Criminal Justice (Scotland) Bill

Part One

Briefing and Suggested Amendments

Stage 2

September 2015

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Introduction

1. JUSTICE is an all-party law reform and human rights organisation working to strengthen the justice system – administrative, civil and criminal – in the United Kingdom. It is the UK section of the International Commission of Jurists. On Scottish matters it is assisted by its branch, JUSTICE Scotland. The issues raised in this briefing should not be taken as our sole concerns with regard to the proposals contained in the Bill.

2. In general terms, we welcome the Bill as a means of bringing forward reforms to the Scottish criminal justice system, particularly to amend changes brought about through the emergency legislation hastily enacted in response to the *Cadder* case[1] that recognised the right of access to a lawyer during police detention. The Bill follows extensive consultation over the past few years by the Government, through dedicated enquiries and Cabinet reviews. We have responded to many of these in great detail. For ease of reference, we do not repeat that detail here, but refer to those responses which can be found on our website.[2] We agree that reform has been needed for some time to the arrest and detention procedure. The Bill allows the Scottish Parliament to focus on how the system might be improved. We set out in this briefing some suggested amendments to the proposed reforms, informed by standards provided in England and Wales under the Police and Criminal Evidence Act 1984, jurisprudence of the European Court of Human Rights, and joint, comparative research that JUSTICE has conducted recently in police stations in Scotland.[3]

3. In summary, our position is:

    - The power to arrest must be clearly circumscribed;
    - The full rights of suspects must be delivered upon detention in police custody, including the right to interpretation and translation;

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[1] *Cadder v HM Advocate* [2010] UKSC 43

[2] See the Scottish section of our website http://www.justice.org.uk/pages/policy-work-events-and-news.html and in particular our response to the Carloway consultation where we set out comparative legal provisions and relevant case law.

[3] J. Blackstock, E. Cape, J. Hodgson, A. Ogorodova, T. Spronken, *Inside police custody: an empirical account of suspect's rights during police detention,* (Intersentia, forthcoming). The research was conducted in two sites in England and Wales, France, the Netherlands and Scotland, with an average of two months spent in each site.

- Decisions to continue detention or delay rights must be taken by senior officers, independent of the investigation;
- Conditions of liberation must be set out in legislation and pertain to the possible conduct of the suspected person;
- Review of conditions following liberation must take place at reasonable intervals throughout the conditional release period;
- A full restatement of suspects' rights in police custody must take place at a reasonable period prior to interview for them to be useful;
- Delay or denial of the right to have a solicitor present must be for narrowly circumscribed reasons in exceptional circumstances;
- No distinction should be made between children under and over 16 years old. The assistance of a solicitor and parent or guardian during police detention must be available to all children without waiver. If a distinction is to be made for over 16 year olds, clear written guidance should explain the significance of the right;
- Consultation with a solicitor must be in person, save for exceptional circumstances;
- Detailed provision must be made in the Bill for the circumstances in which a waiver of legal advice will be valid;
- New sections should be added to the Bill to insert provisions enabling:
    - A policing code of practice on arrest, search and detention powers, including recording of police interviews and other procedures;
    - A test of admissibility of evidence in accordance with the principles of fairness;
    - Prohibition on identification of suspects in the courtroom during trial; and
    - A qualitative no case to answer test of the prosecution's case.

Part 1 – Arrest and Custody

Sections 1 – 2: Statutory power of arrest

<u>Proposed Amendments</u>

Page 1, Line 11 after "committing an offence" insert:

(-) A constable may only arrest a person under subsection (1) for the purpose of facilitating the carrying out of investigations—

(a) into the offence; and/or

(b) as to whether criminal proceedings should be instigated against the person

Briefing

4. While JUSTICE Scotland welcomes the decision to place the power of arrest on a statutory footing, the clear benefit of creating a legislative framework to govern police powers of compulsion is to sufficiently circumscribe those powers, to promote public confidence and to enhance legal certainty both for individuals and for police officers exercising those powers. We are concerned that the powers set out in Sections 1 – 2 do not realise these benefits as a consequence of being overly broad. Our amendment inserts the current condition upon detention of a suspected person, pursuant to section 14 Criminal Procedure (Scotland) Act 1995, to ensure that the power to arrest is operated fairly and proportionately. Our amendment would allow for the current regimes of both detention and common law arrest to be encompassed within section 1.

Section 5 – Information to be given at police station

Proposed Amendments

Page 2, Line 22 after 'persons under' – leave out subsections (i) - (iv) and insert:

(i) section 24,
(ii) section 30,
(iii) section 32,
(iv) section 33,
(v) section 35,
(vi) section 36

(c) that if they do not speak or understand English, they are entitled to the assistance of an interpreter and/or translator in accordance with Directive 2010/64/EU of the European Parliament and the Council on the right to interpretation and translation in criminal proceedings.

