Post-corroboration Safeguards Review

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Consultation Questions

Question 1

Statutory Police Guidelines

Question 1) - Do you agree that Codes of Practice governing key aspects of the gathering of evidence by the police in criminal cases (such as interviewing suspects and conducting identification procedures) should be required by statute?

Yes ☒ No ☐

Please feel free to provide any additional comments to support your answer

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[1] *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.

JUSTICE considers that a similar code is necessary in Scotland. The creation of the Police Service of Scotland ("PSS") provides a timely opportunity to introduce such a uniform statutory code. Although nationwide operational procedures have been developed by PSS, these are not binding

[1] *The Investigation and Prosecution of Criminal Offences in England and Wales*: *The Law and Procedure* (Cmnd 8092-I 12/01/81))

and have not had the benefit of consultation. The PACE Codes are regularly updated through public consultation to take account of legal changes. This makes them transparent and provides for greater accountability from the police officers to whom they apply.

Question 2

Dock Identification (Report of the Academic Expert Group – Chapter 5)

Question 2A) - Do you agree that dock identification evidence should be generally inadmissible?

Yes ☒ No ☐

Please feel free to provide any additional comments to support your answer

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.[2]

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 in the appeal, we are not aware of any case that has succeeded in demonstrating this feature in the nine years since the decision in *Holland*.

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

[2] *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.

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*: see *Lawrence* [2014] UKPC 1 where the Board states that judges should warn the jury of the undesirability in principle, and the dangers, of dock identification; and *Tido* [2012] WLR 115 where the Board considers circumstances, amounting to good reasons for not holding an identification parade, where a dock identification could be admitted as a mere formality. See also *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.

By contrast the courts in Scotland allow dock identification subject to a direction that may be given to the jury to be careful in placing weight upon it. In *Holland*, the High Court of Justiciary set out the safeguards said to be present in such circumstances:

> Every dock identification is subject to the safeguards that *the accused is protected by the principle of corroboration;* and by the opportunity open to the defence to contrast an identification made in court with one made at an identification parade; to point out that if the witness failed to identify at such a parade, the identification in court is unconvincing; and so on.[3] (Italics added)

Without the corroboration requirement, a vital safeguard will be lost. But irrespective of whether the rule were to remain or be abolished, we consider that the scientific material, and particularly that considered by the Academic Expert Group, suggests that these procedures 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.

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.

At the very least, guidelines are required to determine when procurators fiscal should seek to rely upon dock identification, and in what terms a judge should direct a jury.

[3] *Holland* at para 35 per Lord Justice Clerk Gill.

Question 2B) - In what circumstances should dock identification evidence be admissible?

Please provide comments

We would wish to see legislation that declares dock identification inadmissible in all but exceptional circumstances, especially since it can have the effect of 'curing' any prior failure to identify, and corroborating other evidence: see Dan Simon, *The Psychology of the Criminal Justice Process* (Harvard University Press, 2012) amongst other research. Such exceptional circumstances should, in our view, be limited to cases where a lawful identification parade has taken place and the suspect has been identified, or where identification is not in issue. No other circumstance would produce an identification at trial that can be said to be reliable, and any positive identification procured in that way would, in our view, be unfair.

<u>Question 3</u>

Confession Evidence (Report of the Academic Expert Group – Chapter 6)

Question 3A) - Should corroboration be required in cases where otherwise a confession would be the sole evidence?

Yes ☒ No ☐

Please feel free to provide any additional comments to support your answer

Confessions provide a good example of when corroboration can provide a safeguard against wrongful conviction. It is well established that confession evidence is often unreliable. Scottish criminal law's proud and justifiable boast that no man could be convicted upon an uncorroborated account from his own mouth will ring hollow in the event that corroboration is abolished in respect of this type of evidence. The number of high profile overturned convictions in England and Wales which, at the time of trial relied solely upon purported confessions of accused persons, is sufficient to point up the potential hazards of such an approach.

