuaded that the amendment was desirable. The Home Office, throughout, showed itself willing to listen and to respond constructively to suggestions from a wide variety of bodies and individuals.

Although the Act finally received Royal Assent in 1984 it did not come into force until 1 January 1986. The reason for this uncommonly long delay was the Miners' Strike which kept the police otherwise occupied for a year from March 1984 to March 1985. When that was finally over, months were spent by the police in training in preparation for the new system. I was involved in delivering some of that training and recall being quite impressed with the seriousness with which it was being taken.

The Philips Royal Commission was set up by a Labour Government. The Commission's report was implemented by a Conservative administration. In the parliamentary debates there were major party political differences over many of the provisions of the Bill, but as the Act took effect, gradually these party political differences began to fade. By 1991, when the Runciman Royal Commission on

Criminal Justice was set up, PACE had been functioning for six years. The Royal Commission, of which I was a member, received mountains of evidence. None of that evidence called into question the basic structure of the PACE system. By the beginning of the 1990s it had apparently been accepted by all as a piece of legislation that would be with us into the indefinite future.

Which is not to say that there was agreement as to its content. As has already been noted, the amending of PACE was in full flow during the passage of the two Bills in 1982-1984 and has continued up to the present day. Over the years there have been literally hundreds of amendments – I believe I am correct in saying, every one of which was moved by the Government of the day.

Despite the fact that some topics have been removed and transferred to other statutes, both the Act and the Codes of Practice have grown like Topsy. In the first edition of my book on PACE, the Act took up exactly 100 pages; in the latest 5th edition it takes up 135 pages. In the first edition, the PACE Codes took up 47 pages; in the current edition they take up 152 pages.

There have been two significant reviews of PACE, both, as it happens, initiated by the Labour Government. In May 2002, Mr David Blunkett, the then Home Secretary, announced what he called a ‘fundamental review of PACE’ to be conducted by the Home Office and the Cabinet Office. The terms of reference were:

To undertake a review of the requirements of the Police and Criminal Evidence 1984 (PACE) with particular emphasis on, but not limited to, those aspects which govern detention and the custody process. Without compromising the rights of those that the Act protects, the purpose of the review is to identify possible changes to the rules that could: simplify police procedures; reduce procedural or administrative burdens on the police; save police resources; speed up the process of justice.’

The emphasis in short was on efficiency. The review was carried out jointly by the Home Office and the Cabinet Office. From start to publication it took six months. It was an unimpressive affair. In a comment at the time, under the heading ‘The Joint Review of PACE: A Deplorable report’, I wrote:

In some 40 years of experience of the civil and the criminal justice systems, including 25 years as legal correspondent of a national newspaper where one had to read a vast range of official documents, I have never come across anything like this report.⁷

The Review team consisted solely of officials – four from the Home Office and three from the Cabinet Office. Far from being a fundamental review, it was a superficial and shallow exercise. It, for instance, claimed to have interviewed eight

⁷ (14 February 2003) *New Law Journal*, 204.

academic PACE experts. I was one. The so-called interview consisted of a ten-minute phone conversation with someone who appeared to know little about the subject. Others of the eight fellow academics said their experience was much the same.

In 32 substantive pages the report dealt with no less than 43 separate topics. Each issue was described in a few lines. There then followed 'Options proposed' – three or four bullet points each in summary form in a line or two; 'Preferred Action', a line or two identifying the recommended action; and the proposed 'Timescale' for implementation. There was not a single mention of any item from the considerable scholarly or research literature on PACE. If 'by discussion' is meant an elucidation of pros and cons, not one of the issues was discussed.

The overall conclusion was that PACE was viewed positively by police, the courts, and the legal profession as 'having standardised and professionalised police work', but that it required 'updating and reorganizing to ensure that it reflects changes in society over the last twenty years. In particular, to address the commonly held observation that PACE has become increasingly rigid over time as a result of the influence of case law and the accumulation of additional legislation'.⁸

The Review dealt with the caution and the right to silence in 15 lines. The issue was posed in four short sentences:

Police suggested to the Review that the capacity to draw adverse inferences from silence is rarely used in practice. Both police and legal professionals stated that they were unwilling to direct a jury towards adverse inferences from silence. Additionally, police suggested that solicitors have found a way around this by using prepared statements. Legal professionals agreed that prepared statements were used by some unscrupulous solicitors to protect their clients.

There were two options proposed: 'Strengthen the police / CPS's ability to have adverse inferences drawn to the attention of the court' and 'Issue clearer guidelines on the caution'. The Review's Preferred Action: 'There is a need for a definitive discussion on this matter with key stakeholders, mediated by a recognised authoritative figure to determine a clear course of action.' The Timescale: 'Discussion should be completed and a way forward decided by early 2003.' (The Report was published in November 2002.) No such meeting ever took place, and the recommendation went nowhere.