Briefing

5. Section 5 requires persons in police custody to be informed of their rights. Section 5(2)(b) refers to other sections of the Bill where those substantive rights are set out. Our amendments would add to that list section 24, regarding the right to assistance of a

solicitor during police interview, and 33, regarding support for vulnerable persons. Suspects should know what their rights are from the outset. Being aware that the right of access to a lawyer encompasses not only advice, but assistance during interview, may have a bearing on the exercise of that right. Likewise, a constable assessing vulnerability may not appreciate that a suspect is in need of assistance. By informing the suspect that support is available, they may be able to indicate whether this is needed, which will assist the constable in making their assessment pursuant to Section 33.

6. Furthermore, no right to interpretation or translation is set out in the Bill at all. This right must be notified under Section 5(2) along with the other important safeguards. It is fundamental that suspects held in police custody are provided with the assistance of an interpreter and that certain documents are translated to assist them, in order to ensure that they understand the process and can communicate with their lawyer and the police. It is also necessary to include such notification and provision of the right pursuant to EU directive 2010/64/EU on the right to interpretation and translation in criminal proceedings[4] and directive 2012/13/EU on the right to information in criminal proceedings.[5]

Section 7 – Authorisation for keeping a person in custody

Proposed Amendments

Page 4, line 6, after 'having been arrested' insert: 'with or'

Page 4, line 13, leave out (3) and insert:

(3) Authorisation may be given only by a constable who-

(a) is of the rank of sergeant or above, and
(b) has not been involved in the investigation in connection with which the person is in police custody

Briefing

7. Section 7 provides the circumstances in which an arrested person may continue to be detained in police custody following arrest. It only applies to persons arrested without a warrant. Since a warrant only authorises the arrest of a person, not what happens to

[4] OJ (26.10.10) L 280/1

[5] OJ (1.06.12) L 142/1

them during detention, we consider it necessary that the section apply to both those arrest without and *with* a warrant.

8. We welcome the provision in Section 7(3) that authorisation may only be given by an officer who has not been involved in investigation of the suspected offence. However, we do not consider that this goes far enough to ensure that a fair and objective decision is made. Upon arrival at the police station, the investigating officer presents the suspect to the custody sergeant. This is the person who should authorise the decision as to whether the suspect should remain in custody and our amendment would provide for this. The custody sergeant is independent, may be of senior rank to the investigating officer, but, most importantly, is responsible for the welfare and control of the suspect during detention.

Sections 14 and 20 – Release on conditions/undertaking

Proposed Amendments

Page 6, line 35, after 'for the purpose of' leave out the rest of subsection (2) and insert:

'securing-
(a) that the person surrenders to custody,
(b) that the person does not commit an offence while on bail,
(c) that the person does not interfere with witnesses or otherwise obstruct the course of the investigation, or,
(d) the person's own protection or, if the person is under the age of 18, for the person's own welfare or in the person's own interests.

Page 9, line 32, after 'for the purpose of' delete the rest of subsection (3)(b) and insert:

'securing-
(a) that the person surrenders to custody,
(b) that the person does not commit an offence while on bail,
(c) that the person does not interfere with witnesses or otherwise obstruct the course of the investigation, or,
(d) the person's own protection or, if the person is under the age of 18, for the person's own welfare or in the person's own interests.

Page 9, line 34, leave out subsection (4).

Briefing

9. Section 14 provides for the possibility of conditions to be placed upon the liberation of a suspect who is released from police custody prior to charge where a constable considers it necessary and proportionate to impose such conditions for the purpose of ensuring the proper conduct of the investigation. Likewise, section 20 provides for conditions to be imposed upon liberation post charge. We do not think that conditions of liberation should pertain to the conduct of the investigation, which is a matter for the police. The conditions should relate to the possible conduct of the person upon liberation and be limited to an exhaustive set of scenarios, to ensure that officers exercise their powers within reasonable limits and uniformly across the Police Service.

10. Our amendment would also remove the possibility for the police to impose a curfew upon liberation. This is a restriction which deprives the liberty of the person to such an extent that we feel it can be justified only by the independent oversight of a judge.

Section 16 – Modification or removal of conditions

Proposed Amendment

Page 7, line 29, after ‘must keep under review’ insert: ‘at least every seven days’

Briefing

11. Section 16 provides for the review of conditions imposed upon release by a constable of the rank of inspector or above, but it does not specify a period for such review. The review must be carried out at reasonable intervals between the release from custody and the end of the 28 day period of release upon conditions provided in Section 14. We would propose seven day intervals of review to be reasonable, so as to ensure that the investigation is being pursued throughout the period of conditional release.

Section 23 – Information to be given before interview

Proposed Amendments

Page 11, line 9, after ‘Not more than’ leave out ‘one hour before a constable interviews’ and insert ‘two hours before a constable intends to interview’

Briefing

12. Section 23 enables the provision of further information to a suspect about their rights prior to interview. In our view the timescale of 'not more than one hour' before a constable interviews a person about an offence provided by section 23(2) is far too short to enable the suspect to exercise their rights effectively. Should a suspect wish to consult with a solicitor, as provided by section 36, this will have to be organised. The SLAB Solicitor Contact Line must be contacted by the investigating officer, which must take sufficient details concerning the case in order to instruct a solicitor. Experience shows that contacting a solicitor to act on the suspect's behalf may take over half an hour. Once the solicitor has agreed to act, they may require to speak to the suspect by telephone prior to attending. They will need travel time to attend at the police station from their location. The solicitor will wish to obtain a pre-interview briefing from one of the investigating officers. The suspect is then entitled to consult with their solicitor prior to interview, which in our experience can take at least half an hour. In complex cases it may take considerably longer. With respect to assistance from a parent, guardian, appropriate adult or interpreter, this may also take over an hour to organise and for the relevant person to attend.

