Scottish Police Federation

5 Woodside Place Glasgow G3 7QF

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23 April 2015

Dear Colleague

Review of Corroboration – Information

As you will be aware the Scottish Government commissioned Lord Bonomy to conduct a review of the criminal justice bill, including the proposal to abolish corroboration.

That review has now been completed and I attach a copy of Lord Bonomy's report for your information

Please also find enclosed a copy of the statement made to parliament by the Cabinet Secretary for Justice on this matter.

Whilst this circular is primarily for your information, please submit any comments you may have to me no later than 10 days after its date of publication.

Yours sincerely

Calum Steele
General Secretary

The Post-corroboration Safeguards Review

Final Report
April 2015

CONTENTS

1. INTRODUCTION

1.1 It has been a privilege to be the nominal head of this Review involving, as it has done, so many distinguished participants. I am grateful to the erstwhile Cabinet Secretary for Justice, Kenny MacAskill, for giving me a free hand in deciding how the terms of reference should be addressed, and indeed giving me an opportunity to influence the determination of these terms.

1.2 Having regard to the significance in our criminal justice system of the corroboration requirement and the potential for increased risk of miscarriage of justice that could accompany its abolition, I took the view at the outset that a wide-ranging review of the available literature in the various parts of the United Kingdom and many other jurisdictions, addressing the risk of miscarriage and the safeguards that have been developed or have evolved to counter the risk, should be undertaken with a view to identifying those safeguards that might be considered for introduction concurrently with the abolition of the corroboration requirement. James Chalmers, Regius Professor of Law at the University of Glasgow, who had already taken a close interest, and had participated, in the progress of the proposal to abolish the corroboration requirement, willingly accepted my invitation to coordinate that work. That is a job best done by academic lawyers. He did so by forming an Academic Expert Group comprising academics from across and beyond Scotland, itself assisted by a Scottish and an international advisory panel, who undertook a variety of functions aimed at compiling a menu of options for further consideration. Their combined immense contribution to the work of the Review is greatly appreciated.

1.3 The various options identified as the result of the research were then scrutinised with a view to establishing whether and how they might work in practice. That task was undertaken by a Reference Group of 18 members, all of whom have extensive experience of the criminal justice system in some form. This included members of the judiciary, practitioners, those who work with victims and witnesses, and two members of the Academic Expert Group, namely Professor Chalmers and Professor Pamela Ferguson of the University of Dundee. As well as participating fully in the discussions of the Reference Group, they regularly supplemented the academic findings and advice in the course of these discussions. I am grateful to all members of the Reference Group for so readily accepting my invitation to serve in their individual capacity and for their contributions over the past year.

1.4 When the Review started, the form in which the report would be compiled was not clear. It could have been my own personal report formed after taking account of all material obtained, the terms of the Academic Expert Group Report and the views of the Reference Group. Alternatively, it might have been the report of the Reference Group as a committee with me as its chair. I dare say there are other possibilities. However, following the production of the Academic Expert Group Report and the first meeting of the Reference Group at which it was considered, it was clear to me that the appropriate course to follow was to compile and present the views of the Reference Group and, where on any subject their views were not unanimous, to include any other proposal. The end result is a report with recommendations on most of which the Group agreed unanimously, and with the rest supported by the substantial majority of the Group. Where appropriate, disagreement by some with a recommendation is recorded.

1.5 I suppose some differences were inevitable having regard to what is sought to be achieved by abolishing the corroboration requirement, and the different perspectives brought to bear on that by the various roles played by individual members of the Reference Group in the criminal justice system. It has to be acknowledged that, while corroboration may be seen by many to be the safeguard par excellence for accused against miscarriage of justice, the technical barrier it presents to prosecution may deny justice in some deserving cases. That may simply be the price that has to be paid to avoid miscarriages of justice. On the other hand, if safeguards can be devised, which will minimise the risk of miscarriage and at the same time allow such cases to be litigated, so much the better.

1.6 The Review has proceeded throughout on the assumption that the corroboration requirement will be abolished. However, it is a striking feature of a number of the measures recommended that they would enhance our criminal justice system, with or without the corroboration requirement. I mention that because, in the debate around the abolition of the corroboration requirement that will follow the publication of this Report, it would be a pity to lose sight of the wider arguments for, and the benefits that could nevertheless be derived from, the introduction of some of these safeguards.

1.7 Near the end of this Review, the report of the Scottish Court Service "Evidence and Procedure Review" by the Steering Group headed by the Lord Justice Clerk was published. There is nothing in the present Report that appears to be in any way incompatible with the vision expressed in the Evidence and Procedure Review. Indeed, to the extent that this Report recommends more extensive audiovisual recording of aspects of the investigative phase of cases, it is consistent with the ideas explored in the Evidence and Procedure Review. However, in the absence of any way of knowing when that vision might be realised, the work of this Review has necessarily proceeded on the basis of the rules of evidence as they stand.

1.8 I am now pleased to present the Report of the Post-corroboration Safeguards Review.

Iain Bonomy

2. METHODOLOGY OF THE REVIEW

2.1 The following are the full Terms of Reference of the Review:

"In the context of provisions in the Criminal Justice (Scotland) Bill which propose the removal of the general requirement for corroboration in criminal cases, recognising that this is considered by many to be an integral requirement of the criminal justice system, to consider what additional safeguards and changes to law and practice are necessary to maintain a fair, effective and efficient system, to report, and to draft any legislation required to give effect to these changes. In making its assessment, the review would be expected to consider the issues highlighted in the following, non-exhaustive, list:

- Whether a formal statutory test for sufficiency based upon supporting evidence and/or on the overall quality of evidence is necessary,
- Whether any proposed prosecutorial test (or a requirement for publication of any such test) should be prescribed in legislation,
- The admissibility and the use of confession evidence,
- The circumstances in which evidence ought to be excluded,
- The practice of dock identification,
- Jury majority and size,
- The future basis for and operation of a submission that there is no case to answer at the end of the prosecution case,
- Whether a judge should be able to remove a case from a jury on the basis that no reasonable jury could be expected to convict on the evidence before it,
- Whether any change is needed in the directions that a judge might give a jury (including a requirement for special directions in particular circumstances),
- Whether any additional changes are required in summary proceedings.

Appeals are not expected to be considered by the review as they are for wider consideration, not related specifically to corroboration."

2.2 The approach of the Review has been to concentrate on areas where the potential for miscarriage of justice is known to exist, based on experience and empirical research from around the world as well as Scotland, to consider carefully whether, in relation to each of those areas, the removal of the requirement for

corroboration could potentially increase the risk of wrongful conviction, and to identify safeguards which will address that risk.