For me the most important proposal in the Joint Review's report concerned the PACE Codes of Practice. The Codes are a central part of the PACE system. Indeed, I imagine that police officers consult the Codes far more often than the Act itself. Prior to PACE we had the Judges Rules regarding interviews with

⁸ Executive Summary, para 5.

suspects. They were very brief – about a page long – and of little value since the judges themselves gave them little backing. Not surprisingly, they were regarded by the police as optional. The PACE Codes of Practice, by contrast, are long and detailed. Breaches of the Codes cannot be made the subject of civil or criminal proceedings, and disciplinary proceedings for breaches are very rare. But the courts can exclude evidence where a serious breach has occurred, and they do so. Much more significant is that, from the start, the police recognised that the Codes were not ‘Best Practice’, ie aspirational, but ‘the normal way of doing business’. That obviously does not mean that all the myriad rules of the codes are followed by every officer all the time. It means that the Codes are regarded by all ranks as rules basically to be followed.

The Joint Review’s report listed six Options for improvements regarding the Codes and adopted all of them. The Codes should be reworked in plain English. They should include flow diagrams and examples. New ways should be found for distributing the Codes and for keeping police officers up-to-date regarding relevant case-law. The most far-reaching proposal was that ‘the Codes should be simplified and reduced in bulk by being reworked into a framework of key principles with the more detailed guidance moving to National Standards’. No explanation was given as to the meaning of ‘key principles’ or the ‘National Standards’ to which the more detailed guidance was to be removed. It was a nice irony that a proposal aimed at making the Codes more comprehensible was itself incomprehensible. The report also suggested that the Codes should be ‘returned to the original fluidity of the PACE framework’ and that they should give police officers more discretion – ‘encouraging them to use their professional judgment’.

One read those words with disbelief. It is precisely the hard-edged detail and the elimination of discretion that gives the Codes their strength and that has brought about the improved professionalisation of policing, especially in the police station. The detail tells the police what is required of them and gives the suspect, his advisers, and the courts a measure of whether the rules have been followed. If the detail were removed, we would be back to the bad old pre-PACE days when every police station was a law unto itself, where discretion and the Ways and Means Act ruled supreme.

Some of the ‘Proposed actions’ canvassed in the Joint Review’s report were implemented in the Criminal Justice Act 2003. Others surfaced in a fresh consultation paper published by the Home Office in August 2004 entitled *Modernising Police Powers to Meet Community Need*. This was not, however, a serious exercise in consultation. The time allowed for responses from August was eight weeks, ie expiring in October. The Bill to implement many of the proposals was introduced in the Commons on 24 November and became law the following year as the Serious Organised Crime and Police Act 2005.

The so-called consultation paper made no reference to proposed changes to the PACE Codes.

The second review of PACE was a very different affair from that conducted in 2002. It did engage in proper and serious consultation. It began in March 2007

with a consultation paper again entitled *Modernising Police Powers*. In his Foreword, the Minister, Mr Tony McNulty, acknowledged the importance and values afforded to the individual in the criminal justice system. He asserted that there were however 'bureaucratic processes and over-complicated procedures in the application of those safeguards, which do not serve the best interests of the police or the criminal justice system, or importantly those of the victim'. His aim he said was 'to re-focus the investigation and evidence gathering processes on serving the needs of victims and witnesses and helping raise the efficiency and effectiveness of the police service'.

This was an inauspicious beginning. I do not share the Minister's view that the investigation and evidence gathering processes should be re-focused to serve 'the needs of victims and witnesses'. This has become a fashionable mantra, rehearsed repeatedly by Ministers. It is code for rebalancing the criminal justice system in favour of the prosecution.

The notion that the criminal justice system should be rebalanced in the interests of witnesses is frankly absurd. It is the duty of witnesses to give their evidence. The system should make appropriate arrangements to support them in doing so. End of story.

Nor do I accept that the interests of victims should be a central concern of the criminal justice system. Where relevant, they should of course be taken into account. But in regard to the investigation and evidence-gathering processes of the criminal justice system the interests of victims as victims (as opposed to potential witnesses) have little, if any relevance. The victim is of course likely to have an entirely legitimate concern that the person responsible for the crime be apprehended and convicted. But it is as wrong to make that personal interest the basis for altering the balance of the criminal justice system as it would be to do so because of the personal interest of the victim's mother. In respect of the proper balance of the criminal justice system, the victim, his family, and friends are simply members of the public with a particular interest in the outcome. The appropriate balancing of the system is not about them. The preoccupation with the position of the victim in this context is political correctness distorting straight thinking.

