

THE MENTALLY HANDICAPPED OFFENDER: RIGHTS AND RESPONSIBILITIES

TERRY THOMAS 1)

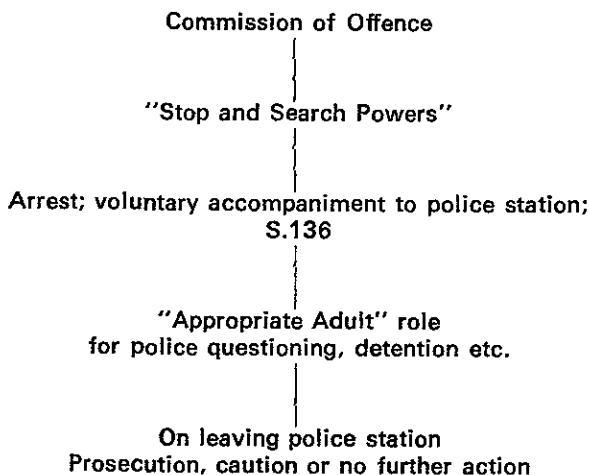
1) Terry THOMAS
Senior Lecturer in Social Work
Department of Social Studies,
Leeds Polytechnic.

The continuing policies of care in the community for people with a mental handicap and the consequent decarceration from 'long stay' hospitals has implications in a number of directions. One relatively unexplored implication is the potential for criminal behaviour amongst mentally handicapped people and what sort of social response should be forthcoming to manage that behaviour.

The purpose of this paper is to examine the responsibilities of those agencies of the criminal justice system who may come into contact with mentally handicapped people whether as offenders or alleged offenders. The paper considers the criminal justice system as a series of decision stages, moving from suspicion, through arrest, questioning and charge to court appearance and appropriate sentencing or disposition from the court (Bottomley, 1973). In particular it is the intention to examine those agencies that operate in the earliest parts of the criminal justice system when a person might first expect to have contact in what might be termed the pre-court stage. It is the role of the police, social workers, nursing staff and others at the point of initial investigation, arrest and detention of a suspected offender and the special responsibilities they have toward people with a mental handicap, that is of critical importance, together with the rights accorded to suspects who find themselves under investigation (see Fig. 1).

Figure 1.

Possible stages in the pre-court criminal justice system for mentally handicapped offenders



Commission of the Offence

Before any criminal investigations can be started someone must have committed an act that others can interpret as being potentially criminal. Whilst this may appear to be stating the obvious, it is necessary to consider the position of professionals who offer care and support to mentally handicapped people when they learn of, or obtain information of, the possible commission of an offence. Residential care staff, community nurses or others are all in the position of possibly picking up this information before the police do and having to decide what use they are going to make of this information. The question at issue becomes one of confidentiality and the proper or improper passing of information to a third party, i.e. the police.

Within law no professional, or indeed any other person, is required to disclose information about a crime to the police.¹ There is only a generalised civic duty "that all citizens have a duty to help police officers to prevent crime and discover offenders" (Home Office, 1985a). For social services department staff there is the additional Dept. of Health guidance that in "exceptional" circumstances information should be disclosed to the police "if it can help to prevent, detect or prosecute a serious crime" (D.o.H., 1988), and likewise for health personnel "where the disclosure is necessary for the prevention, detection or prosecution of a crime which is so serious that the public interest must prevail over the right to confidentiality" (DHSS, 1984). Ultimately the caring professions will still have to make their own professional decisions, e.g. what is "serious crime" or be guided by Codes of Conduct or Employers' policies. If any discretion remains to them they will have to base their decision on considerations of interest to the mentally handicapped person and/or the Individual Programme Plan designed for them, and balance that against the perceived public interest.