The case of *Ward* (1996) Cr. App. R.1 is an interesting and tragic illustration of an accused person falsely confessing to involvement in a serious crime. Upon conviction there was no challenge by way of appeal. Subsequent expert testimony showed that the accused suffered from a personality disorder which rendered her susceptible to claims of responsibility for crimes which she had not committed. In parallel, there was concerning partisanship on the part of forensic scientists. On the face of it, this fabricated confession appeared compelling. In this field – extra judicial statements or confessions to police officers – the importance of the requirement for corroboration is thrown into sharp focus. Absent that check upon the truthfulness of the account given to police officers – some confirming or concurring evidence implicating the accused – it is highly likely that miscarriages of justice will increase. That is not to say that the police will be more prone to fabricate confessions but, rather, simply having

met, perhaps exceeded, the legal requirement of sufficiency, the impetus to look further for an independent check may not be present. Lord Bingham of Cornhill [4] offers a sceptical view of such evidence which emphasises the need to pause for thought:

> I would add that for my part I always suspect these confessions, which are supposed to be the offspring of penitence and remorse, which nevertheless are repudiated by the prisoner at the trial. It is remarkable that it is of very rare occurrence for evidence of a confession to be given when proof of the prisoner's guilt is otherwise clear and satisfactory; but, when it is not clear and satisfactory, the prisoner is not unfrequently alleged to have been seized with the desire borne of penitence and remorse to supplement it with a confession; - a desire which vanishes as soon as he appears in a court of justice.[5]

It is worth noting that, in England and Wales, although there is no requirement for corroboration in confession cases, section 76 PACE provides for confessions to be excluded where they can be considered unreliable or obtained by oppression; section 77 specifically provides that where the evidence depends wholly or substantially on the confession of a person who is 'mentally handicapped' and made without a person present who was independent of the police, the judge must give a warning to the jury of the special need for caution before convicting in reliance upon the confession; and section 78 PACE enables a confession obtained without access to a lawyer to be excluded. Moreover, the requirement for recording of interviews and signing of significant statements in the PACE Codes of Practice seeks to ensure the possibility of proper review of the incriminating statements to be used at trial. The Crown Prosecution Service must satisfy itself that both the evidential threshold and public interest threshold are met before a charge is pursued to trial. Even in the absence of a formal requirement for corroboration, this makes it highly unlikely that a confession will be the sole evidence where a person pleads not guilty and the case goes to trial.

Given the unique prominence in Scotland of the corroboration safeguard, we consider corroboration should still be required, by way of primary legislation, when confession evidence is to be relied on. A multitude of other safeguards, such as those available in England and Wales are also necessary in our view, to guard against wrongful conviction.

Question 3B) – Where a confession is corroborated by way of special knowledge, do you consider that the defining characteristic of special knowledge should be: (a) knowledge of a fact or facts relating to the crime which could only be known by the accused if he was the perpetrator; (b)

[4] "Justice and Injustice" – the Sir Dorabji Tata Memorial Lecture 5th January 1999 in *The Business of Judging, Selected Essays and Speeches*

[5] *R v Thompson* [1893] 2 QB 12 at 18 per Cave J

knowledge of a fact or facts relating to the crime which were not in the public domain; (c) some other formulation?

Please provide comments

As with many distinguished commentators over the years, JUSTICE Scotland considers that special knowledge is a weak and dangerous method of corroboration. There are many means by which information can be obtained by a wrongful confessor that may not be appreciated by the trial court and advocates, but which can still lead to a miscarriage of justice. Confession evidence ought not to be the mechanism through which a crime is proven. Rather, a well conducted investigation should produce other evidence upon which to base a charge.

Should special knowledge be considered, in our view it must be in the most limited form contained in option (a) above and subject to scrutiny of the trial judge prior to being admitted.

Question 4

Hearsay Evidence (Report of the Academic Expert Group – Chapter 8)

Question 4A) Should corroboration be required in cases where hearsay evidence would be the sole or decisive evidence on which a conviction would be based?