The March 2007 document also had an Introduction – written by Mr Vic Hodge, Director of Policing Policy and Operations Directorate. The task, he wrote, was to build on the work that had been done to examine how best PACE and the PACE Codes of Practice 'serve the demands of a modern police service'. In appearing to suggest that the interests of the police were to be regarded as trumping those of the citizen or the suspect, that formulation was not the happiest.

Mr Hogg acknowledged the success of PACE. The Act had been the subject of innumerable amendments. The codes had grown from the original four to the present eight. But the nature of the PACE system was essentially the same as when it came into force. It had grown considerably, but its basic character had not been challenged.

He then set out the criteria for judging whether changes would be beneficial. There were three: 1) Improving police efficiency; 2) Maintaining safeguards and enhancing accountability; and 3) Increasing Usability and Accessibility. It is striking and not, I think, commendable that improving police efficiency was listed first. Managerial values deserve recognition, but the system would be badly skewed if they are regarded as the top priority.

Getting to the content of the March 2007 consultation paper, the document was quite short, canvassing a great variety of issues in a somewhat sketchy form. It made few firm proposals. Its main purpose was to indicate topics for discussion and to invite suggestions.

This time, the changing of the structure of PACE and of the PACE Codes of Practice was again on the agenda. Chapter 2 of the consultation paper (headed 'Reviewing PACE and the PACE Codes') said, 'Since PACE was introduced, there has been a plethora of changes and related legislation which has impacted on PACE. Consequently, PACE and the Codes have become unduly complex and cumbersome.'⁹

One thought, wearily, here we go again.

There is no denying that PACE and the Codes have become much longer as a result of the innumerable additions that have been made. It could also be said that the total PACE package is now quite complex and cumbersome. But the complaint was '*unduly* complex'. It was not that the content should be altered by the scrapping of any of the many additions. The suggestion seemed to be, can one improve the way the material is presented whilst keeping the content?

In Home Office speak, there was said to be 'a need to consider how we can use the benefit of these changes whilst ensuring that PACE continues to provide the framework approach setting out police powers to investigate crime and the safeguards and protections for the public'.

Several new options were advanced:

- **Codification** – collecting and restating the law of PACE, and the opportunity should be taken 'to consider the benefits of a complete and fundamental review'.
- **The PACE Codes** – The Codes had grown in size and complexity. Whatever the reason the format and content of the Codes was 'very much written in a formal, legalistic style'. Given their legal status, this was understandable, but the potential existed 'to rationalise the style, format and presentation of the Codes so that they better meet the operational needs of the police, wider stakeholders and the public'.
- An independent review of the design and format of the Codes was being undertaken by the Stationery Office (TSO). Preliminary indications from

⁹ para 2.2.

that review were that ‘the format and presentation of the Codes are considered outdated and too complex. The answer? ‘Consideration should be given to the potential for statutory guidance to replace the Codes.’ I repeat, ‘for statutory guidance to replace the Codes’. The paragraph continued: ‘This would provide greater flexibility to update and review and the opportunity to consider the language and format used to best suit the needs of practitioners and users.’ A useful example, it added, was the *Safer Detention Guidance* published by NPIA (the National Policing Improvement Agency) which provided ‘definitive guidance to the police on custody and custodial care matters and by its very nature, reflects much of the content of PACE Code C’.¹⁰

CODIFICATION

It was not clear whether when it said ‘Codification’ the paper actually meant ‘consolidation’, which is what is generally understood when one speaks of bringing together in one statute what was previously scattered amongst a number of statutes. This is a purely mechanical exercise that has in fact already been achieved by the official Statute Law database, by the version of the statute as amended available on Westlaw (or in my book on PACE).

Codification in the sense of seeing whether the statute is still ‘fit for purpose’ is a very different undertaking. In a field as open to controversy as the correct balance of the criminal justice system, this could be a long and difficult process requiring a suitably constituted body like a Royal Commission to undertake it. No government would set up such an inquiry unless it was clear that there was a great deal wrong with the existing law. That is not the case with PACE. The burden of the complaint is not about the law but about ‘bulk and complexity’. In my view, it seems unlikely that the vast expenditure of time and effort, not only for those conducting such a review, but also for the entire ‘PACE community’ in writing submissions, would bear much, if any, significant fruit in regard to either bulk or complexity. It might even result in the bulk being increased. In short, codification would involve a great deal of work by a lot of people to little purpose.