Stop and Search

Part I of the Police and Criminal Evidence Act 1984 provides powers to the police to stop and search individuals in the street. The accompanying Code of Practice regulates the powers (Home Office, 1985a). The police should only stop someone when there are 'reasonable' grounds that could be theoretically upheld to an impartial third party. Presumably behaviour traits of some mentally handicapped people might mark them off from others in the community but the police would still have to explain how they linked the behaviour to the aims of crime prevention or detection.

"Section 136"

Section 136 has long been known as a power available to the police, not least since it goes back to the 1959 Mental Health Act, and remains the unchanged Section in its successor the 1983 Mental Health Act. It enables the police to remove someone from a public place to a "place of safety" if he/she appears to be suffering from a mental disorder and in immediate need of care and attention. The removal does not constitute an arrest, even though the behaviour of the person might constitute grounds for an arrest, e.g. breach of the peace, and the removal should be for purposes of assessment rather than just detention

¹ The law only intervenes if crime is concealed for a consideration, i.e. bribery etc. (Criminal Law Act 1967, s. 5).

or admission to a hospital. In fact, Section 136 is overwhelmingly used for people with a mental illness, rather than a mental handicap, with some researches putting its use for mentally handicapped people as low as 5.8% (Rogers, A. and Faulkner, A., 1987).

The Section has been the subject of some criticism over the years but seems to be persistent in hanging on. The police have been said to be unskilled in assessing mental disorder when using Section 136, although, in fact, the evidence would suggest their assessments are usually accurate when compared to later psychiatric assessments (Rogers and Faulkner, 1987; Thomas, T., 1986). There appears to be wide variation in its use around the country, although this may be due to methods of recording statistics rather than operational issues (Butler Report, 1975). Ethnic minority communities appear over represented in having Section 136 used on them (Rogers and Faulkner, 1987) and the Mental Health Act Commission has expressed its concern that the Section is being used more for admission and detention rather than assessment as the law requires (Mental Health Act Commission, 1987).

When the police do arrange hospital admission they are advised by the Home Office to make available to the hospital all the information there is concerning the person's behaviour that has led to Section 136 being implemented (Home Office, 1986). Conversely, hospitals are expected to provide the police with relevant information if someone later leaves the hospital voluntarily but still might be likely to cause local 'difficulties' (Home Office, 1986).

Searching of Premises and the Seizure of Property

The searching of premises and seizure of property would again appear at first to have little direct relevance for mentally handicapped people. In practice there are a number of critical points for professionals working in this field to note.

Mentally handicapped people are as liable as anyone else to be the subject of police search warrants signed by a Magistrate (Pace, 1984, s.8).² If they live in health or local authority accommodation, supervising staff and/or the person in question will be approached to allow the search to proceed. The accompanying Code of Practice is not very helpful in advising how such searches should be carried out. Can the police do a general 'trawl' through the whole building or are they limited to the specific areas of residence of the mentally handicapped suspect? What can they take and what are the responsibilities of the staff to ensure the rights of the resident are upheld? The only guidance we get from the Code of Practice is that:

"In the case of a lodging house or similar accommodation (emphasis added), a search should not be made on the basis solely of the landlord's consent unless the tenant is unavailable and the matter is urgent."

(Home Office, 1985a)

If we read "similar accommodation" to mean special housing for mentally handicapped people run by whichever authority then the Officer in charge ("landlord") will have to make decisions on what is "urgent" and what meaningful consent the resident ("tenant") can make.

If the mentally handicapped person lives in their own home in the community and is the subject of a search, then professionals may also be involved if requested. Anybody subject to a police search is entitled to have a representative

² Searches may be made without a warrant, of course, if consent is given by the owner, resident, etc.

or friend with them during the search and it would seem good practice in the absence of anyone else for a professional to be present for mentally handicapped people (Home Office, 1985a).

On the question of information contained in case records held at a hostel or residential home, we have already seen that social services staff are encouraged to hand over relevant information if there has been "serious crime" (D.o.H. 1988). In the unlikely event of them refusing to do so the police can apply to a circuit judge for a Production Order (Pace 1984, Schedule 1) that would require an authority to hand them over. A Production Order bypasses Sections 11-12 of the Police and Criminal Evidence Act 1984 which otherwise designates personal social work records as "excluded material" not subject to a magistrate's search warrant.