Yes ☒ No ☐

Please feel free to provide any additional comments to support your answer

In *Campbell v H.M. Advocate*[6] the compatibility of hearsay evidence with Article 6 ECHR was considered,

> Most of the situations in which it has been held by the court that there had been a violation of art 6(1) and (3)(d) could not arise in Scotland. *Against the requirement for corroboration* of all crucial facts, a conviction could not be based solely on the evidence of a single witness. (Italics added)

The significance of the safeguard of corroboration within the Scottish system[7] lies in the lack of any statutory provision allowing for the exclusion of hearsay evidence. In *N v H.M. Advocate*[8] the Lord Justice Clerk noted that the statutory scheme removed the common law discretion to exclude evidence, which he contrasted unfavourably with the equivalent English provisions.[9] It was the explicit safeguards provided in the English statutory

[6] 2004 SCCR 220 at para 16 per Lord Justice General Hamilton.
[7] Criminal Procedure (Scotland) Act 1995 s 259.
[8] 2003 SLT 761.
[9] At that time, ss 23-28 Criminal Justice Act 1988 and s 78 Police and Criminal Evidence Act 1984.

provisions which lay at the heart of the debate as to the appropriateness of the sole and decisive rule; whose high water mark can now be seen to be the decision in *Al-Khawaja and Tahery v United Kingdom.*[10] The ECtHR held that, despite the domestic court's view that the 'evidence against the appellant was very strong,' the decisive nature of witness statements had resulted in a violation of Article 6. In *R v Horncastle*[11] the Supreme Court took the opportunity to explicitly state their objections to the rule, which was said to have paradoxical results and to permit the possibility of acquittals, even where cogent evidence of guilt existed. The Court did not rest, however, on theoretical objection but rather set out in a very detailed way the safeguards in the English system which, it was said, ensured that the rights guaranteed by Articles 6(1) and 6(3)(d) were respected. In inviting a reconsideration of the rule, it undertook a survey of the Strasbourg case law and sought to demonstrate that protections afforded by the domestic statutory scheme would have achieved the same outcome as an application of the sole and decisive rule.

That invitation was taken up with the referral of *Al-Khawaja and Tahery* to the Grand Chamber.[12] The Court maintained that the reasons said to underpin the rule, including the inherent unreliability of hearsay evidence, remained valid. It also cited decisions of the High Court of Justiciary in rejecting the argument that the test was difficult for appellate courts to apply in practice. Despite this, and with little by way of explanation, the Grand Chamber signalled a retreat from a hard and fast rule, which was said to be a 'blunt and indiscriminate instrument'.[13] No longer would the fact that the hearsay evidence was a sole or decisive factor in a conviction result in an automatic breach of Article 6(1). Rather, in such circumstances, courts must subject the proceedings to the 'most searching scrutiny.' Sufficient counterbalancing factors, including the existence of strong procedural safeguards, were required which were explicitly said to include 'measures that permit a fair and proper assessment of the reliability of that evidence to take place.'[14]

In applying this test to Mr Al-Khawaja's case, the Grand Chamber noted the 'strong' safeguards provided by the English legislation, including the specific discretion of the judge to refuse to admit a hearsay statement if satisfied that the case for its exclusion substantially outweighs the case for admitting it, and the power to stop proceedings where reliance on a statement would make a conviction unsafe. Of importance was the testimony of another witness, of which it was said 'it would be difficult to conceive of stronger corroborative evidence.'[15] In finding no violation, the Grand Chamber noted that these amounted to sufficient counterbalancing factors. In contrast, and against the same statutory background, Mr

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[10] [2009] ECHR 26766/05.
[11] [2009] UKSC 14.
[12] Judgement of 15 December 2011.
[13] *Al-Khawaja* at para 146.
[14] *Al-Khawaja* at para 147.
[15] *Al-Khawaja* at para 156.

Tahery's trial was found to be unfair because of the decisive nature of the hearsay statement 'in the absence of any strong corroborative evidence.'[16] This lack of corroboration meant that the jury was unable to conduct a fair and proper assessment of the reliability of the hearsay evidence. It is the significance that the Grand Chamber attaches to corroboration which is almost as noteworthy as the departure from an inflexible sole or decisive test. Indeed one commentator has inquired whether the case marked "the return of corroboration."[17]

Consequently, at the very least, the abolition of corroboration is likely to require reconsideration of the statutory hearsay scheme contained in the Criminal Procedure (Scotland) Act 1995. Of more general significance, perhaps, is the Grand Chamber's peremptory requirement for scrutiny to ensure measures exist which permit proper assessment of the 'reliability' of evidence.[18] It would seem that, properly understood, this would encompass reliability, as that term is employed in the Scottish procedure, but also a quantitative assessment, raising what a Scottish lawyer might regard as issues of 'sufficiency.' The *Horncastle* judgment reflected a high degree of judicial confidence that the English system's strong procedural safeguards would ensure a fair trial. Yet this approach was found lacking by the Grand Chamber. In our view, to abolish corroboration in cases where hearsay was the sole or decisive evidence against an accused would fall foul of the requirements propounded in *Al-Khawaja.*

Question 4B) What additional (or alternative) counterbalancing measures should be required where hearsay evidence would be the sole or decisive evidence on which a conviction would be based?