Reference Group

2.3 The Justice Secretary invited the Right Honourable Lord Bonomy, retired High Court Judge, to head the Review. He was assisted by a Reference Group of experts with extensive experience of the operation of the criminal justice system through their involvement in a wide range of different roles. They were invited to join the Reference Group either as individuals or as nominees from selected organisations. However all were invited and undertook to serve in a personal capacity and over the last year have made available to the Review their wealth of knowledge and experience.

2.4 The 18-strong Reference Group membership was:

- Jim Andrews[1] (Victim Support Scotland),
- Sandie Barton (Rape Crisis Scotland),
- Professor James Chalmers,
- Ian Cruickshank (Convener of the Criminal Law Committee of the Law Society of Scotland),
- Rt Hon Lady Dorrian,
- Jane Farquharson (Advocate Depute),
- Professor Pamela Ferguson,
- Sir Gerald Gordon CBE QC,
- Louise Johnson (Scottish Women's Aid),
- Deputy Chief Constable (DCC) Iain Livingstone (Police Scotland)[2],
- Murray Macara QC (Society of Solicitor Advocates),
- Murdo MacLeod QC (Faculty of Advocates),
- Shelagh McCall (Scottish Human Rights Commission),
- Sheriff Norman McFadyen,
- Frances McMenamin QC (Scottish Criminal Cases Review Commission),
- Joe Moyes (Scottish Court Service),
- Sheriff Michael O'Grady QC,
- Dr Charles Stoddart (retired Sheriff).

Academic Research

2.5 The starting point of the Review was a major academic research project designed to identify possible problems and safeguards, drawing on academic literature, law and practice here and in other jurisdictions, and the jurisprudence of the European Court of Human Rights.

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[1] In September 2014, Jim Andrews replaced David McKenna who was originally the nominee from Victim Support Scotland.

[2] Assistant Chief Constable (ACC) Malcolm Graham acted as a substitute for DCC Iain Livingstone on two occasions.

2.6 This work was carried out by a team consisting of academic staff from University Law Schools in Scotland and beyond (referred to hereafter as the Academic Expert Group), led by Professor James Chalmers. Members of the Reference Group also suggested subjects for the Academic Expert Group to consider.

2.7 The Report by the Academic Expert Group is published on the Review's website and should be viewed as a companion piece to this Report. It provides the foundation for much of the Review's thinking. It is a substantial volume reflecting extensive research which is not reproduced in this Report for the sake of brevity.

2.8 Upon its completion, the Report by the Academic Expert Group was scrutinised by the Reference Group who analysed, tested and challenged the academic suggestions[3] in a series of 12 meetings to determine their practicability.

Public Consultation

2.9 This consideration led to the preparation and publication by the Reference Group of a Consultation Document which reflected their emerging ideas, and sought responses from the public at large. The Reference Group posed a series of questions relating to areas such as police interviews, confession evidence, hearsay evidence, and the distinctive features of the jury in Scotland.

2.10 One of the principal reasons for consulting was to ascertain whether there were any further circumstances beyond those identified in either the Academic Expert Group Report or in the Consultation Document in which the abolition of the corroboration requirement may give rise to a risk of miscarriage of justice which ought to be considered by the Review.

2.11 The consultation period ran from 14 October – 28 November 2014. During this period the Review held six public discussion events in Aberdeen, Dundee, Edinburgh, Glasgow, Hamilton and Inverness to hear ideas or concerns from legal practitioners and the public. There were 36 written responses to the Consultation.

2.12 The Consultation Document, non-confidential responses, and a Consultation Analysis have been published on the Review's website.

Further Consideration and Fact Finding

2.13 Responses to the consultation, comments during the public discussion events, and suggestions from individual members of the Reference Group, led to the Group considering some matters that had not been addressed as part of the academic research. Examples are the legal aid issue referred to in the chapter on suspect interviews and the proposal to require courts to give reasons for their verdicts in summary cases.

[3] It should be noted that the Reference Group, as part of its membership, contains two of the academics who worked on the Academic Expert Group Report. Both Professor James Chalmers and Professor Pamela Ferguson participated in the discussions of the Reference Group but also provided their expertise and assistance in relation to the academic proposals.

2.14 Throughout the period of the Review Lord Bonomy and members of the Reference Group have engaged in informal discussion with colleagues and others involved in the criminal justice system and with members of the public, which further informed discussion at Reference Group meetings. In addition, further information on how certain procedures work in practice was sought from other jurisdictions, primarily England and Wales, where discussions were held with senior academics, the police, the Crown Prosecution Service (CPS) (in London and Newcastle), Judges of the Crown Court in Southwark and Judges and staff of Newcastle Magistrates Court.

2.15 Unless otherwise stated, the views contained within this Report are those of the Reference Group as a whole. Where views diverged, that is reflected.

2.16 In formulating recommendations considerable attention has been given to matters of detail, including enlisting the invaluable assistance of Parliamentary Counsel to draft legislative provisions for some. However, before any recommendation can be implemented, further consideration will inevitably have to be given to finalising the practical arrangements for its introduction.

2.17 In producing its recommendations, the Reference Group has not assessed the costs of implementation. While some matters relating to costs are mentioned in this Report, any costing or cost-benefit exercise will be a matter for Scottish Ministers.

3. SUMMARY OF RECOMMENDATIONS

3.1 Below is a summary of the main recommendations included in this Report. Individual Chapters should be consulted for further details and supplementary recommendations.

Chapter 5 – Suspect Interviews

- All formal police interviews with suspects at police offices should be recorded by audiovisual means.

- Informing a suspect of the right to legal assistance and recording the decision whether to exercise the right or waive it should also be recorded by audiovisual means. The suspect's reason for waiving the right, if known, should be noted on the Solicitor Access Recording Form (SARF).

- Police Scotland should give early attention to drawing up a programme to install audiovisual recording equipment in police vehicles.

- The requirement for some suspects to pay a contribution towards the cost of legal advice and assistance provided to them while they are in a police office should be abolished.

Chapter 6 – Evidence of Identification

- The practice of relying on dock identification should be ended.

- Effective case management procedures should be developed in order to ascertain in every case whether identification is in issue and to ensure that it is addressed before the trial.

- Out-of-court identification procedures should be audiovisually recorded, with the recording being made available to the Court if appropriate.

Chapter 7 – Codes of Practice

- The Lord Advocate should be bound by statute to issue Codes of Practice in connection with identification procedures and interviewing of suspects. The Codes of Practice should set out the procedures to be followed by the police, such other matters as the Lord Advocate considers appropriate, and the extent to which they should apply to Specialist Reporting Agencies.

- The Lord Advocate should be bound by statute to regularly review the Codes to reflect changes in law and practice, should be bound to consult widely before issuing or revising a Code, and should lay any resulting Code before Parliament.

- The test to be applied in considering the admissibility of evidence obtained following a breach of a Code of Practice should remain the current common law fairness test. There should be a statutory requirement obliging the Court to take into account any breach of a relevant provision of an applicable Code in determining the admissibility of evidence.