At the Police Station

Whether a mentally handicapped person goes voluntarily to a police station or is arrested, he or she is entitled when questioned to have a third party with them, known as the "appropriate adult". Usually the "appropriate adult" will be a parent or relative but it can often be a professional working with mentally handicapped people. Mentally handicapped people fall into that category of people known to the police as "vulnerable" or "at risk" and should not be interviewed on their own. The rationale for this is that people might confess to crimes they had not committed or at the very least make statements that were not based on any factual happenings. The Code of Practice and its predecessor the Judges Rules (Home Office, 1978), are both quite clear on the protection that should be afforded mentally handicapped people:

"It is important to bear in mind that although persons who are mentally ill or mentally handicapped are often capable of providing reliable evidence, they may, without knowing or wishing to do so, be particularly prone in certain circumstances to provide information which is unreliable, misleading or self-incriminating."

(Home Office, 1985a)

Such protection has not always been available and indeed, the old Judges Rules were only amended to cover mentally handicapped people in 1978 following the Official Report into the Confait affair. That Report sought to unravel why two juveniles and a mentally handicapped adult had been convicted and sentenced largely on the basis of confessions later held to be unsound. The adult had spent time in Rampton Special Hospital and both he and the juveniles were later paid compensation by the Home Office (The Confait Case, 1977).

The position was later considered by the Royal Commission on Criminal Procedure, who admitted that "The mentally handicapped present a problem to which we see no ready solution" (Royal Commission on Criminal Procedure, 1981). Despite the guidelines that now exist and the Royal Commission's exhortation for more training in this area of work, a number of "false confessions" from mentally handicapped people have continued to crop up. Paul Hails spent a year in Rampton before his conviction was quashed as "unsafe" (*The Times*, 7.5.76). Alan Westlake's murder prosecution was stopped because of confessions thought unreliable for a mentally handicapped person (*The Guardian*, 6.12.78). The cases of John Cheesman and Norbert Devlin provided further unsafe confessions (*New Statesman*, 15.5.81) and in 1984 Barry Foster's confession

of 9½ pages, countersigned by a social worker, was still ruled unsafe (*The Guardian*, 9.4.84). In 1986 the Home Office directed that Valerie Hodgson be released from secure detention after her confessions to murder had been found false (*Yorkshire Post*, 4.11.86). In 1988 one of the men convicted of murdering a policeman at the Broadwater Farm riots, made an unsuccessful appeal based on the fact of his mental impairment and 'unsound' confession (*The Independent*, 4.12.88).

The Codes of Practice are probably right to suggest mentally handicapped people are "capable of providing reliable evidence" and research would go some way to confirming that (Tully and Cahill, 1984). It remains true, however, that someone used to taking their cues for thought and action from other people is always liable to give misleading statements to the police, who may be acting with the best will in the world. As Lord Widgery has said in the Court of Appeal:

"If the suspect's mental state is such that he is deprived of the capacity to make a free choice whether to confess or not, then any confession which he makes is necessarily not a voluntary confession because it was not supported by the capacity to make a voluntary choice."

(quoted in *The Confait Case*, 1977)

The "appropriate adult" role in protecting the rights of mentally handicapped people is clearly a critical if underrated job. Even though the Codes call for "someone who has experience of dealing with . . . mentally handicapped persons" (Home Office, 1985a), there is no concomitant requirement for that person to understand the penal processes they are involved in or just what is required of an "appropriate adult". Some attempts to remedy this deficiency appear in the literature (Thomas, 1986; BASW, 1987; Thomas, 1988; Hewitt, 1985) but the bare truth is that many "appropriate adults" are acting by rules of thumb or no rules at all. The police may also have "diagnosis" problems as to what constitutes mental handicap, and one suspects that in some ways they will have more difficulty doing this than with mental illness. Some observers see an inter-disciplinary team approach as the answer:

"The Act and Code create a framework within which expertise in this area is likely to develop with help from other agencies."