Please provide comments

Scotland requires a test similar to that in section 78 PACE which provides for the trial judge to assess the evidence prior to it being admitted, and exclude it where that evidence would be so adverse to the fairness of the proceedings that it ought not to be admitted.

Scotland would also benefit from the continuing opportunity to make a meaningful submission at the end of the prosecution case that no *prima facie* case against the accused has been led.

Question 5

Jury Directions (Report of the Academic Expert Group – Chapter 9)

[16] *Al-Khawaja* at para 165.
[17] Roberts, "*Al-Khawaja and Tahery v UK, case comment*" (2012) Crim LR 375 at 377.
[18] For a recent application of the reasoning in *Al- Khawaja*; *see Ellis v United Kingdom* (admissibility) 46099/06.

Question 5) - Do you have any suggestions as to how jurors should be instructed on the law and how to consider the evidence in a trial? For example, should they be given written instructions from the judge?

Please provide comments

Research conducted with jurors by Professor Cheryl Thomas indicates that jurors benefit from written instructions. English judges often provide written instructions in their trials, though this remains a matter of discretion. It is a matter of common sense that in order for an instruction to be remembered and properly understood it should be provided in written form. It is hard to conceive of another situation where a set of instructions as important as deciding a person's fate in this manner is left to a lengthy, wide ranging and sometimes convoluted speech, with no requirement even for this to be transcribed for the listeners. The process is reflective of the jury trial's roots, where members of the local community who were rarely literate stood in judgement over their peers. Modern society continues to fulfil this important role, but no longer requires to rely on memory alone, given the prevalence of the written word in our everyday lives.

In complex cases, jurors may well benefit not only from written instructions, but a written summing up, even with diagrams and charts where available.

It would not be too demanding to provide electronic notebooks for the duration of the trial, with secure email through which to send such helpful information from the Court, and through which to allow jurors to type their notes, rather than write. This would reflect the further advance of modern society, in which the pen has been replaced by the keyboard. Such electronic devices could be wiped at the end of the trial and re-issued to the next jury panel.[19]

This is an area that JUSTICE Scotland considers worthy of further research and consideration.

<u>Question 6</u>

Recording of Police Interviews (Report of the Academic Expert Group – Chapter 10)

Question 6A) - Do you agree with the general principle that all questioning/interviewing of a suspect should be recorded by audio visual means?

Yes ☒ No ☐

[19] Such processes are already being used in the complex and lengthy trials heard in London Crown Courts.

Please feel free to provide any additional comments to support your answer

Whilst conducting the empirical research for our joint study *Inside Police Custody: An Empirical Account of Suspects' Rights in Four Jurisdictions* (Intersentia, 2014) we noted that the majority of summary offences we observed in the two Scottish police offices in which we were stationed were recorded by the officer onto paper. The reason for this was that they were not audio or video recorder trained. This seems to be a remarkable reality given that it would not appear to require complex training to work either an audio tape or visual recording device. Given the prominence of interviews in the investigative process, it is unfortunate that so much reliance is placed upon the transcribing of the police officers conducting the interviews. Often, these transcriptions can only record a summary of the conversation rather than questions and answers given. The notes are not always transcribed contemporaneously. Whilst some resource must be spent in providing audio visual equipment, and training officers to use it, as well as in having the recordings transcribed, the provision of accurate recordings should be an accepted safeguard against wrongful conviction, as well as a protection for the police against accusations of fabrication. The recordings can reveal whether undue pressure was placed on a suspect and assist with understanding whether inculpatory statements were reliably made. Moreover, recorded interview transcripts have already demonstrated when legal advice was unlawfully refused.[20]

Question 6B) Do you consider that any breach of the Codes of Practice governing interview procedure should normally result in that evidence being inadmissible?

