CABINET

INQUIRY INTO CAPITAL PUNISHMENT

MEMORANDUM BY THE HOME SECRETARY AND THE SECRETARY OF STATE FOR SCOTLAND

On 22nd July, on the consideration by the Commons of the Lords amendments to the Criminal Justice Bill, the Home Secretary made a statement about the question of capital punishment on lines which had been approved by the Cabinet that day (C.M. (48) 33rd Conclusions). The statement was as follows (Hansard, 22nd July, cols. 710-711):

"The dropping of this Clause from the Bill does not mean the abandonment of the issues which it has raised. The long discussion in both Houses of the question of the death penalty has brought this question into the full forefront of public consciousness. I do not myself believe that public opinion, although sections of it may be opposed to the complete suspension of the capital penalty at this time, is irreconcilably opposed to some change in the present law under which this the only penalty for all offences of murder. I believe that the searching debates on this subject have prepared the way for further consideration of the direction in which the law should be amended.

In both Houses there has been revealed in all parties a considerable body of opinion which desires that some steps should be taken which will mark a definite amelioration of the law relating to the death penalty. The Government welcome this attitude and propose to explore without delay the practical means there are of limiting the death penalty to certain crimes of murder in a manner which would not be open to the objections taken against the recent effort to reach a compromise. I hope that it may then be possible for Parliament to give further consideration to this question as a separate issue."

Later in the debate the Lord President of the Council said (loc. cit., col. 738):

"I do not think it would be right for a Minister at this Box, before the proposed investigation takes place and the results of it are known, to declare that there is going to be a Bill in this Parliament which is going to be put on the Statute Book during this Parliament."

2. The Government is thus committed to further investigation of this subject, and we have been considering what form the investigation should take. The proposed compromise clause in the Criminal Justice Bill, which was subjected to strong criticism in the House of Commons and was rejected by the House of Lords, was devised after the most careful consideration of possible alternatives, and we are satisfied that, if the investigation took the form of a further attempt by the Departments to devise a compromise, it would not be likely to produce any solution which would be accepted by Parliament and by public opinion. It will therefore be necessary, in our view, that the investigation should be conducted by some body set up for the purpose. A Departmental Committee would not be suitable, because it would not carry sufficient authority. At the meeting of the Cabinet on 22nd July it was suggested that it might be helpful to appoint a
small committee including persons of different shades of political opinion to consider how the death penalty could best be limited, but this is not wholly or mainly a political question, and for this reason a committee representing different shades of political opinion would be open to objection: moreover, it would be difficult to find prominent persons representing different shades of political opinion who have not already committed themselves to one or other side of this controversy. The same objection applies to a Select Committee; opinion on a Select Committee would inevitably tend to divide itself along party lines, as happened in the case of the last Select Committee on this subject: in any event a new Select Committee would have to be representative of both Houses, and the House of Lords has already declared itself against any amendment of the law.

There remains the alternative of a Royal Commission, and in our view the appointment of a Royal Commission is the only course that can be adopted. The status of a Royal Commission would be appropriate to the importance of the subject, and it would be possible, though it would no doubt be difficult, to find persons to serve on the Commission who would carry public confidence and who have not associated themselves with any particular view on the question of capital punishment.

It was suggested at the Cabinet meeting on 22nd July that the terms of reference of any committee which might be appointed should be so drawn as to relieve it of the task of considering afresh the general arguments for and against the total abolition of capital punishment. If, however, a Royal Commission is appointed it would scarcely be practicable to exclude from its scope consideration of the question whether the death penalty should be abolished altogether. To do so would mean drafting the terms of reference on the basis that capital punishment is to be retained, and that the Commission has merely to consider to what crimes or in what circumstances this punishment should be applied. Such terms of reference might arouse criticism and would not achieve their object because it would still be open to the Commission to recommend that capital punishment should not be applied to any crimes or in any circumstances. It would clearly be preferable to include the issue of abolition within the Commission's terms of reference from the outset.

3. We suggest the following terms of reference for the Royal Commission:—

To consider and report whether capital punishment should be retained or abolished, and, if retained, whether, and if so to what extent and by what means, liability to suffer it should be limited or modified; and if recommendations are made to limit, modify or abolish the liability to suffer capital punishment, under what conditions and for how long persons who would otherwise have been liable to suffer it should be detained, and what changes in the existing law and the prison system would be required.

These terms of reference direct attention to the important questions (upon which no light has been thrown by the debates in either House), what is to done, if capital punishment is abolished or limited, with persons who would otherwise have been hanged, how long it would be practicable to detain them, and what effect the necessity of their prolonged detention would have upon the prison system.

4. The task of a Commission with these terms of reference would inevitably be a long one. It would be necessary for them to take evidence from foreign countries and it might well be necessary for the Commission to visit foreign countries, in order to ascertain how and to what extent the problem of the alternative to capital punishment has been solved in practice in those countries which have abolished capital punishment. The selection and appointment of suitable persons as members of the Commission would require careful consideration, and we contemplate that it would take some months to settle the membership. We can see no prospect of a Royal Commission, if it is appointed, presenting a report on this subject during the lifetime of this Parliament, or indeed before the election in 1950.

5. If our colleagues agree that the appointment of a Royal Commission is the right course, the question arises whether an announcement of the Government's intention to appoint a Royal Commission should be made now. There are, in our view, certain considerations which are strongly in favour of this course:—

(1) It is unlikely, in view of the statements quoted in the first paragraph of this memorandum, that it will be long before a Question is asked
in the House as to what steps the Government is taking in pursuance of the undertaking given in those statements. The matter might be raised on the adjournment. In any event it is likely to be raised when the Criminal Justice (Scotland) Bill reaches the House of Commons. It might be raised by the introduction of a Private Member's Bill. If action is postponed until the matter is raised in the House the impression will be created of reluctance on the part of the Government to do what it has undertaken to do.

(2) It is possible that those who wish to see a change in the law relating to capital punishment may be content not to press the matter, in the belief that, in the meantime, the prerogative will be exercised in all cases of murder, and they may find support for this belief in the fact that there has been no case since February last in which the capital sentence has been carried out. As the law stands, however, it is impossible to recommend the exercise of the prerogative upon any other principles than those upon which its exercise has been recommended in the past, though it may be proper to give these principles a wide application in individual cases. Sooner or later a case is bound to occur in which there will be no alternative but to recommend that there should be no interference with the sentence. When this happens, if the Government, in the meantime, has taken no further step in regard to the general issue of capital punishment, the decision in the individual case is likely to be called into question, and the Government will be pressed to do something about the general issue. To announce then that the Government proposes to set up a Royal Commission would not only have the appearance of yielding to pressure, but might even convey the unfortunate impression that this decision had been prompted by criticism of the action taken in the individual case. We cannot but think that the announcement in these circumstances of the appointment of a Royal Commission would be interpreted in a sense very unfavourable to the Government, and might indeed be embarrassing to us in continuing to carry out our duty of advising on the exercise of the prerogative.

(3) If, on the other hand, an announcement is made now of the Government's intention to set up a Royal Commission, criticism of a refusal to recommend a reprieve in a particular case will be very much easier to deal with, and the Government cannot be accused of inaction, bad faith, or submission to pressure.

6. We therefore ask for the approval of the Cabinet to the proposal to appoint a Royal Commission, and to the terms of reference suggested, and for authority to make an announcement at the earliest opportunity in the present Session that the Government has decided to set up a Royal Commission with these terms of reference. This could be done by an arranged Question and Answer.

J. C. E.
J. W.

3rd November, 1948