13. If the intention of section 23 is to repeat the rights available to the suspect, this is in principle welcome. However, to repeat the rights unnecessarily and out of context can only serve to confuse suspects about what their rights are and lead to a failure to exercise them effectively. Our amendment extends the timescale to a more realistic period and removes the rigidity as to when the interview will take place, by focussing on the constable's intention.

Section 24 – Right to have a solicitor present

Proposed Amendments

Page 11, line 30, after 'has the right to' leave out 'have a solicitor present' and insert 'be assisted by a solicitor'

Page 12, line 2, after 'being present if' leave out 'the' and insert 'an appropriate'.

Page 12, line 4 leave out Subsections (4)(a) and (4)(B) and insert:

(a) An urgent need to prevent interference with evidence in connection with the offence under consideration, or

(b) An urgent need to prevent interference with or physical harm to a person

Page 12, line 13, after 'right to have a solicitor present' insert:

(7) An "appropriate constable" must be a constable who-

(a) is of the rank of superintendent or above, and

(b) has not been involved in the investigation in connection with which the person is in police custody

Briefing

14. Section 24 provides that a person has the right to have a solicitor *present* while being interviewed. This does not adequately describe a solicitor's role, as understood in the judgment of the UK Supreme Court in *Cadder*. Our amendment would reflect the active participation a solicitor ought to provide their client during interview, as required. The section should specify that a person has the right to be *assisted* by a solicitor while being interviewed. This would make clear that a solicitor is able to make appropriate interventions on behalf of their client so as to effectively represent their interests.

15. Section 24(4) provides that a constable may proceed to interview without a solicitor present in certain specified circumstances. This is a significant curtailment of the rights of the suspect whilst in police custody, which may have critical consequences for their right not to self-incriminate. The circumstances in which the denial of the right is appropriate must be more tightly drawn. The European Court of Human Rights has indicated that access should be allowed unless there are compelling reasons, in light of the particular circumstances of the case, to restrict that right.[6] Our amendments would ensure that the decision must be taken by an independent officer of the rank of superintendent or above, so that the decision is objective and fair in the circumstances. They also follow the EU Directive on the right of access to a lawyer[7] and the narrower circumstances provided in England, Wales and Northern Ireland pursuant to the Police and Criminal Evidence Act.[8]

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[6] *Salduz v Turkey* (2009) 49 EHRR 19, para 55.

[7] Directive 2013/48/EU. The UK has not opted in to this measure, but it is a reflection that standards in other EU countries will be higher in other EU countries than in Scotland.

[8] Section 58 Police and Criminal Evidence Act provides:
(6) Delay in compliance with a request is only permitted—
(a) in the case of a person who is in police detention for an indictable offence; and
(b) if an officer of at least the rank of superintendent authorises it.

(8) Subject to sub-section (8A) below an officer may only authorise delay where he has reasonable grounds for believing that the exercise of the right conferred by subsection (1) above at the time when the person detained desires to exercise it—
(a) will lead to interference with or harm to evidence connected with an indictable offence or interference with or physical injury to other persons; or

This would ensure that it is only in the most exceptional circumstances that a person is denied access to a legal representation during interview.

Section 25 – Children and waiver of legal advice

Proposed Amendments

Page 12, line 22, leave out Subsections (3) to (5).

In the alternative,

Page 12, line 23, after 'a solicitor present only' insert '(a)'
Page 12, line 24, after 'a relevant person' insert:

'and (b) having received written guidance suitable for their level of comprehension on the right to legal advice and assistance'

Briefing

16. Section 25 prevents children under 16 consenting to an interview without having a solicitor present. We welcome this provision. Children in custody are particularly vulnerable and although accompanied by a relevant person in interview, that relevant person – often a parent or guardian - may have minimal or no experience of custody, little understanding of the gravity of the offence that the child has been arrested in connection with, and no grasp of the significance of the right to legal advice and assistance. The denial of waiver should extend to the right to legal advice, contained in Section 36, and we set out amendments to ensure the right to legal advice is secured for children below.

17. However, the Bill would exclude children aged 16 and 17 from the operation of this provision, but would provide that they can waive the right to the presence of a solicitor only with the approval of their relevant person. We consider that many of the same risks

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(b) will lead to the alerting of other persons suspected of having committed such an offence but not yet arrested for it; or
(c) will hinder the recovery of any property obtained as a result of such an offence.

(8A) An officer may also authorise delay where he has reasonable grounds for believing that—
(a) the person detained for [the indictable offence] [4] has benefited from his criminal conduct, and
(b) the recovery of the value of the property constituting the benefit will be hindered by the exercise of the right conferred by subsection (1) above.