Yes ☐ No ☒

Please feel free to provide any additional comments to support your answer

Codes of Practice must be detailed in order to be useful. Whilst officers should endeavour to follow the Code at all times, minor breaches that do not affect the accuracy of the outcome of the procedure should not result in exclusion of evidence. This would not be a productive use of public resources. Serious breaches, however, should be capable of resulting in exclusion of challenged evidence.

Question 6C) If you answered no, what do you consider should be the test for admitting evidence where the Code has been breached?

Please provide comments

Whether a breach results in exclusion should depend on whether the breach would have an adverse impact on the fairness of the proceedings.

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[20] *Paul v HM Advocate* 2014 S.C.L. 230; 2014 S.C.C.R. 119

For example, if the Code requires all officers present to state their names at the start of the interview, but only the interviewing officer does so, this should not be a reason to exclude the interview, unless the suspect alleges that an unidentified officer present in the room was involved in placing undue pressure on them, perhaps by threatening but silent gestures. However, if the officer fails to caution the suspect at the start of the interview and then seeks to persuade them to answer questions rather than remain silent, this should automatically lead to exclusion.

Question 7

No Case to Answer Submission (Report of the Academic Expert Group – Chapter 12)

Question 7A) - Do you agree that the circumstances in which the no case to answer submission can be made should be broadened, and that a judge should be empowered to uphold a submission of no case to answer if he or she considers that no jury or judge acting reasonably could find the charge proved beyond reasonable doubt on the evidence presented?

Yes ☒ No ☐

Please feel free to provide any additional comments to support your answer

Without the corroboration requirement the test currently applied as to whether there is a *sufficiency* of evidence is plainly inadequate. The issue is one of whether the trial should continue on the quality of evidence, not its quantity. The test should address whether the prosecution has made its case out on the evidence, and, quite literally, whether this needs to be answered. Without such a standard being achieved, the accused should not be required to give any answer. Without such a procedure, there is a risk that the quality of evidence could become a matter which was unregulated by the Court.

Question 7B) – Should the accused be allowed to make a no case to answer submission at the close of the whole of the evidence?

Yes ☐ No ☒

Please feel free to provide any additional comments to support your answer

We do not see much point to a submission at this stage. The point of the submission is to avoid the accused being forced to put a defence forward, in the face of an insufficient prosecution case. Once that defence has been put, in a situation where there is a case to answer of sufficient quality, the jury will usually be in the best position to weigh the evidence and decide if

the case against the accused has been made out.

Question 8

Jury Size, Majorities and Verdicts (Report of the Academic Expert Group - Chapter 13)

Question 8A) – Should a jury be required to strive to achieve a unanimous verdict or is a verdict by a weighted majority acceptable?

Unanimous verdict ☒ Verdict by weighted majority ☐

Please feel free to provide any additional comments to support your answer

By starting with a requirement for only a majority verdict there is a risk that jurors will not properly debate the evidence in order to reach a true verdict according to the evidence. Where evidence in a case is clear juries in England and Wales will often reach a unanimous verdict within the period deemed reasonable by the trial judge. Where the case is not clear, the Court affords an appropriate length of time in which the jury can properly consider the evidence in order to try to agree upon the right verdict.

Question 8B) - If you answered "unanimous verdict" to question 8A, what do you think the qualified majority should be, should the jury be unable to reach a unanimous verdict?

-1 less than the total number of jurors ☐

-2 less than the total number of jurors ☐

Other ☒

Please feel free to provide any additional comments to support your answer

In our view, if a full jury of fifteen is to remain, with the possibility of retirements which would reduce the overall number to a limit before which the jury must be discharged, it would be better to establish a percentage majority which can attach to any total number of jurors. We would advocate that an 80% majority is required, akin to that in England and Wales. This would ensure fairness in the verdict since as many jurors as possible would have voted in the majority.

Question 8C) – if you answered "weighted majority" to question 8A, what do you think that weighted majority should be?

Two thirds (2/3) of the jury ☐

Three quarters (3/4) of the jury ☐

Other ☐

Please feel free to provide any additional comments to support your answer

Comments

Question 8D) - Should the same number of jurors as is required for a guilty verdict also be required for an acquittal verdict?

