

an open visit if exceptional circumstances warrant, there is a belief among them that the decisions by the authorities concerning such requests are arbitrary and irrational. The report notes that during the visit to the U.K., the Chief Inspector of Prisons indicated to the SR that closed visits would soon be discontinued.

On provisions in emergency legislation and ordinary criminal law that impinge on the ability of the judiciary to function independently, the report refers to three main points: abrogation of the right to silence, the lower threshold for admissibility of confession evidence, and the absence of a jury.

With regard to the right to remain silent, the report notes that the Criminal Evidence (Northern Ireland) Order 1988 and section 34 of the Criminal Justice and Public Order Act 1994, which extends the same legislation to England and Wales, permit a judge to draw adverse inferences from a detainee's silence in four circumstances: 1) when the defendants base their defence on a fact that they could reasonably have been expected to raise during police questioning, but did not; 2) when the accused fails to give the police an explanation for the presence of a nearby substance, object, or mark that could reasonably be believed to have a connection to a crime; 3) when defendants fail to account for their whereabouts at the time a crime was committed; and 4) if the defendant fails to answer questions at trial.

The report recalls that general principles of criminal law place the burden of proving guilt with the prosecution and article 14 (3) of the International Covenant on Civil and Political Rights (ICCPR) establishes the right not to be compelled to incriminate oneself. With this in mind, the SR expressed the view that any means used by the state to exert undue influence upon a detainee to compel a confession of guilt is unacceptable and, in the case of the U.K. which is a state party to the ICCPR, a violation of article 14 of the Covenant.

Referring to issues related to the admissibility of confession evidence, the report notes that in Northern Ireland such evidence is admissible in cases scheduled under section 12 of the EPA unless the accused was subjected to torture, ill treatment or violence in order to induce a statement. The report further notes that in Northern Ireland the accused must present prima facie evidence of the torture, inhuman or degrading treatment, or violence, or threat to violence, while under the Police and Criminal Evidence (Northern Ireland) Order (PACE) there is a lower threshold for the admissibility of such evidence. In Northern Ireland, once the defendant makes this showing, the burden shifts to the prosecution to show that the confession was not coerced in the specified manner.

On the issue of the absence of a jury, the report refers to the so-called Diplock courts which were established by the government in Northern Ireland in which certain scheduled offences are tried, by a single judge, without a jury. The report states that the absence of a jury and the unique role that judges play in these cases (e.g., the infer-

ences that may be drawn if the accused remains silent) has altered the manner in which judges are viewed. In consequence, a large segment of the population of Northern Ireland view the administration of justice in such cases as not being independent and impartial and the SR stated that restoration of the jury system, which has been a culture within the criminal justice system in England, would help restore public confidence in the administration of justice.

A number of concerns related to the practice of "bugging" are addressed in the report, including that: Part III of the Police Act allows an operation to be approved if the authorizing officer believes that the action is likely to be "of substantial value" in the prevention or detection of serious crime and that the same value cannot be reasonably achieved by other means; legally privileged matters which are excluded from such actions include various communications between a professional legal adviser and the client, or any person representing that client, matters which are privileged as to their content, but which are in the possession of someone who should not have them, and matters held or communications made with the purpose of furthering a criminal purpose.

The report notes that the provisions in the Police Act and Code of Practice have been criticized on the basis that: the Act is narrowly drafted and deals only with the use of listening devices which interfere with "wireless telegraphy" or use of which necessitates trespass, thereby excluding such devices as sensitive microphones, or the "bugging" of communications in a police or prison cell; the Act does not define the additional criteria necessary for authorization of intrusive operations in which privileged communications are likely to be intercepted, and conditions that may be attached to such operations; the Code of Practice does not adequately explain the concept of legal privilege — for example, by failing to clarify a borderline case between a lawyer acting legitimately for a client suspected of a criminal offence, and the lawyer furthering a criminal purpose; and the Code fails to clarify the term "legal adviser" and does not explicitly provide for the destruction of legally privileged material.

The report notes that the concept of legal privilege is crucial to the independence of lawyers. On that basis the relevant provisions in the Police Act are viewed with concern particularly in light of the fact that under the Police Act for England and Wales the decision to authorize "bugging" of legal premises is made by a police officer, who most likely will not have the requisite training to appreciate the concept of legal privilege. The SR stated that such a decision should require prior authorization from a judicial officer.

The report concludes with a number of recommendations, including that:

- ♦ the authorities, preferably the proposed Police Ombudsman, conduct an independent and impartial investigation of all threats to legal counsel in Northern Ireland;