(Irving, 1986)

Apart from knowing the rights and wrongs of what constitutes proper interviewing and oppressive or leading questions, the "appropriate adult" should also know about rights concerning photographs, finger-prints, identification parades, the laying of charges and all other intricacies of police interrogation considered appropriate. A reconsideration of the importance of this role for professionals working with mentally handicapped people is long overdue. Although the courts might recognise invalid confessions from mentally handicapped people at a later date, and indeed are obliged to give them careful scrutiny "if the court is satisfied that he is mentally handicapped and that that the confession was not made in the presence of an independent person" (Pace, 1984, s.77) it would still be far better if they were picked up at source and prevented from being committed to paper at that point.³

³ In March 1975 Christopher Price M.P. to those convicted in the Confait Case, introduced the Protection of Mentally Retarded Persons (Evidence) Bill as an attempt to regulate the admissibility of statements in evidence — Hansard Vol. 887 Cols. 1486-8. The Bill did not become law but was used by Price "to focus attention on the particular case and the general issue" (Price and Caplan, 1977).

Leaving the Police Station

Assuming the mentally handicapped person has not been charged and detained by police custody to appear before magistrates, a point is reached where he or she can leave the police station. This point offers opportunities for professional input to deal with any traumas of the detention, to explain in simple language that which is still unclear and to provide background information to any carers who have not been to the police station. The professional input is most likely to be the "appropriate adult" now changing role back to that of health or social services carer.

The mentally handicapped person is entitled to know whether the police intend any further action, whether they are subject to police bail or are going to be "reported" for a possible later summons. The latter course of action gives time for the police to consult with other agencies like social services (see below with regard to cautions) and to decide if alternatives to prosecution are possible or desirable. Ultimately prosecution is in the hands of the Crown Prosecution Service.

Further considerations enter the decision making if it is felt that residence other than home is required but detention with a view to an application for remand in custody is unnecessary. Local authority accommodation or hospitalisation may be thought of as an option with due regard to rights if the hospital admission is compulsory. Any other non-statutory placement would require negotiation with the welfare of the mentally handicapped person being a first consideration.

Cautions

The police can also be determinants of whether a mentally handicapped person actually goes to court or is diverted away to some alternate disposition. Since 1985 the Home Office has been encouraging the police that "a lesser disposal than prosecution may be appropriate where the offender is suffering some form of mental illness or impairment" (Home Office, 1985b). In making such decisions the police are asked to consider consulting social services departments (Home Office, 1985b). In effect such diversion will lead often to the cautioning of the mentally handicapped person as an alternative to court. If a caution is administered it is done so by an Inspector or above and only after the offender both admits the offence and agrees to be cautioned, and the available evidence would appear to have supported a prosecution. Cautions are to that extent formal affairs and should not be confused with what might be called informal warnings; cautions remain on record.

In practice the police are usually very sympathetic to cautions for mentally handicapped people especially if the degree of impairment is readily visible. Indeed there have been instances in the experience of the author where some practitioners have believed their clients as seemingly "above the law" because they are never prosecuted however often they are "warned" by nurses or social workers about the likely consequences of their actions.

CONCLUSIONS

The entrance of a mentally handicapped person into these early stages of the criminal justice system requires careful monitoring and assistance in order to ensure a degree of justice and civil liberties. The responsibilities of those

"processing" the person concerned and their need to properly investigate allegations of criminality must be weighed against the rights of the suspect to be treated fairly and to make voluntary statements within the capacity of their understanding. Many of the activities described in this "early stage" of the criminal justice system are of low visibility in that they take place in police stations and behind closed doors and within the mystique of power that law enforcement agencies have over us all. It is incumbent upon all professionals working with mentally handicapped people to make themselves aware of this process and to bring low visibility matters more on to the open stage.