Yes ☐

No ☒

Please feel free to provide any additional comments to support your answer

It is always for the Crown to establish guilt.
A requirement for the same number of jurors for an acquittal may well result in "hung juries", with all the unsatisfactory aspects of the English system which accompany those.

Question 8E) - Do you agree that the size of a jury in Scotland should be reduced from 15 to 12 persons?

Yes ☐ No ☒

Please feel free to provide any additional comments to support your answer

In general, there is a sense in the legal profession in Scotland that juries "get it right" most of the time. There is no evidence that a jury of 12 will provide fairer or better outcomes than a jury of 15. It is for those making the case for reducing the numbers to demonstrate that fairness would not suffer. Financial arguments must be secondary to issues of fairness and, thus far, it seems that these are prominent in this suggestion, along with a rather unconvincing point about jury sizes elsewhere. Without research on juries in Scotland, considerable uncertainty about outcome would attend

any change.

Question 8F) - Do you think there should be 2 or 3 verdicts in criminal trials?

2 ☐ 3 ☒

Please feel free to provide any additional comments to support your answer

It may well be that logic would suggest two verdicts is the appropriate amount, but the Scottish system has developed and maintained its position over many centuries. The abolition of corroboration would involve the removal of an acknowledged safeguard. To remove another aspect of the patchwork of protections from accused persons at the same time would, at best, produce uncertainty about the fairness of future proceedings. At worst it would increase the risk of miscarriages of justice.

While it makes sense to consider all safeguards during this Review , there may be a particular alchemy in the present system of safeguards which helps to ensure a fair trial. Speculative removal of several existing safeguards at the same time as introducing new ones, and without research into the impact of consecutive change, might be regarded as reckless.

Question 8G) If you answered 2, what should these verdicts be?

Guilty and Not Guilty ☐

Guilty and Not Proven ☐

Proven and Not Proven ☐

Please feel free to provide any additional comments to support your answer

Comments

<u>Questions 9, 10 and 11</u>

Additional Comments

Question 9) - Do you have any comments to make on proposals raised in the Report of the Academic Expert Group that have not been mentioned in the consultation document?

The introduction of an 'Independent Legal Advisor' for victims in certain cases has been posited. This is an interesting suggestion which is one method of addressing an acknowledged area of concern. It may be that a pilot scheme for such an Advisor would be appropriate to ascertain if it is the best method of doing so.

Question 10A) - Do you think there are any additional matters to be considered in relation to safeguards in solemn cases that are not raised in the consultation document or in the Report by the Academic Expert Group?

We are of the view that any discussion of safeguards must address the issue of expert evidence. Experience in this and other jurisdictions has shown the difficulties that can arise as a consequence of witnesses who are not sufficiently qualified, or the admission of expert evidence of a speculative or untested kind.

Question 10B) - Do you think there are any additional matters to be considered in relation to safeguards in summary cases that are not raised in the consultation document or in the Report by the Academic Expert Group?

Recent decisions of the Scottish courts have considered whether it is appropriate to admit expert evidence. In *Young v HMA,*[21] arising from a SCCRC referral, the Appeal Court considered that:

> Evidence about relevant matters which are not within the knowledge of everyday life reasonably to be imputed to a jury or other finder of fact may be admissible if it is likely to assist the jury or finder of fact in the proper determination of the issue before it. The expert evidence must be relevant to that issue (and so not concerned solely with collateral issues), and it must be based on a recognised and developed academic discipline. It must proceed on theories which have been tested (both by academic review and in practice) and found to have a practical and measurable consequence in real life. It must follow a developed methodology which is explicable and open to possible challenge, and it must produce a result which is capable of being

[21] 2014 SLT 21 at para 54

assessed and given more or less weight in light of all the evidence before the finder of fact. If the evidence does not meet these criteria, it will not assist the finder of fact in the proper determination of the issue; rather, it will risk confusing or distracting the finder of fact, or, worse still, cause the finder of fact to determine the crucial issue on the basis of unreliable or erroneous evidence. For this reason, the court will not admit evidence from a "man of skill" or an "expert" unless satisfied that the evidence is sufficiently reliable that it will assist the finder of fact in the proper determination of the issue before it. We agree with, and adopt, the general observations of the court with regard to evidence from a person claiming specialist knowledge and expertise which were made by the court in *Hainey v HM Advocate* [2013] HCJAC 47, particularly at paragraph [49]. "