Chapter 8 – Prosecutorial Test

- The Lord Advocate should be bound by statute to publish the terms of the Prosecutorial Test, but the terms of the test itself should be left to the Lord Advocate and the test should be subject to regular review involving public consultation.

- The application of the new Prosecutorial Test in practice should be monitored by the Inspectorate of Prosecution in Scotland, which should report annually to the Lord Advocate.

Chapter 9 – Hearsay Evidence

- The corroboration requirement should be retained for hearsay evidence.

Chapter 10 – Confession Evidence

- The corroboration requirement should be retained in relation to confession evidence.

Chapter 11 – The No Case To Answer Submission

- The basis on which a motion that there is no case to answer may be sustained should be extended to include circumstances where it would not be proper to convict on the evidence presented.

Chapter 12 – Juries: Majority, Size, and the Three Verdict System

- A simple majority system is untenable in a post-corroboration system and a move to increase the majority to 10 out of 15, as currently stated in the Criminal Justice (Scotland) Bill, is acceptable pending further research.

- The case for any further change has not yet been made.

- Research into jury reasoning and decision-making should be undertaken to ensure that changes to several unique aspects of the Scottish jury system are only made on a fully informed basis.

Chapter 13 – Communication with the Jury

- The Judicial Institute, as it further develops the Jury Manual, should note the research produced in the Report of the Academic Expert Group and continue to clarify and simplify the language used in, and delivery of, some aspects of jury directions.

Chapter 14 – Reasons for Verdicts in Summary Proceedings

- It should be mandatory for the Court to deliver orally in open court, and have minuted, brief reasons for the verdict, whether conviction or acquittal, including on the sustaining of a no case to answer submission, in every summary case.

Chapter 15 – Miscellaneous Issues

- The Criminal Justice (Scotland) Bill should be amended to identify a body or organisation with responsibility for ensuring adequate provision of "Appropriate Adults" for vulnerable persons in custody.

3.2 The abolition of the corroboration requirement will inevitably lead to the Judicial Institute, which is responsible for judicial training and for providing and updating guidance for the judiciary on communicating with juries, considering what further guidance and training is appropriate. With that in mind, the Report mentions subjects which the work of the Review indicates merit consideration by the Institute. These can be seen in Chapter 6 at paras 6.44 and 6.45, and throughout Chapter 13.

4. MISCARRIAGES OF JUSTICE IN SCOTLAND

Introduction

4.1 The Terms of Reference invite the Review to consider what additional safeguards and changes to law and practice would be necessary to maintain a fair, effective and efficient system should the corroboration requirement be removed. However, in addressing this, two matters should be borne in mind: firstly, the existence at present in the Scottish criminal justice system of a number of safeguards designed to achieve that objective; and secondly, the incidence of miscarriages of justice in the past despite the requirement for corroboration.

4.2 This short chapter shows that corroboration is far from the only safeguard that exists in the Scottish system, and that it has not completely eliminated miscarriages of justice in the past.

4.3 The current safeguards include, but are not limited to, the following:

a. An accused is presumed innocent

b. The onus of proof is on the Crown - it is for the Crown to establish that the accused is guilty of the offence

c. The Crown is obliged not to act in a way that is incompatible with an accused's rights under Article 6 of the European Convention on Human Rights (ECHR)

d. The standard of proof is beyond reasonable doubt

e. The police and Crown are under a legal duty to thoroughly investigate criminal allegations

f. An accused has the right to remain silent throughout the investigation and any criminal proceedings

g. No adverse inference can be drawn from a suspect's silence during police interview

h. A suspect has the right to legal advice before and during police interview

i. An accused has the right to be legally represented at trial

j. The right to have that representation paid for from public funds where appropriate

k. The Crown is obliged by law to disclose to the defence all material information for or against an accused or anything likely to form part of the evidence led

l. The judiciary is independent and impartial

m. Criminal trials generally proceed in public

n. An accused is entitled to a fair trial

o. An accused can challenge the admissibility of evidence

p. Evidence irregularly or unlawfully obtained is inadmissible unless the fault is excusable

q. Evidence of statements unfairly obtained is inadmissible

r. An accused has the right to cross-examine or have cross-examined all witnesses against him or her

s. An accused may give and lead evidence in his or her defence

t. Hearsay and collateral evidence are generally inadmissible subject to certain exceptions prescribed by law

u. In solemn (serious) cases, the accused will be tried before a jury

v. In solemn cases judges give directions to juries about the law to be applied and how to evaluate the evidence

w. In solemn cases a majority of the jury must be satisfied beyond reasonable doubt of the guilt of the accused before a conviction can be returned

x. There are two verdicts of acquittal

y. If convicted, the accused has a right of appeal on the basis of any alleged "miscarriage of justice", or in solemn cases on the additional basis that the jury returned a verdict which no reasonable jury, properly directed, could have returned

z. The right of appeal is supplemented by provision for the Scottish Criminal Cases Review Commission (SCCRC) to refer cases to the High Court to be considered on the ground that a miscarriage of justice may have occurred and it is in the interest of justice that a reference should be made.

4.4 It has often been thought that the requirement for corroboration in Scotland, along with those safeguards, has helped to avoid the types of miscarriage of justice that have arisen in other jurisdictions. To an extent that may be the case. Scotland does not appear to have experienced anything like the rate of miscarriage or the phenomenon of convicted accused being exonerated in significant numbers that have occurred in the USA, nor has it had the volume of convictions based on false confessions that arose in England in the 1970s. However, Scotland has experienced its share of notorious miscarriages of justice, ranging most prominently from Oscar Slater in the 1920s to Raymond Gilmour and Campbell and Steele, whose convictions were quashed in the 2000s. The "complacency and… blind arrogance

about the righteousness of the system*"* of which we have been accused in the past[4] must be avoided.

4.5 Chapter 4 of the Report of the Academic Expert Group considers research into miscarriages of justice (referred to as "wrongful convictions") and demonstrates that the causes of wrongful conviction remain fairly constant throughout most jurisdictions. The most significant causes may be categorised as follows[5]:

- Unreliable eye witness identification
- Unreliable confessions
- Inaccurate or unsubstantiated expert evidence
- False witness evidence

There are various others.

4.6 However, as the Academic Expert Group notes[6], wrongful convictions rarely have a single cause and a number of factors may combine to result in a wrongful conviction. It is clear from an assessment of the relevant case law that these causes of wrongful conviction apply in Scotland although not to the same extent as in some other jurisdictions. The particular issue that we currently face is how the abolition of the requirement for corroboration will impact on the incidence of miscarriages of justice, and in addressing that we should heed the experience of other jurisdictions where there is no corroboration requirement.

Scottish Criminal Cases Review Commission

4.7 In Scotland, the SCCRC was established as an independent public body in 1999 to review alleged miscarriages of justice[7]. The SCCRC recognises that the causes of wrongful conviction in some of the cases with which the SCCRC deal are reflected in the causes identified in Chapter 4 of Report of the Academic Expert Group.