Further detailed provisions as regards delay are set out in Annex B to the PACE Codes of Practice.
The Police and Criminal Evidence (Northern Ireland) Order 1989, article 59 applies in Northern Ireland.

will apply to all under 18s as apply to those aged 16 and under. The Section may be designed to recognise that older children and young adults have increasing cognitive capacity and competence to understand complex decision making and to take responsibility for their own choices. However, this assumption is undermined by the fact that the determinative decision will be taken by the relevant person in many cases. JUSTICE Scotland considers that in order to safeguard the rights of young people the distinction should be deleted. If the Bill is to continue to adopt the distinction between children under and over 16 years old, written guidance on the right to legal representation, the significance of the right to legal representation and the relevance of the waiver decision must be given to the child and the relevant person prior to the exercise of the decision. This information should be provided in an accessible format that both the young person and the relevant person assisting them can understand.

Section 30 – Right to have intimation sent to another person and section 32 - Right to under 18s to have access to other person

Proposed Amendments

Page 16, line 19, after 'This sections applies where' leave out 'a' and insert 'an appropriate'

Page 16, line 25, after 'who has care of the person' insert:

"an appropriate constable" has the meaning set out in Section 9(3)

Page 17, line 29, after 'restricted so far as' insert 'an appropriate constable considers'

Page 17, line 34, after 'who has care of the person' insert:

"an appropriate constable" has the meaning set out in Section 9(3)

Briefing

18. Sections 30(5) and 32(3) afford a constable the power to delay the exercise of intimation or access to another person for under 18s. For the reasons set out above in relation to Section 24, this decision is a significant restriction to a person's custodial rights and should be made by an officer independent of the investigation of the rank of inspector or above.

Section 31 – Right to have intimation sent: under 18s

Proposed Amendments

Page 17, line 3, leave out Subsection (4)(b)

Briefing

19. Section 31(4) distinguishes between juveniles under 16 or over 16 in relation to whether a constable should continue to contact a parent or guardian to attend at the station on the child's behalf where it has been difficult to reach them. We do not believe this distinction should be made between these age groups. A 16 or 17 year old child may become impatient at waiting for assistance and decide that intimation is no longer necessary simply to seek to avoid further delay and detention in the police station, rather than because they no longer need the support. Section 31(4)(b) should be deleted.

Section 33 – Support for vulnerable persons

Proposed Amendment

Page 18, line 1, leave out Subsection (1)(b)

Briefing

20. Section 33(1) distinguishes between adults and juveniles with regard to whether they need assistance owing to a mental disorder. We do not think the distinction ought to be made when it may lead to children failing to receive appropriate support. It cannot be assumed that a parent is able to provide appropriate assistance to a child with a mental disorder. The officer should make enquiries of the parent as to whether further assistance is needed, and have the residual discretion to obtain further support where they consider it necessary, even if the parent does not.

Section 36 – Right to consult with a solicitor

Proposed Amendments

Page 19, line 12, after 'exceptional circumstances' leave out 'a' and insert 'an appropriate'

Page 19, line 14, leave out Subsections (2)(a) and (b) and insert:

(a) An urgent need to prevent interference with evidence in connection with the offence under consideration, or

(b) An urgent need to prevent interference with or physical harm to a person

Page 19, line 18, after 'telephone', insert:

(4) An “appropriate constable” must be a constable who-

(a) is of the rank of superintendent or above, and

(b) has not been involved in the investigation in connection with which the person is in police custody

Page 19, line 16, after ‘means consultation’ leave out ‘ by such means as may be appropriate in the circumstances and includes (for example)’ and insert:

‘in person save for in exceptional circumstances, but may include initial’

Briefing

21. Section 36(2) makes provision for the refusal of access to consultation in exceptional circumstances. As we set out above with regard to refusal of legal assistance during interview, this power is a significant curtailment on the most important right a suspect holds during police custody. It must be narrowly exercised by a sufficiently experienced and independent officer.

22. We do not agree with the provision in Section 36(3) that appropriate consultation may be provided through telephone advice. Solicitors are unable to adequately advise their clients by telephone alone since they are unable to assess the suspect’s welfare and demeanour; nor does the solicitor have the same opportunity for access to information from the police concerning the suspected offence. Furthermore, the solicitor cannot readily make effective representations to the police concerning the decision to charge or further detain if they only advise their client by telephone. A pre-interview telephone consultation cannot provide sufficient protection for a suspect in the dynamic setting of a police interview, especially where such interviews are increasingly carried out after detailed planning, and advice to the interviewing officers from a Police Interview Adviser. Allowing solicitors to give advice only by telephone without a presence in the police station risks condoning the provision of inadequate advice. Our amendment recognises that, in exceptional circumstances this may be the only option, and that initial telephone advice can assist a suspect, but would require consultation to be effected in person as a standard practice.