In *Hainey* it was underlined that experts should have the relevant qualifications, competence, expertise and experience to speak to the matters they are invited to give evidence about. Such matters must themselves be clearly defined so that their competence to speak to them can be readily identified and confirmed. The Inner House approved of the High Court's analysis in *Kennedy v Cordia Services Ltd.*[22]

Likewise, in *Wilson v HMA,*[23] Lord Wheatley delivering the opinion of the court considered the role of experts as witnesses:

> [T]he court will expect in a criminal matter that an expert's report must state the facts upon which opinions are based, and if assumptions are made, these must be clearly identified. Reasons must be given for conclusions. Whether instructed for the prosecution or defence, the principal duty of an expert witness is to the court, and this overrides any duty he owes to the party which instructed him. Again, explanations should be given for the basis on which all relevant material is either accepted or rejected.

As *Young* indicates, there can be problems with reliance upon expert evidence. The *McKie* case alone highlights how badly wrong the process can go when inconclusive techniques are given undue weight, and there are inadequate checks on the quality of the opinions produced.[24] The Fingerprint Inquiry set up to consider the evidence in *Asbury* and *McKie* concluded that the misidentifications arising from the fingerprint analysis exposed weaknesses in the methodology of fingerprint comparison, in particular where it involves complex marks. Recommendations for training and procedural reform were made, as well the need for evidence to be clearly identified as opinion rather than fact. It is worthy of note that these problems arose in relation to a well-established "science" which had been accepted in the Courts for many years as providing sufficient evidence to

[22] [2014[CSIH 76 at para 16 per L. Brodie
[23] 2009 JC 336 at para 61
[24] See http://www.thefingerprintinquiryscotland.org.uk/inquiry/21.html

justify conviction without any further corroboration, depending on the site of the incriminating prints.[25] That highlights the potentially greater risks involved when it comes to newer "science".

The Law Commission of England and Wales reported in 2011 that expert opinion evidence was being admitted in criminal proceedings too readily, with insufficient scrutiny.[26] It drew attention to a range of cases where expert evidence had been relied upon to assert near certainty which was subsequently proved to be wrong.[27] The Commission concluded that special rules are required to assess the reliability of expert evidence prior to its admittance, which should be set out in primary legislation rather than being left to the common law, accompanied by guidelines and amendment to the Criminal Procedure Rules. Further, disclosure obligations were also considered necessary for both prosecution and defence.[28] The Commission Report highlights the danger of over reliance upon expert evidence by the trier of fact, which may not be sufficiently equipped to independently assess scientific evidence itself, and therefore simply defers to the expert witness. The consultation exercise further revealed that, while it is assumed that cross examination provides a sufficient safeguard in the use of expert evidence, often advocates do not question the underlying basis of the opinion being given and focus more on challenging the expert's credibility. It is crucial therefore that expert evidence informs, rather than misleads, the court.

In a recent lecture,[29] the Lord Chief Justice of England and Wales underlined the consequences of reliance upon poor expert evidence:

> Perhaps the most obvious point for all of us here, is the risk of a miscarriage of justice if the forensic science is wrong, or the expert presents or interprets it incorrectly, or indeed if the expert is deliberately misleading.[30]

He observed that the majority of serious cases now involve forensic

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[25] See, for example, Rolley v HMA 1945 J.C. 155

[26] Law Commission of England and Wales, *Expert Evidence in Criminal Proceedings in England and Wales* (Law Comm No. 325) (TSO, 2011)

[27] See *Dallinger* [2002] EWCA Crim 1903, [2005] 1 Cr App R 12 concerning an ear print, subsequently disproved on appeal by DNA evidence, and *Clark* [2003] EWCA Crim 1020, [2003] 2 FCR 447 (second appeal) and *Cannings* [2004] EWCA Crim 1, [2004] 1 WLR 2607 on sudden infant death where the statistics relied upon as to the prevalence of multiple deaths in a family through natural causes were subsequently shown to be wholly erroneous, and *Harris and others* were empirical research as to natural causes for head injury was criticised as being too small a dataset to form a hypothesis that could provide such strong opinion evidence as was given at trial. *R v T* [2010] EWCA (Crim) 2439; [2011] Cr App R 9 is a further, recent example, of the need to ensure evidence in footwear analysis is clearly expressed as opinion only.