4.8 Detailed statistical information available in the SCCRC Annual Report 2013-14, which outlines the main grounds of referral of conviction cases from 1 April 1999 to 31 March 2014, shows that cases are referred in Scotland on a variety of grounds including:

- 22% of cases were referred on the basis of errors in law which includes insufficient evidence; wrongful admission or exclusion of evidence; refusal of "no case" submissions; and miscellaneous matters

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[4] C Walker, "Miscarriages of Justice in Scotland", in C Walker and K Starmer (eds), *Miscarriages of Justice: A Review of Justice in Error* (1999) 323 at 352,

[5] Chapter 4.3 of the Report of the Academic Expert Group.

[6] Report of the Academic Expert Group p43.

[7] The Commission was created by section 25 of the Crime and Punishment (Scotland) Act 1997, inserting provisions into the Criminal Procedure (Scotland) Act 1995, and has the power to refer cases to the High Court for determination. Under section 194B of the 1995 Act, the Commission has the discretionary power to refer to the High Court any conviction or sentence passed on a person convicted on indictment or complaint whether or not an appeal against the conviction or sentence has been heard and determined by the High Court

- 12% were referred on the basis of irregular proceedings including conduct of the judge, jury and prosecutor

- 16% were referred on the basis of misdirections on evidence (omission, weight and value); and law (corroboration[8] and other)

- 51% were referred on other grounds including evidence not heard at original proceedings; disclosure; and defective representation.

4.9 Some of the grounds of referral with which the SCCRC have dealt previously have become largely historic due to developments in police practices and procedures, and the way in which matters such as interview and identification are now more regulated. The SCCRC dealt with a number of confession evidence cases in the 2000s. However the cases in question originated from the 1970s and 1980s since when there have been significant changes to police procedures, such as audio (and sometimes video) recording of interviews and rights of solicitor access. The examples which have occurred in the USA, and which are referred to in Chapter 4 of the Report of the Academic Expert Group, have not been replicated in this jurisdiction.

4.10 Academic writers[9] who have considered the work of the SCCRC have noted that the cases do not follow any particular pattern. One United States academic commented:

> "What is surprising… is the absence of traditional (read U.S.) causes of wrongful convictions in the applications made to the SCCRC and referred by them, i.e., faulty one-witness identification evidence, false testimony by jailhouse snitches and other informants, prosecutorial non-disclosure of exculpatory evidence, and junk science."[10]

4.11 The grounds of appeal for cases referred to the SCCRC now differ from those that were common when the SCCRC was first established. Two prominent cases relating to identification referred by SCCRC were dealt with by the High Court in the last 3 years.[11]

Previous Miscarriages of Justice in Scotland

4.12 This section provides an account of some miscarriages of justice in Scotland. A selection of relevant cases[12] is considered under the subject headings below. These

[8] 3% of cases were referred on the basis of misdirection on corroboration, amounting only to two cases.
[9] For example see the Academic Expert Group Report, footnote 10, page 31; J Chalmers and F Leverick, "The Scottish Criminal Cases Review Commission and its referrals to the appeal court: the first ten years" [2010] Crim LR 608 at 613-614; and L Griffin, "International Perspectives on Correcting Wrongful Convictions: The Scottish Criminal Cases Review Commission" (2013) 21 Wm. & Mary Bill Rts. J. 1153.
[10] Griffin, *supra* at 1157.
[11] Gage v HM Advocate [2012] HCJAC 14, 2012 JC 319; Docherty v HM Advocate [2014] HCJAC 94, 2014 SCL 758.
[12] This chapter is not intended to be an exhaustive review of all miscarriages of justice.

headings reflect some of the common causes of wrongful convictions as noted in the Report of the Academic Expert Group and discussed above.

Identification

4.13 It is significant that the development of courts of criminal appeal in both England and Scotland was directly influenced by miscarriages of justice arising largely from flawed identification evidence[13].

4.14 In the well-known case of Oscar Slater[14], an appeal against convictions for murder and robbery was, eventually, successful on the ground of misdirection about evidence of bad character and amidst allegations of misidentification[15]. Slater's case became a cause célèbre and was taken up by a number of public figures including Sir Arthur Conan Doyle, who was also active in the case of Adolf Beck, a similarly notorious mistaken identity case in England.

4.15 Patrick Meehan and Maurice Swanson were both granted Royal Pardons in the 1970s on account of errors in identification evidence. In Meehan's case two other suspects later confessed to various people that they were the perpetrators of the murder, although one was murdered before the reliability of the confessions was ever tested and the other was acquitted after trial, after Meehan had been granted a Royal Pardon in 1976. The process of invoking the prerogative rather than referring the matter to the Appeal Court gave rise to significant controversy and ultimately a judicial inquiry which itself proved controversial in its conclusion that Meehan may have been involved in some way. Swanson was convicted of a bank robbery in 1974 but also granted a Royal Pardon when another man subsequently confessed to the crime and his palm print was obtained from the locus.

4.16 Identification of the accused as the perpetrator remains as a significant area of appeal. This arises predominantly from the practice of dock identification in Scotland, a procedure which is not widely used in other jurisdictions. There have been a number of appeal cases[16] since the decision of the Supreme Court in Holland v HM Advocate[17] that dock identification was not per se inadmissible. As yet none of these cases has been successful, although it is understood that the matter will again be considered by the Supreme Court later this year[18].

4.17 The issue of dock identification is not necessarily linked to the abolition of the requirement for corroboration. For example, in the case of Oscar Slater a number of witnesses incorrectly identified Slater. In the case of Adolf Beck, 15 witnesses positively but incorrectly identified Beck, many of them when Beck formed part of an

[13] The now infamous cases of Adolf Beck in England and Oscar Slater in Scotland. See R v Beck (1896) unreported and E R Watson, *The Trial of Adolf Beck* (1924); R Pattenden, *English Criminal Appeals 1844-1994* (1996); Slater v HM Advocate 1928 JC 94.
[14] Slater v HM Advocate 1928 JC 94.
[15] It is of interest to note that Slater was convicted by only slightly more than a bare majority, namely of 9 to 6 – Slater at 97.
[16] e.g. Robson v HM Advocate [2014] HCJAC 53; Brodie v HM Advocate [2012] HCJAC 147, 2013 JC 142.
[17] Holland v HM Advocate [2005] UKPC D 1, 2005 1 SC (PC) 3.
[18] Leave to appeal has been granted in the case of Macklin v HM Advocate (previously reported at [2013] HCJAC 80, 2013 SCCR 616) and a hearing date is to be fixed in due course.

identification parade line-up. However the risk of misidentification is sufficiently well recognised that the abolition of the requirement for corroboration without the introduction of appropriate and balancing safeguards raises real concerns as to the increased risk of wrongful convictions in such cases.