New Section - waiver

Proposed Amendments

Page 19, after Section 36 insert:

Section X1 – Waiver of right to consultation with a solicitor

(1) A person may only waive the right to consultation with a solicitor where a constable is satisfied-

(a) that the person has received clear and sufficient information about the right,

(b) that the person understands the content of the right and consequences of waiver, and

(c) that the waiver is made voluntarily and unequivocally

(2) A person may not waive the right to consultation with a solicitor if-

(a) the person is under 18 years of age, or

(b) the person is 18 years of age or over and, owing to mental disorder, appears to the constable to be unable to-

(i) understand sufficiently what is happening, or

(ii) communicate effectively with the police.

Briefing

23. In answer to a Parliamentary question on 25th June 2015, the Cabinet Secretary for Justice provide the information currently known regarding waiver of the right to legal assistance by suspects in police detention[9]:

> Police Scotland did however complete a custody data study in June 2013 which captured the solicitor access waiver percentage for a 1 month period. They were then able to extrapolate for a 12 month period, which concluded that 75% of all persons brought into police custody who had the right of access to a solicitor waived their rights. The final report of Lord Bonomy's Post Corroboration Additional Safeguards Review also refers to analysis of 1000 interviews by Police Scotland in October and November 2014 which showed 71% of those in custody did not seek a consultation with a solicitor.

24. It is extremely concerning that four years after the right of access to legal advice during police detention was pronounced by the UK Supreme Court as an integral right held under article 6 ECHR,[10] only 30 per cent of people were accessing such advice. Our proposed new section would ensure that proper checks are in place prior to a person

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[9] Available in the Daily Written Answers Report for 25th June 2015, http://www.scottish.parliament.uk/S4_ChamberDesk/WA20150625.pdf

[10] *Cadder v HM Aadvocate,* see note 1 above.

waiving their right to legal advice. The decision to waive legal assistance should not be taken lightly given the implications for the suspect. Our amendment follows the wording in Directive 2013/48/EU on the right of access to a lawyer, and reflects some of the comments made in the judgment of the UK Supreme Court in the case of *McGowan v B.*[11]

25. Subsection (2) replicates the acknowledgment in Section 25, concerning interview without a solicitor, that a child has insufficient capacity to waive their rights and should always be provided with legal assistance.

Section 42 – Duty to consider child's best interests

Proposed Amendments

Page 20, line 18, after '(1)' leave out 'Subsection (2) applies' and insert 'Subsections (2) and (3) apply'

Page 20, line 25, after 'primary consideration' insert:

> (3) A decision under subsection (1) must be taken as a last resort and exercised for the shortest possible time.

Page 20, line 26, replace '(3)' with '(4)'

Briefing

26. We welcome the statutory provision of the child's best interests as a primary consideration prior to arrest and detention of a child. We are concerned, however, that the section includes the possibility of holding a child in police custody. Our amendment would insert the requirement in article 37 of the UN Convention on the Rights of the Child as regards the detention of children. Where the arrest of a child is deemed necessary, they should be taken to a place of safety and not detained with adult suspects, in order to safeguard their welfare.

[11] *McGowan v B* [2011] UKSC 54, 2012 S.C. (U.K.S.C.) 182.

Proposed additional amendments to the Bill

27. In addition to our earlier observations for enabling the safeguards in the Bill to be made more effective, we consider the Bill to be a prime opportunity to include additional important safeguards across the criminal justice process. These are borne out of the review of corroboration that has taken place over the past three years and are areas that we have highlighted to the reviews of Lord Carloway and Lord Bonomy that in our view, irrespective of any change to the rule on corroboration, are worthy of reform. Lord Bonomy in his Post Corroboration Safeguards Review[12] highlighted a number of areas that the group also considered currently in need of reform and many of these overlap with our areas of concern.

New section - Police Code of Practice and test for admissibility of evidence

Proposed amendments

Section X2 – Policing Code of Practice

(1) The Scottish Ministers shall within 12 months of the Bill passing Royal Assent bring forward regulations for a Code of Practice to govern operational policing powers.

(2) The Code of Practice under subsection (1) shall apply to all statutory powers set out in Part 1 of this Act and any other common law powers pertaining to arrest, search and custody held by any official exercising those powers.

(3) Breach of a provision set out in the Code of Practice shall be taken into account by a court hearing a criminal matter in which the breach occurred in assessing whether evidence shall be admitted into the proceedings. Section X3 shall apply when deciding upon admissibility of such evidence.

(4) The Scottish Ministers may, by regulations, specify the procedure for amendment of the Code of Practice under subsection (1).

(5) Regulations under subsection (1) are subject to the affirmative procedure.

Section X3 – Test of admissibility of evidence

(1) A court hearing a criminal matter may refuse to admit evidence on which the Crown proposes to rely if it appears to the court that, having regard to all the

[12] Final Report, consultation responses and Academic Expert Group report available at http://www.gov.scot/About/Review/post-corroboration-safeguards

circumstances, including the circumstances in which the evidence was obtained, the admission of the evidence would have such an adverse effect on the fairness of proceedings that the court ought not to admit it.