[28] Appendix A, from p 144 sets out the draft legislation and rules that the Commission recommends.

[29] Lord Chief Justice of England and Wales, Lord Thomas of Cwmgiedd, *Expert Evidence: the Future of Forensic Evidence in Criminal Trials*, 2014 Criminal Bar Association Kalisher Lecture (14 October 2014), available at http://www.judiciary.gov.uk/wp-content/uploads/2014/10/kalisher-lecture-expert-evidence-oct-14.pdf

[30] At para 5, p 3.

evidence and cautioned about this reality:

> With increasingly complex or novel science there comes the risk of testing the science, rather than the evidence, in front of the jury. This in turns risks undermining juries' and public confidence in forensic science, with highly undesirable consequences, resulting either in less use of forensic evidence, or less use of juries. So there is a challenge for all of us – advocates and judges – to manage the presentation and testing of forensic evidence in such a way as to avoid fatally undermining confidence.[31]

Although primary legislation was not adopted in England and Wales as a result of the Law Commission recommendations, case law has underlined its recommendation for reliability[32]; the Criminal Procedure Rules were amended; and a Practice Direction handed down[33] to set out what matters an expert report must cover and the factors to be taken into account when determining reliability of an expert witness. The Rules also encourage the pre-trial meeting of expert witnesses for each party and, where possible, to set out in a report the areas of agreement and disagreement, in order to narrow the issues for the jury. The Advocacy Training Council is also producing a best practice toolkit to support advocates in making an assessment of reliability, which will be freely available on the Advocates' Gateway.[34]

The Lord Chief Justice continued in his lecture to highlight the dangers of a lack of scientific rigour around many disciplines[35] and drew attention to the role of the Forensic Science Regulator[36] and the concerns of the Science and Technology Committee as to the structure and strategy of forensic science following the closure of the Forensic Science Service and its replacement with private sector enterprises.[37] His final recommendation was for short guides to scientific areas of relevance, upon which there is consensus, that might be presented to the jury, and be of use for judges and lawyers also, so as to provide a basis upon which they can properly consider the relevant expert evidence. He acknowledged the challenge of ensuring this information reflects developments in science, but drew analogy to the use of such 'primers' in

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[31] At para 6, p 3.

[32] R v Dlugosz [2013] 1 Cr App R 425, at para 11, in which the Court recalled the principle that courts must be satisfied that there is a sufficiently reliable scientific basis for the evidence to be tested.

[33] Crim PD 33A.

[34] See also *R v H* [2014] EWCA Crim 1555; [2014] Crim LR 905 at paras 42-44 in which the court emphasised the need for a new and more rigorous approach to expert witnesses in light of the Law Commission Report and new procedure rules.

[35] Citing the National Academy of Sciences Report to Congress, *Strengthening Forensic Science in the United States: A Path Forward* (National Research Council of the National Academies, 2009) and the efforts of the Royal Society and the Forensic Science Society in England to create appropriate accreditation.

[36] Information available at: https://www.gov.uk/government/organisations/forensic-science-regulator

[37] House of Commons, Science and Technology Committee, Second Report of session 2013-14, *Forensic Science*, HC 610 (26 July 2013)

the Patents Court to show that this is possible.

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 *Young, Wilson* and other cases 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[38].

Question 11) - Do you believe that there would be any unforeseen consequences arising from the changes discussed in the consultation document or the Report of the Academic Expert Group? These could be in relation to any aspect of the criminal justice system, for example the effect of any possible changes identified on the position of victims and witnesses. If so, what might these be?

Whilst we welcome many of the safeguards suggested in this consultation exercise, and the work of the Academic Review Group, we continue to hold the view that corroboration remains an important safeguard in Scots criminal procedure, and that the case has not been made for its abolition.

An unforeseen consequence of further discussion of the reforms proposed by the Review may well be a presumption that the debate over corroboration is settled in favour of its removal.

JUSTICE Scotland's view is that the safeguards proposed by the Review, and in particular those that we endorse above, should be additional to, rather than a replacement of, corroboration.

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