Forensic/Scientific evidence

4.18 There are a number of prominent examples of miscarriage as a result of unreliable or discredited forensic science or other expert evidence. These include the cases of John Preece[19] whose appeal against convictions for rape and murder was successful when scientific expert evidence relating to blood groupings was discredited; Andrew Smith[20] where the pathologists' evidence of cause of death was later established to be erroneous; Craig McCreight[21] where the scientific evidence regarding the possibility of ingestion of chloroform was described as erroneous and carrying the flavour of bias; and Kimberley Hainey[22] where expert witnesses gave evidence on matters beyond their field of expertise. The circumstances surrounding the acquittal of Shirley McKie, who had been charged with perjury, and the related case of David Asbury, where the conviction was subsequently overturned on appeal, are notorious Scottish examples of the problems which can be encountered when reliance is placed on expert evidence which subsequently proves to be unreliable. However, it is perhaps salutary to note that the requirement for corroboration was not sufficient to avoid the problems encountered in relation to either the Mckie or Asbury cases.[23]

4.19 The Reference Group considered issues that might arise in respect of expert evidence in light of the abolition of the corroboration requirement but came to the conclusion that the matters considered above were very much case-specific and not indicative of systemic problems. The matter is dealt with again briefly in Chapter 15.

Police Interviewing and Confessions

4.20 There are a number of examples of miscarriages of justice in Scotland arising from statements made by or attributed to the accused. One of the most notorious is the case against Thomas Campbell and Joseph Steele[24] who were charged with the murder of six members of a family in the so-called "ice cream wars" case in 1984.

4.21 Following a variety of unsuccessful appeal procedures, the SCCRC eventually referred the case to the High Court on the basis of reports obtained from expert witnesses in cognitive psychology and forensic linguistics. They concluded that it was unlikely in either case that all of the officers concerned could have recalled the relevant statement, and noted it independently in their notebooks, in virtually identical words, contrary to the claims of those officers.

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[19] Preece v HM Advocate 2013 SCL 523.
[20] Smith v HM Advocate 2001 SLT 438.
[21] McCreight v HM Advocate [2009] HCJAC 69, 2009 SCCR 743.
[22] Hainey v HM Advocate [2013] HCJAC 47, 2014 JC 33.
[23] See www.thefingerprintinquiryscotland.org.uk
[24] 2004 SLT 397.

4.22 Raymond Gilmour[25] was convicted in June 1982 of the rape and murder of a 16 year old girl who was walking home from school through a wooded area near Gilmour's home. He is alleged to have confessed to police officers but then withdrew that confession and was released from police custody. A few months later, whilst on remand for other matters, police officers collected him from the remand centre, purportedly to take him to court. It is alleged that he made further admissions in the car and afterwards at the police office. Gilmour alleged that he had been assaulted and threatened by the police officers. In quashing the conviction the Court said:

> "…there were four outstanding areas of weakness in the Crown case; namely, the lack of evidence linking the appellant with the deceased; the errors and discrepancies in the appellant's confessions; the doubt as to whether the alleged special knowledge truly related to matters that could have been known only by the perpetrator of the crime; and the doubts as to the fairness of the circumstances in which the confessions were obtained." [26]

Conclusion

4.23 The foregoing review of Scottish cases has concentrated on prominent examples of miscarriage of justice, and particularly some which it took time to resolve. In addition to such cases, the High Court routinely hears appeals against conviction in which miscarriages of justice are said to have occurred in the types of situation highlighted in that review, and where appropriate quashes the conviction on that basis.

4.24 Wrongful convictions have a pernicious effect on the justice system, reducing public confidence and increasing cynicism about the prospects of a fair trial. High-profile instances of miscarriages of justice have been responsible for significant changes to the legal systems of both Scotland, and England and Wales. In both jurisdictions such cases have led directly to the creation and development of courts of criminal appeal and also to the introduction of independent criminal case review commissions.

4.25 It is plainly important that any increased risk of miscarriage of justice resulting from the abolition of the corroboration requirement should be mitigated by the simultaneous introduction of appropriate safeguards.

[25] [2007] HCJAC 48, 2007 SCCR 417
[26] Lord Justice Clerk Gill at paragraph 98

5. SUSPECT INTERVIEWS

Introduction

5.1 This Review is the latest in a series of developments triggered by the case of Cadder v HM Advocate[27]. Even before the Supreme Court reversed the earlier decision of the High Court in HM Advocate v McLean[28], the Lord Advocate issued instructions to the police on advising suspects that they could have legal advice prior to and during interview by the police. Immediately following the judgment in Cadder, the Criminal Procedure (Legal Assistance, Detention and Appeals) (Scotland) Act 2010[29] introduced a statutory right to legal assistance as a safeguard against infringement of the right of a suspect not to incriminate him/herself in the course of a police interview. Arrangements are in place for advice to be given by telephone or by personal attendance of a solicitor.

Uptake of Legal Assistance Since Cadder

5.2 Although the effect of these developments was to enshrine in our practice the suspect's right to legal advice in connection with interview, it was a matter of concern to the Review to learn how infrequently that safeguard appears to have been taken up in practice. Both the Scottish Legal Aid Board and Police Scotland provided to the Review information relating to the uptake of legal assistance. On the face of it, as many as three-quarters of suspects waive their right and fail to take advantage of this safeguard[30]. On the other hand, information from Police Scotland suggests that since the judgment in Cadder more suspects have declined to answer questions posed at interview. That is consistent with information given to the Justice Committee by the Lord Advocate[31] that, because more suspects in cases of rape are declining to answer at interview, it is becoming increasingly difficult to corroborate sexual penetration of the alleged victim or that sexual contact took place.

5.3 Although there is an increase in the number of suspects declining to answer, a significant number still do, and what they say may become evidence in any resultant prosecution. Indeed, if section 62 of the Criminal Justice Bill[32] removing the distinction between self-serving statements and mixed statements becomes law, there is likely to be an increase in the volume of interview evidence presented in court, particularly on behalf of accused persons. It will, therefore, continue to be important that the interview is not only conducted fairly but also *seen* to be conducted fairly, and that the exchanges are accurately recorded and reported.

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[27] Cadder v HM Advocate [2010] UKSC 43, 2011 SC (UKSC) 13., 2010 SCCR 951
[28] [2009] HCJAC 97, 2010 SLT 73, 2010 SCCR 59
[29] Criminal Procedure (Legal Assistance, Detention and Appeals) (Scotland) Act 2010
[30] Information obtained from Police Scotland showed that around 75% of those in custody waive their right to legal advice. This figure was obtained from a data gathering exercise conducted during the month of June 2013 across all custody stations in Scotland. The figure is further reinforced by an 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.
[31] See Scottish Parliament Official Report, Justice Committee, 20 November 2013 Col 3734.
[32] Section 62 of the Criminal Justice (Scotland) Bill will insert a new provision, namely section 261ZA of the Criminal Procedure (Scotland) Act 1995.