Briefing

Codes of Practice

28. Although the Bill will place some important policing powers on a statutory footing, there are many operational details as to how these powers relating to arrest and detention ought to be exercised that should be set out to provide uniform guidance to, and accountability of, police officers in Scotland. In our view, a code of practice, similar to the PACE Codes of Practice in England and Wales, will enable Police Scotland and any other policing authorities to fulfil these aims.[13] As a statutory instrument, such a Code will be open to revision on a regular basis in light of research, legislative reform and international obligations to ensure that its provisions remain appropriate and proportionate. As in England and Wales, a Code Review Board of experienced practitioners from the police, legal and judicial professions, could be established to present draft revisions to the Scottish Parliament.

29. The Bonomy Review has recommended that codes of practice in connection with identification procedures and interviewing of suspects should be developed and revised by the Lord Advocate. We do not believe that this approach would be sufficiently

[13] The English and Welsh Police and Criminal Evidence Act 1984 (PACE) Codes of Practice, and later Police and Criminal Evidence Order 1989 in Northern Ireland, followed a detailed period of research under the Royal Commission review[13] *The Investigation and Prosecution of Criminal Offences in England and Wales*: *The Law and Procedure* (Cmnd 8092-I 12/01/81). Amongst other findings, the Commission identified the lack of procedural rules applying to police officers. Until that point, police discretion largely dictated practice, subject to the Judge's Rules which are scant in detail. The Codes of Practice, by contrast, cover arrest, detention, search and identification procedures in detailed, binding provisions with additional guidance notes. The Police quickly came to respect and apply these Codes, realising that they provided a helpful framework in which to operate fairly, and be shown to have done so. Moreover, because the Codes are provided pursuant to statute, compliance with their contents is mandated. This gives force to the rules, for suspects held in detention, for oversight by superior officers and for legal advisers attending the police station. The Code can be relied on to ensure procedure is fair. Further, a failure to follow the Code can result in an exclusion of evidence obtained in breach at trial. Due to the application of section 78 PACE, the court will consider whether the breach would have such an adverse effect upon the fairness of the proceedings that the evidence ought not to be admitted. Where the breach is material to the case, evidence, such as the fruits of searches, significant statements, interview records and identity parades, has been excluded by the courts in England, Wales and Northern Ireland. Likewise, pursuant to section 76 PACE, confessions shown to be unreliable or obtained through oppression are excluded.

comprehensive and recommend a wider scope for such codes to cover all aspects of arrest, search and detention in police custody. We also disagree that the obligation lies with the Lord Advocate alone for the Code to be established. Although the Lord Advocate may present the proposed regulation to Parliament that will introduce a code of practice, we consider that it requires the oversight and approval of Parliament, in its inception and any revision. We do agree with the recommendation in the Bonomy Review[14] that the test to be applied to evidence obtained in breach of the code should be one of fairness and we have set out below an overarching test of fairness that we believe should apply to admissibility of evidence more widely.

30. We welcome the recommendations of the Advisory Group on Stop and Search, which published its findings in September.[15] We understand that the Advisory Group has recommended a statutory code of practice that has been welcomed by the Scottish Government. It therefore appears that the benefit of a code of practice has been recognised. We trust that a similar approach can be taken to the arrest and detention of suspects.

Recording of police interviews

31. The Bonomy Review has recommended the audio-visual recording of suspect decisions to waive legal advice, the custody areas and all suspect interviews. The finding that this does not happen in all cases, particularly in summary ones accords with the evidence that JUSTICE jointly found in the study *Inside Police Custody.*[16] The majority of uniformed officers are not trained in conducting a recorded interview and, as such, hand record the interview in their notebook or on a statement form. As the Bonomy Review states[17]:

> A recording that is both an audio and video recording of a formal interview is a valuable way of vouching the fairness of the proceedings, providing an accurate record, and enabling presentation of evidence in court in a form that enhances the opportunity for judge or jury to evaluate any statement made…[recording] would enhance the transparency of the whole interview process and materially reduce the opportunities for misconduct or

[14] At para 7.31.

[15] See http://www.gov.scot/About/Review/stopandsearch

[16] See note 3 above.

[17] At para 5.6.

misrepresentation of conduct. The universal deployment of such measures would provide protection for both police officers and accused persons.

32. We agree with this recommendation, having previously called for such recording in our own work. The Codes of Practice should detail this requirement, and the methods of capture and storage of such evidence.

Admissibility of evidence

33. The admissibility of evidence test is taken from section 78(1) PACE. Section 78 applies to 'evidence on which the prosecution *proposes* to rely' and therefore applications to exclude evidence under the section should be made before the evidence is adduced. If a court decides that admission of the evidence in question would have such an adverse effect on the fairness of proceedings that it ought not to admit it, it cannot logically exercise discretion to admit it.[18]

34. Although a fairness test exists in Scotland at common law, section 78(1) PACE directs the court, in deciding whether to exercise the statutory discretion, to have regard to all the circumstances, including those in which the evidence was obtained. We consider that placing this test on a statutory footing would make the obligation clearer and underline the importance of compliance with the Code of Practice. The critical test under s78 is whether any impropriety affects the fairness of proceedings: the court cannot exclude evidence under the section simply as a mark of its disapproval of the way in which it was obtained.[19] It is important to note that this admissibility test would apply widely to all evidence, not just breach of the policing code of practice. That would enable other evidence which it may not be fair to admit into the trial, such as "special knowledge" confession or hearsay evidence because it is the decisive evidence of an alleged criminal act, to be considered against an overall test of fairness.[20]

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[18] *Chalkley* [1988] QB 848 at 874, per Auld LJ.