A number of factors might improve our understanding and work in this area for the future. The proposed introduction of tape recording of all police interviews should improve techniques and quality of interviews. It is unfortunate that the new Code of Practice (Home Office, 1988) does not mention any direct implications for mentally handicapped people. The joint-training of the different professionals involved might help preserve rights and make for more effective investigation. The model of joint police/social worker interviewing of children involved as victims of sexual abuse provides a possible starting point, although the possible conflicts may not be so immediately apparent (Metropolitan Police and Bexley Social Services, 1987). And finally, the increased awareness of existing Circular guidelines as well as new guidelines to the police and health and social services personnel might clarify the ground rules for inter-disciplinary work and further raise their profile from low to higher visibility. The wider publication of the Home Office Consolidated Circular to the Police on Crime and Kindred Matters (Home Office, 1986) for example, which contains much useful information and guidance that can only improve inter-disciplinary work for the future.

REFERENCES

- BOTTOMLEY, A. K. (1973). *Decisions in the Penal Process*, Oxford, Martin Robertson.
- B.A.S.W. (1987) *Social Work Guidelines to the Police and Criminal Evidence Act 1984*. Birmingham, BASW.
- BUTLER REPORT. (1975). *Report of the Committee on Mentally Abnormal Offenders* Cmnd. 6244, London, HMSO.
- THE CONFAIT CASE. (1977). Report by the Hon. Sir Henry Fisher, HC 90.
- DEPT. OF HEALTH. (1988). *Personal Social Services: Confidentiality of Personal Information*, Circular LAC(88)17.
- DEPT. OF HEALTH AND SOCIAL SECURITY. (1984). *Code on Confidentiality of Personal Health Data*, Circular DA(84) 25.
- HEWITT, S. E. K. (1985). *Interviewing Persons with Mental Handicap and the Codes of Practice* (available from the author at 1, Oxney Place, Peasedown St. John, Bath).
- HOME OFFICE. (1978). *Judge's Rules and Administrative Directions to the Police*, Circular 89/1978.
- HOME OFFICE. (1985a). *Police and Criminal Evidence Act 1984 (s.66) Codes of Practice*, London, HMSO.
- HOME OFFICE. (1985b). *The Cautioning of Offenders*, Circular 14/1985.
- HOME OFFICE. (1986). *Consolidated Circular to the Police on Crime and Kindred Matters*.
- HOME OFFICE. (1988). *Police and Criminal Evidence Act 1984 (s.60(1)(a)) Code of Practice (E) on Tape Recording*.
- IRVING, B. (1986). *The Interrogation Process* in Benyon, J. and Bourn, C. (1986) "The Police: Powers, Procedures, and Proprieties", Oxford, Pergamon Press.
- MENTAL HEALTH ACT COMMISSION. (1987). *Second Biennial Report, 1985-7*.
- METROPOLITAN POLICE AND BEXLEY SOCIAL SERVICES. (1987). *Child Sexual Abuse: Joint Investigation Programme -- Final Report*, London, HMSO.
- PRICE, C. and CAPLAN, J. (1977). *The Confait Confessions*, Marion Boyars.
- ROGERS, A. and FAULKNER, A. (1987). *A Place of Safety*, London, MIND.
- ROYAL COMMISSION ON CRIMINAL PROCEDURE. (1981). Cmnd. 8092, London, HMSO.
- THOMAS, T. (1986). *The Police and Social Workers*, Gower/Community Care.
- THOMAS, T. (1988). *The Police and Criminal Evidence Act 1984: the Social Worker Role*, Howard J. of Criminal Justice, Vol. 27 No. 4.
- TULLY, B. and CAHILL, D. (1984). *Police Interviewing of the Mentally Handicapped*, Police Foundation.