Recording of Interviews

5.4 Currently in serious cases formal police interviews with suspects are recorded by audio or audiovisual means. Which technique is adopted varies across the country reflecting different practices in different forces prior to the creation of Police Scotland. In the Grampian and Lothian areas such interviews are routinely video recorded. In the others only audio recording is regularly used.

5.5 In less serious cases, which are likely to be the subject of summary proceedings, interviews are dealt with differently. Authority to audio or video record an interview is confined to CID officers who have been trained in that technique. Such an officer conducting an interview in a case which is likely to be the subject of summary proceedings may carry out a formal audio or video recorded interview. However, the vast majority of interviews in these cases are conducted by uniformed officers who have not undergone training in interviews using digital recording techniques. The interview is recorded in a notebook or on a statement form.

5.6 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. The added element of video recording could be extended to cover breaks in the interview. The treatment of a suspect both before and during breaks in an interview, and things said at these times, including inducements such as the possibility of bail, feature regularly in criminal court proceedings in support of arguments that evidence should not be admitted because it has been unfairly obtained. The combination of CCTV coverage of the public areas of police offices, the charge bar and the cell corridor, and continuous audiovisual recording of the interview room at all times when the suspect is present there, would enhance the transparency of the whole interview process and materially reduce the opportunities for misconduct or misrepresentation of conduct. The universal deployment of such measures would provide protection for both police officers and accused persons.

5.7 If the availability of resources, such as properly equipped interview rooms, appropriate training, recording equipment, etc, means the rationing of recorded interviews, it makes sense to prioritise their use in more serious cases. However, whether the case is likely to be solemn or summary, the potential challenges to the admissibility of the evidence are the same. The benefits of transparency, vouched accuracy, enhanced opportunity of assessment and the likely elimination of areas of contention warrant the expansion of audiovisual recording of interviews to encompass all formal interviews of suspects in police offices.

5.8 Police Scotland agree that the audiovisual recording of all formal suspect interviews is desirable. In fact, as long ago as 2003, the European Committee for the Prevention of Torture, on a visit to the United Kingdom, noted that police forces in Scotland were working towards the audio recording of all interviews[33]. The Committee "encourage[d] the authorities to have this done at the earliest

[33] Report to the Government of the United Kingdom, on the visit to the United Kingdom and the Isle of Man carried out by the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT) from 12 to 23 May 2003 - CPT/Inf (2005) 1 paragraph 59.

opportunity". The Committee's report was published in 2005. At that time the United Kingdom Government response indicated that it considered that "existing practices with regard to the tape-recording of interviews should continue to be observed[34]". Since then the High Court has noted that the absence of audio or video recording may place the finder of fact at "a huge disadvantage" when drawing conclusions regarding the suspect's answers[35].

Consultation Responses

5.9 A large majority[36] of those who responded to the Consultation question asking if all interviewing of a suspect should be audiovisually recorded agreed with the point in principle. Some of those responding also suggested that recording should go further than the interview even though the Reference Group did not consult on that particular point. However, many of those agreeing that interviews should be recorded also highlighted significant practical and financial implications in taking such proposals forward.

The Decision to Waive the Right to Legal Assistance

5.10 In light of the figures discussed at the beginning of this Chapter indicating that only about a quarter of suspects take up the right to legal advice before or during interview, it seems appropriate to monitor the way in which the decision to waive the right is taken. A form, known as a Solicitor Access Recording Form (SARF) is used by the police to inform a suspect of his/her rights and record the decision on exercising the right or waiving it. It is recognised that that decision is not one in respect of which the suspect requires advice from a solicitor[37]. However, before a waiver is effective it must satisfy a number of requirements. The suspect must understand the right; must choose to give up the right free from any pressure to do so; and must display no hesitancy or uncertainty in doing so[38]. In other words the decision must be a voluntary decision made on a fully informed basis. That means the suspect must be advised that the consequence of waiving the right will mean that the interview will proceed without the benefit of legal advice. In the absence of an audiovisual record of the decision to waive the right to legal advice, the only evidence available of the process undergone is the suspect's signature and a few boxes ticked by the custody officer. There is no requirement that the reason for the decision should be recorded. However, section 24(6) of the Criminal (Justice Scotland) Bill (the Bill) requires that any reason for waiver given must be recorded.

5.11 Having regard to the importance of any incriminating statement made by a suspect, and the significance attached by the jurisprudence of the European Court of Human Rights (ECtHR) and the judgment of the Supreme Court in Cadder v HM

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[34] Response of the United Kingdom Government to the report of the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT) on its visit to the United Kingdom and the Isle of Man from 12 to 23 May 2003 - CPT/Inf (2005) 2 at paragraph 146.
[35] See Beattie v HM Advocate [2009] HCJAC 22, 2009 JC 144, 2009 SCCR. 446, at para 83.
[36] 25 of 30 respondents answering the question agreed with the general principle that all questioning/interviewing of a suspect should be recorded by audio visual means
[37] McGowan v B [2011] UKSC 54, 2012 SC (UKSC) 182, 2012 SCCR 109; Jude v HM Advocate [2011] UKSC 55, 2012 SC (UKSC) 222, 2012 SCCR 88
[38] Paul v HM Advocate [2013] HCJAC 13, 2014 SCCR 119.

Advocate[39] to the right to legal assistance before and during a police interview, making an audiovisual recording of the process during which the suspect is advised of the right and decides to waive it would provide a valuable safeguard ensuring that the decision to waive the right is voluntary, informed and unequivocal. It would permit the Court to be satisfied that the right was explained to the suspect in a way that would enable the suspect to understand it clearly and would demonstrate whether the decision to waive was clear and truly that which the suspect wished to make. Should the suspect indicate the reason for waiving the right, recording that on the form would add further transparency to the process, afford protection for the police, and provide a means of monitoring the effectiveness of the right as a safeguard for suspects. Since the suspect has the right at any time to revoke the waiver, all procedure associated with that should also be recorded by audiovisual means.

5.12 Improvements in certain areas of police practice might result in fewer waivers. A recent inspection of custody arrangements by HM Inspector of Constabulary[40] identified areas for improvement which could have a bearing on the level of uptake. The solicitor access recording form (SARF) was found to contain "complex but vital information" which the Inspectorate were "not content...was easily understood" by all suspects. The Review was advised by Police Scotland that the form is currently being revised. There was also a disturbing general lack of clarity about the role and responsibilities of solicitors which should be addressed by improved communication and training. The Law Society of Scotland has now compiled and published "Police Station Interviews – Advice and Information from the Law Society of Scotland"[41]. This is a publication which seeks to promote best practice for solicitors from the point of initial contact intimating the suspect's presence at a police office, through the various preliminary matters that require to be addressed, thereafter meeting with and advising the suspect and participating in the interview, to post-interview matters such as identification parades and searches.