[19] *Ibid.*

[20] The provisions on exceptions to the rule against admitting hearsay evidence are set out in s259 Criminal Procedure (Scotland) Act 1995 and do not allow for the fairness of the admittance of the evidence to be considered in the circumstances of the case. As the Lord Justice Clerk identified in *N v H.M. Advocate* 2003 SLT 761, the statutory scheme removed the common law discretion to exclude evidence, which he contrasted unfavourably with the discretion afforded by s78 PACE and other English provisions. The Court was nevertheless able to rely on article 6 ECHR to require a consideration of fairness to be made by courts assessing hearsay evidence, but as the Bonomy Review has concluded, there is 'widespread judicial reluctance to disregard evidence entirely or direct a jury that it should be disregarded,' at para 9.22.

New section – dock identification

Proposed Amendment

Section X4 – Abolition of dock identification

(1) Where identification of an accused person is in issue at trial, courtroom identification before a jury during trial conducted as part of the prosecution evidence against the accused shall be prohibited.

Briefing

35. Whilst some other jurisdictions allow dock identification there can be little doubt that Scotland is unique within the United Kingdom in the significance it attaches to it. The rules which are in place elsewhere, restricting the circumstances in which witnesses who have not attended an identification parade may identify an accused in court, have no Scottish equivalent. Dock identification can take place even where the identity of the perpetrator is a live issue in the trial and there has been no pre-trial identification procedure or, where one has been held, there has been no identification. Such evidence is routinely relied upon to secure convictions and the Appeal Court has endorsed the practice of leaving consideration of the weight of the evidence to the jury.[21]

36. The Judicial Committee of the Privy Council (JCPC) in *Holland v HM Advocate 2005 1 SC(PC) 3* unanimously decided that dock identification was not a breach of the right to a fair trial *per se*. However, Lord Rodger set out in detail the fallibility of this process, the need for careful consideration of the circumstances of each case before a dock identification is admitted, and the importance of judicial direction to the jury as to how to treat that evidence if it is so admitted. Nevertheless, because Lord Rodger indicated that it would only be in an "extreme" case that dock identification would be unfair *per se*, a practice has developed in which it has become necessary to identify exceptional features that would make a case an "extreme" example before a trial judge will exclude such evidence. Despite a number of cases where identification has featured as a key aspect in the appeal, we are not aware of any case that has succeeded in demonstrating an exceptional feature in the nine years since the decision in *Holland*.

[21] *See Toal v H.M. Advocate* [2012] HCJAC 123 and the recent cases of *Robson v HM Advocate* [2014] HCJAC 109; *Docherty v HM Advocate* [2014] HCJAC 71 and *Bell v HM Advocate* [2014] HCJAC 127.

37. The approach taken to dock identification in common law jurisdictions, such as Canada, Australia, New Zealand and England and Wales, as well as other European nations within the Council of Europe, highlights that the reasoning in *Holland* is no longer seen elsewhere as a sufficient basis upon which to admit dock identification as fair in accordance with article 6 ECHR. Moreover, recent decisions of the JCPC demonstrate a move towards limiting the use of dock identification whilst attempting to remain deferential to the decision in *Holland*: such as *Lawrence* [2014] UKPC 1 where the Board stated that judges should warn the jury of the undesirability in principle, and the dangers, of dock identification; and *Edwards* [2006] UKPC 23 where the Board held that it was well established that dock identification should only be admitted in the most exceptional circumstances, in effect the opposite of the approach in Scotland.

38. Academic research, and particularly that considered by the Academic Expert Group to the Bonomy Review, suggests that the corroboration rule and directions to jurors in Scotland provide insufficient safeguard, since juries may be more persuaded by an apparently confident in-court identification that takes place before them than other forms of identification, despite the suggestive nature of the identification and the potential irrelevance of the witness's confidence.[22]

39. Given the lapse of time between the alleged event and the trial diet, the fallibility of observation and memory, and the social pressure upon a witness to positively identify the accused at trial, JUSTICE Scotland has grave concerns about the use of this evidence at trial and its impact upon the fairness of the case against the accused. We agree with the Bonomy Review that due to the risk of misidentification the practice of dock identification must be ended.[23]

40. We understand from the Bonomy Review that a case is pending before the UK Supreme Court to consider this issue. However, in our view, it would be more appropriate for the Scottish Parliament to end this practice through legislation. Some members of the Bonomy Review Group considered this to be the best course because it would add clarity and consistency to the law. Others suggested that an undertaking by the Lord Advocate to stop the practice in all prosecutions would ensure that this actually took

[22] See as an example of the literature Dan Simon, *The Psychology of the Criminal Justice Process* (Havard University Press, 2012) and also the Report of the Academic Expert Group for the Post Corroboration Safeguards Review, August 2014, chapter 5, available at: http://www.scotland.gov.uk/Resource/0046/00460650.pdf, pp 44-66.