THE STYLE OF THE CODES

The criticism that the Codes are ‘very much written in a formal, legalistic style’ has some validity. But given that these are rules that fall to be interpreted by lawyers and judges as well as by police officers, this seems appropriate. Moreover, the style is less formal and legalistic than a statute or statutory instrument. The aim of the draftsman of the Codes, I believe, has been to make them understandable for the ordinary police officer. (No attention has been given to the needs of the ordinary

¹⁰ para 2.7.

suspect. One of the helpful recommendations of the TSO Report is that a simpler version of the Codes be made available to suspects.) Despite all the talk of undue complexity, I think that for the most part they have succeeded remarkably well – though, as the TSO Report stated, there are things that could be done to improve their accessibility.

REPLACING THE CODES BY ‘STATUTORY GUIDANCE’

What would be the status of such guidance? The PACE Codes of Practice contain rules. Guidance is something quite different. As the House of Lords said in a case in 2005:

There is a categorical difference between guidance and instruction. In calling for hospitals to have clear written guidelines on the use of seclusion, the code acknowledges that hospitals are not bound simply to reproduce the terms of the code [...] No express obligation was placed on hospitals to follow the guidance [...]¹¹

If this were applied in the case of the PACE Codes, it would be left to individual police officers of whatever rank to decide whether there were cogent reasons for not following the provisions of the Code. What are now regarded by everyone as rules to be followed would become something less than rules which might or might not be followed. To say that this would be a very unhelpful development is a considerable understatement.

As to the suggestion that the document entitled *Safer Detention Guidance* would be a good model for the proposed guidance, this is difficult to comprehend. Far from that document providing ‘definitive guidance’, over and over again it refers the reader for further detail to the Act or the Codes. That is natural in a document intended to complement PACE. Scrapping the Codes or having them morph by some mysterious process into a guidance document would wreck the PACE enterprise.

One consequence is that one would lose the benefits of Parliamentary scrutiny. That may no longer be quite so significant a process as was the case when the first Codes were introduced. But it is still a valuable part of accountability.

The proposal in the March 2007 consultation paper that I did think valuable was the plan to set up a broadly-based PACE Review Board ‘to provide independent oversight of the consultation process’. The PACE Review Board began its existence in December 2007. Its members include a circuit judge and representatives of ACPO, the Police Superintendents’ Association, the Police Federation, the Association of Police Authorities, the Independent Police Complaints Commission, the Criminal Justice Council, the CPS, the Bar, the Law Society, the Institute of Legal Executives, JUSTICE, Liberty, and the Equality and

¹¹ R (*on the application of Munjaz v Mersey Care NHS Trust*) [2005] UKHL 58 at [20].

Human Rights Commission. The Board was chaired by a senior Home Office official. I was invited to be the academic member. Once I had been assured that joining would not prevent me from publishing comments on PACE developments, I was happy to accept the invitation. In August 2008, the Home Office announced that it intended to continue what it called this 'direct external link into policy development'. So the idea of a standing, multi-agency independent Board to advise Ministers had become a fixture.

Since the PACE Review has now come to an end, the Board has been reconstituted, with the same membership, as the PACE Strategy Board. Its terms of reference are to contribute to the determination of policy on policing powers; to assist in the evaluation of their impact on the criminal justice system and the rights of the individual; and to help raise public knowledge of their rights and improve access to what they should expect when coming into contact with the police. Details of its proceedings are on the Home Office PACE website.

That has been a positive outcome to emerge from the PACE Review. It would be foolish to expect too much from the Board, but from my experience as a member I would say that, if continued by the new Government, it will play a useful role in providing sensible advice for Ministers and officials. (Whether that advice is followed is of course a matter for them.) I have been impressed in particular at how often the very disparate membership has been able to agree that a proposed change in the PACE system was a good idea or a bad idea.

Otherwise, the PACE Review that was launched in March 2007 has not yet had any concrete achievements. It fell victim to a combination of its own lengthy process of consultation and unexpected events. The initial consultation from March to November 2007 produced some 200 responses, making over 700 proposals. In August 2008 the Home Office published a 50-page revised consultation paper *Government Proposals in Response to the Review of the Police and Criminal Evidence Act 1984*. This was a substantial document making a raft of firm proposals. The PACE Review Board met in February, March, and July 2009 to consider the proposals. The expectation was that officials would ask Ministers for decisions with a view to implementing changes by way of legislation during the 2009-2010 parliamentary session. But that did not happen because of an unexpected, and for the Government, unwelcome event. The small team of officials dealing with the PACE Review found themselves redeployed to work on the Government's response to the decision of the European Court of Human Rights in *S and Marper* that the PACE system for retention and destruction of DNA samples was contrary to the ECHR.