5.13 In England and Wales, where solicitors routinely sit in on interviews, the uptake of the right to legal assistance, though still relatively low, is significantly higher than that in Scotland. A number of reasons have been identified for the still fairly high waiver rate of 55% in England and Wales[42], including the belief of suspects that they will remain longer in custody waiting for a solicitor to attend, decisions by suspects that legal assistance will not help them, as well as failure by the police to communicate the right or the effect of exercising it clearly and accurately. It is also the case that in England and Wales Legal Aid is provided free of any contribution for suspect interviews**.** That may have a bearing on the greater uptake in England and Wales. A similar arrangement is to be introduced in Scotland by Regulations to be drafted under the Legal Aid (Scotland) Act 1986. It is not clear when this will be done.

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[39] Cadder v HM Advocate [2010] UKSC 43, 2011 SC (UKSC) 13, 2010 SCCR 951

[40] Thematic Inspection of Police Custody Arrangements in Scotland, August 2014, available at: http://www.hmics.org/publications/thematic-inspection-police-custody-arrangements-scotland

[41] http://www.lawscot.org.uk/rules-and-guidance/section-f-guidance-relating-to-particular-types-of-work/division-a-criminal-work/advice-and-information/police-station-advice/

[42] P Pleasance et al, "The justice lottery? Police station advice 25 years on from PACE" [2011] Crim LR 3 at 5.

5.14 The amendments to section 8A of the Legal Aid (Scotland) Act 1986[43] effected by section 17 of the Scottish Civil Justice Council and Criminal Legal Assistance Act 2013[44] are noted. That section paves the way for Scottish Ministers to abolish the current requirement for suspects to have to pay a contribution towards the costs of legal advice and assistance provided to them whilst they are in a police office. The then Cabinet Secretary for Justice said in October 2010: "The Bill makes provision to ensure we have the necessary powers to make the right to legal advice for suspects effective in practice"[45]. However, in order for that practical result to be brought about, Scottish Ministers must lay before Parliament Regulations dis-applying the provisions of the 1986 Act which require a contribution to be made.

5.15 Requiring persons present in a police office as suspects to pay a contribution towards legal advice and assistance (and that possibility is specifically stated in the Letter of Rights given to suspects) is likely to dissuade some from taking up the right to legal advice. Were Ministers now to give effect to the intention and abolish the requirement to pay contributions for legal advice provided while the suspect is at a police office, that would eliminate anxiety over the possibility of having to contribute to the cost of legal assistance as a factor in the low uptake.

5.16 The Criminal Justice (Scotland) Bill expands the right beyond that originally provided in the Criminal Procedure (Legal Assistance, Detention and Appeals) (Scotland) Act 2010 by including in section 24 the right to have a solicitor present while being interviewed. Indeed the section also specifically provides that the interview cannot begin, other than in exceptional circumstances, until a solicitor attends, unless of course the suspect consents. This change and the intimation to the suspect that the solicitor will be able to sit in on the interview may result in fewer waivers. Only time will tell.

Resources

5.17 As stated earlier, one difficulty in the way of introducing routine audiovisual recording of suspect interviews by the police may be the availability of sufficient resources. There are a number of aspects to the problem. None appears to be insurmountable.

5.18 To set the matter in context, it is appropriate to note some figures compiled by Police Scotland for the force as a whole by extrapolation from a small sample. These figures are very approximate, but are the only ones available to the Review. Somewhere between 108,000 and 162,000 interviews of suspects at police offices are conducted each year. Around 17% are digitally recorded, with the remaining 83% noted. Any requirement for digital recording could, therefore, have an impact on 83% of interviews. A number of these interviews are likely to be in cases identified during the investigative stage as not likely to result in court proceedings. Recording of these interviews would not be required. However, in road traffic cases many interviews are carried out at the roadside. In these and other cases, where it is deemed unnecessary to take the suspect into custody or invite the suspect to a police office for interview, interviews will have to continue to be noted and carried out

[43] 1986, c 47.
[44] 2013 asp 3.
[45] Scottish Parliament Official Report, October 27, 2010, col 29559.

without legal assistance, as at present. The development of suitable in-car, portable or body-worn cameras referred to below, may lead in due course to interviews in these cases also being recorded.

5.19 Police Scotland has embarked on a training programme designed to enhance the interviewing skills of officers already authorised to conduct interviews and to augment the pool of officers so authorised. With the best will in the world it will be some time before all officers are suitably trained. However, it may not be long before a sufficient number of officers are suitably trained to enable a requirement for audiovisual recording to be implemented.

5.20 Police Scotland is reviewing its custody estate. It is expected to move to a model with a core number of full-time (24/7) custody centres, a further number of custody centres that are open at times of peak demand, and a large number of rural and island offices where there is an infrequent need to hold suspects and arrested persons and which will only be staffed on a needs basis. Since the universal audiovisual recording of interviews discussed in this Chapter was not anticipated, no provision has been made for additional interview rooms nor additional recording equipment. Making appropriate arrangements to secure the successful implementation of the recommendation for audiovisual recording of formal suspect interviews will therefore require a review of existing facilities to determine the additional number of rooms and items of equipment that will be necessary, followed by action to implement the findings. That will take time.

Extended Use of Video Recording

5.21 Since 2010 there have been pilot schemes for the deployment of body-worn cameras in parts of Scotland. Since 2012 every officer in Aberdeen City, Aberdeenshire and Moray has had access to body-worn cameras. There is also a pilot scheme in Renfrewshire. The cameras can be activated by the officer as appropriate, including to record potentially crucial evidence, and could be used to record on-street or at-home interviews. There are similar schemes in three areas in England, in Kent, London and Essex. Such information as has been published[46] about the pilot schemes in Scotland gives cause to believe that the cameras will be useful tools in a number of areas of police work. Although difficulties in some aspects, including when to activate the camera and data processing and storage of the recordings, have yet to be addressed, there are obvious benefits for the public, the target of police interest and the police themselves of having a recording of any interaction between and among actors, bystanders and police.

5.22 No matter what audiovisual recording facilities and arrangements are introduced, there will always be situations where comments are made by suspects that are not captured by any recording device. That situation is traditionally dealt with by addressing it at an early stage in the formal interview at the police office. However, there are notable examples of significant comments being made in circumstances where making a recording would not present any particular difficulty. Comments are not infrequently made by suspects in police cars en route to the

[46] Body Worn Video Projects in Paisley and Aberdeen, Evaluation Report, July 2011 available at: http://www.bwvsg.com/wp-content/uploads/2013/07/BWV-Scottish-Report.pdf

police office. Installing appropriate equipment in police vehicles should, subject to the availability of resources, be straightforward.