[23] See chapter 6 of the Review report.

place. We consider that a statutory provision is the most effective means of ensuring that the practice does stop.

41. In our view, there is only one circumstance in which it would be appropriate to allow a dock identification to take place in court. That is where identification is not an issue in the case, and the identification would not be a formal matter of evidence, but rather one of continuity; a witness may point to the accused, or be directed towards them by counsel, while giving evidence in order to associate them with the matters being described. However, in any case where identification is in issue, usually where the accused says they were not present at the scene, or if they were, they did not commit the criminal act, it will never be appropriate to invite a witness to attempt to identify the accused in the courtroom.

42. Identification procedures must therefore, as the Bonomy Review highlights, take place prior to court proceedings. Identification should form part of the prosecution evidence to demonstrate that proceedings are being taken against the right person. It logically follows that this evidence ought to be obtained not during trial, but at the outset of the case. It is surprising that this does not happen in every case where identification is in issue and this is a matter for Police Scotland to address. Parliament, however, has the opportunity to end the current highly questionable practice of court identification within this Bill.

New Section – No case to answer submission

Proposed Amendments

Section X5 – No case to answer in summary cases

(1) The Criminal Procedure (Scotland) Act 1995 is amended as follows.

(2) In section 160 (no case to answer), after subsection (3) there is inserted—

"(4) For the purpose of this section, the judge is entitled to be satisfied that evidence is insufficient in law to justify the accused being convicted of an offence if the judge concludes that the evidence provides no proper basis on which the accused could reasonably be convicted of the offence.".

Section X6 No case to answer in solemn cases

(1) The Criminal Procedure (Scotland) Act 1995 is amended as follows.

(2) After section 97C there is inserted—

> "97CA Insufficiency under sections 97, 97A and 97B (1) This section applies for the purposes of sections 97, 97A and 97B. (2) The judge is entitled to be satisfied that evidence is insufficient in law to justify the accused being convicted of an offence if the judge concludes that the evidence provides no proper basis on which the accused could reasonably be convicted of the offence.".
>
> (3) Section 97D is repealed.

Briefing

43. This is the test proposed by the Bonomy Review for responding to cases where no corroboration is required. The current test set out in both sections of the 1995 Act is:

> If, after hearing both parties, the judge is satisfied that the evidence led by the prosecution is insufficient in law to justify the accused being convicted of the offence charged in respect of which the submission has been made or of such other offence as is mentioned, in relation to that offence, in paragraph (b) of subsection (1) above, he shall acquit him of the offence charged in respect of which the submission has been made and the trial shall proceed only in respect of any other offence charged in the indictment

44. The amendment aims to ensure that, at the end of the prosecution case, the accused is able to challenge the quality of prosecution evidence on the basis of whether there is, in fact, a sufficiency of evidence upon which the jury, properly directed, ought to convict. The current test allows the quantity of evidence, through the application of the corroboration rule to be the deciding factor.[24] In our view, this amendment is necessary with the corroboration rule intact. It will enable the purpose of the rule to properly be performed – namely that the accused should only be required to answer a charge against them when the prosecution has led sufficient evidence upon which the jury would be entitled to convict. Corroborated evidence does not necessarily guarantee that this test is made out – two pieces of evidence may, when given orally in court and cross examined by the defence, amount to very weak evidence that the offence was in fact committed.

[24] To which, see chapter 11 of the Bonomy Review report.

Expert Evidence

45. In our response to the Bonomy Review we set out that the common law in Scotland recognises many of the concerns expressed elsewhere as to reliability and credibility of expert evidence. But more is also needed here to ensure such evidence is used appropriately. We consider that current Scottish procedure does not provide sufficient safeguards against wrongly admitted evidence of this kind. We are of the view that the criteria set out in recent cases[25] should be put on a statutory footing and the potential evidence should be assessed by a judge pre-trial, as is provided for in part 33 of the English and Welsh Criminal Procedure Rules and accompanying Practice Direction, and as suggested by the High Court of Justiciary in its Opinion in the *Hainey* case in which a conviction depending on expert evidence was quashed.[26] The Review did not agree with us. However, as part of the JUSTICE Scotland Strategy for 2015-2017,[27] one of our aims is to review the procurement and admissibility of expert evidence in both civil and criminal proceedings in the Scottish courts. Once we have reviewed the position in detail, through a working party of our members and relevant experts, we will make detailed recommendations for reform of the Scottish practice in this area.

JUSTICE Scotland
17th September 2015

[25] Such as *Young v HMA,* 2014 SLT 21 and *Wilson v HMA,* 2009 JC 336.

[26] Hainey v HMA 2013 S.L.T. 525.

[27] Available here http://2bquk8cdew6192tsu41lay8t.wpengine.netdna-cdn.com/wp-content/uploads/2015/07/JUSTICE-Scotland-Strategy-2015-17.pdf