That response reached the statute book when the Crime and Security Bill received Royal Assent in April on the last day of the parliamentary session. The Act put in place a new system under which the DNA profile of convicted persons can be retained indefinitely, but the DNA profile of persons who were arrested but not convicted can be retained for only six years. Activating the DNA-related provisions of the Act requires action by the new Government to put in place the

necessary Code of Practice. It is by no means certain that that will happen. Both the Conservatives and the Liberal Democrats strongly opposed the six-year retention for persons who had not been convicted. (In the parliamentary debates there was much talk of these being ‘innocent’ people – which, of course, may or may not be the case.) The Tory spokesman in the Lords said, ‘A Conservative Government if in office will do the following: they will legislate in the first Session to make sure that the DNA database includes permanent records only of people who have been convicted of offences and for a more limited period [of three years], those charged with sexual or violence offences.’¹² If I was a betting man I would put a bit of money on this being in the first tranche of legislation introduced by the new Government.

The DNA issue was a side-show which blew the Pace Review off course. What then was the outcome of the PACE Review? In March 2010 the Home Office published a summary of the responses to the August 2008 consultation paper. The Introduction to the summary said, ‘The outcome of the PACE Review is a programme of work which we will be undertaking and looking to implement over the next 12 months.’

The details were set out in a six-page Annex which listed 18 proposed reforms under the heading ‘Awaiting a suitable legislative slot’. (Most unusually, the Annex also identified eight proposals that had been dropped – ‘No further action proposed’).¹³

Which of the detailed proposals declared to be ready for implementation will now go forward under a Conservative-Liberal Democrat coalition must at this point be a matter for speculation.

What was proposed for PACE and the PACE Codes?

The Government’s August 2008 paper said, ‘The public consultation has shown a huge level of support for the existing structure of PACE [...] There were no calls for amendment to the framework.’¹⁴ The Summary of Responses to the August 2008 consultation paper, which was published in February 2010, confirmed this: ‘The strong, positive message from the open consultation process is that the framework and structure of the 1984 Act continues to achieve high levels of support and confidence across the criminal justice system.’

Of how many pieces of legislation can that be said? The late Sir Cyril Philips and his colleagues would be entitled to feel satisfaction that their work has borne such well-regarded fruit.

Similarly as to the Codes, the August 2008 paper, confirmed by the February 2010 Summary of Responses, said their format and the procedures for parliamentary approval should remain unchanged. The change proposed was that work should be done to improve accessibility along the lines indicated by the TSO – in particular, making the Codes available electronically with appropriate search

¹² HL Hansard, col 1550 6 April 2010.

¹³ For both lists see the writer’s ‘So, Where are We Now with Reform of PACE?’ (6 March 2010) *Crim.L. & Justice Weekly*, 133, available at <www.criminallawandjustice.co.uk>.

¹⁴ para 4.1.

engines and navigational aids providing linkage to guidance, circulars, associated cases, etc.

That seems entirely sensible and would, I think, be backed by every member of the PACE Strategy Board. My only slight worry was the final sentence. The section on the Codes ended with this strange paragraph:

We also want to help minimise potential confusion at ground level between statute, the codes and guidance whether issued nationally or locally. The establishment of the National Policing Improvement Agency (NPIA) provides the opportunity to work in partnership on the future development of the Codes. That work may take the form of development of the codes to include integrated guidance and produced [sic] under the *Doctrine Development* provisions of the Police Reform Act 2002.¹⁵

I do not have the slightest idea what that means.

But for the time being it seems that PACE as we know it is safe.

I have not in this lecture discussed the content of the legislation. To do so adequately would require a series of lectures. But in concluding let me say a word about how I would answer the question whether PACE has fulfilled the hopes of the Philips Royal Commission on Criminal Procedure. Does PACE provide a balance between the interests of the community and the rights and liberties of the individual citizen who becomes a suspect?

In my view the question has always been – and will always be – unanswerable. By ‘balance’ in this context one means balanced fairly or appropriately. The question is unanswerable because everyone will have a different view. There is no ‘right balance’. The police officer and the civil libertarian will have different opinions. Each will want to see changes that support their respective perspectives of how the criminal justice system should be organised. The history of PACE in its first quarter of a century is one of constant change. Every substantive change can affect the balance. The Philips Royal Commission struck the balance in a particular way. Willie Whitelaw’s Mark I Bill struck a different balance. Leon Brittan’s Mark II Bill changed it again. Since its enactment PACE has been subject to hundreds of amendments, many of which have been extremely significant. I have no doubt that that will continue for as long as the Act remains on the statute book.

¹⁵ para 5.5.