5.23 It is plainly desirable to both audio and video record, so far as possible, all contact between a suspect and the police. An audiovisual recording of the events leading to that contact would be an incidental bonus. Although the body-worn camera pilot schemes appear to be progressing well, in the absence of any final assessment of their value, recommendations on audiovisual recording have been confined to situations where contact between a suspect and the police can be recorded by fixed audiovisual equipment. Beyond that, attention is simply drawn to the potential benefits which may ultimately be derived from the widespread deployment of body-worn and other portable cameras.

Conclusion

5.24 It is recommended that all formal police interviews with suspects at police offices should be recorded by audiovisual means, as should the completion of the Solicitor Access Recording Form (SARF). The suspect's reason for waiving the right, if known, should be noted on the SARF, as provided for in section 24(6) of the Criminal Justice (Scotland) Bill.

5.25 It is recognised that detailed rules covering matters such as the sealing, storage and transfer (including sharing with third parties) of the recorded material will require to be developed, and the direction of travel outlined in the Government's Justice Digital Strategy[47], published in August 2014, is noted. The recommendation to make an audiovisual recording of all suspect interviews[48] is wholly in line with, and is capable of being seen as an integral aspect of and driver for, the advancement of the Justice Digital Strategy.

5.26 Police Scotland should give early attention to drawing up a programme to install audiovisual recording equipment in police vehicles.

5.27 There is discussion in Chapter 7 of the introduction of Codes of Practice relating to the exercise of certain police powers and practices. A Code would be an appropriate mechanism by which to regulate the conduct of suspect interviews. The Code could set out the general requirement for audiovisual recording of an interview with appropriate excepted categories and situations where good reason exists why that cannot be done. It could prescribe the procedure to be followed to ensure the fair conduct of the interview and to secure the integrity of the record. Provision could be made for those who cannot communicate in English or who suffer from a relevant disability such as hearing impairment, and additional provision could be included as appropriate to supplement legislative requirements, for example in relation to interviews of young and vulnerable suspects. These are simply examples of matters that might be so regulated.

5.28 One particular example highlighted in Reference Group discussions was the administering, before the interview commences, of the caution that the suspect is not

[47] Digital Strategy for Justice in Scotland: http://www.gov.scot/Publications/2014/08/5429

[48] The recommendation should also apply to authorised interviews of persons charged as provided for in section 27 of the Criminal Justice (Scotland) Bill (as introduced).

obliged to say anything. Section 23(2) of the Bill requires that to be done “not more than one hour” before the interview begins. In practice the caution is repeated at the commencement of the interview, and any Code would be expected to include a requirement to that effect. It is not clear why section 23(2) is thought to be necessary, or indeed appropriate.

5.29 It would also be appropriate for the Code to require that anything of significance said by the suspect while with a police officer but before the commencement of the formal interview should be put to the suspect for comment at as early a stage in the interview as is reasonably practicable.

5.30 One incidental concern relates to the requirement in section 5 of the Bill that a person in custody must be informed of his rights as soon as possible. That may be implemented by providing the information “verbally or in writing”. To avoid failure to comply with the requirement where an inability to read is not disclosed, e.g. on account of embarrassment, it is recommended that the requirement should be to provide the information “both verbally and in writing” save where there is cause not to, such as in the case of a suspect known to be deaf.

5.31 Scottish Ministers should forthwith abolish the requirement for some suspects to pay a contribution towards the cost of legal advice and assistance provided to them while they are in a police office.

6. EVIDENCE OF IDENTIFICATION

Introduction

6.1 At present, before an accused person can be convicted, each of the essential elements of the charge requires to be proved by corroborated evidence. Identification of the accused as the perpetrator of the crime is one such essential element. The rule does not require two independent eyewitnesses. Further, it has been said that where there is an "emphatic positive identification by one witness then very little else is required"[49].

6.2 The risk of miscarriage of justice that flows from misidentification is well-known and well-documented[50] . The evidence includes decisions in infamous Scottish[51] and foreign cases[52], reviews and inquiries flowing from such cases[53], and extensive academic work. While much of the focus has been on the incidence of the problem in the United States and in England and Wales, there is a risk of miscarriages of justice occurring in Scotland through misidentification, the incidence of which is unquantifiable. This risk has been noted by the High Court[54]. The Lord Justice General's Practice Note on the matter[55] expressly recognises that:

> "…in many cases in which acceptance by a jury of evidence of visual identification is essential to a conviction the risk of conviction on mistaken identification by honest witnesses cannot wholly be excluded"[56].

6.3 One practice routinely followed in Scotland, which some consider can create the perception of unfairness and which has the potential to result in misidentification and a miscarriage of justice, is that of dock identification[57]. There will be a greater risk of miscarriage of justice as a result of unreliable dock identification in the absence of the corroboration requirement.

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[49] Ralston v HM Advocate 1987 SCCR 467 at 472. Judges are however discouraged from focussing in their jury directions on the quantity of the evidence said to provide corroboration, rather than its quality as a secondary source of evidence confirmatory of the case: Kearney v HM Advocate [2007] HCJAC 3.

[50] Chapters 4 and 5 of the Academic Expert Group Report, esp. 4.3 and 5.3

[51] e.g. Slater v HM Advocate 1928 JC 94.

[52] e.g. State v. Cotton, 394 S.E.2d 456, 457, 460 (N.C. Ct. App. 1990): see N Vidmar, J E Coleman and T A Newman, "Rethinking Reliance on Eyewitness Confidence" (2010) 94(1) Judicature 16, available at http://law.duke.edu/news/pdf/judicature.pdf

[53] See, in particular, the reviews, inquiries and articles referred to in para 4.3 of the Academic Expert Group Report.

[54] e.g. Gage v HM Advocate [2012] HCJAC 14, 2012 JC 319, 2012 SCCR 254

[55] Issued 18 February 1977

[56] Ibid, para 2.

[57] Dock identification is a *practice*, rather than a rule of law; see Murphy v HM Advocate [2007] HCJAC 57, 2007 SLT 1079, 2007 SCCR 532, per Lord Osborne (in the Chair) at para 48: 'the implication of an accused person in the commission of an offence may be proved in a variety of different ways by direct evidence, or by indirect evidence of different kinds. How the Crown goes about proving that essential feature of a case must be a matter for the exercise of its discretion'. Chapter 16.1 of the Jury Manual (January 2014 Edition), whilst recognising that the case is authority for the proposition that dock identification is a practice rather than a rule of law, emphasises aspects of Lord Macfadyen's Opinion in that case, where he states (at para 90) the proposition that 'there is a long recognised general rule of practice that a witness who speaks to the commission of a crime should be asked to make a dock identification'.

Problems with Dock Identification

6.4 The inherent risks in, and scope for mistakes caused by, the use of dock identification are obvious. They are set out more fully in the Academic Expert Group Report[58] , and include:-

- Dock identification may occur many months or indeed years after the incident occurred, allowing the passage of time to have an impact on the memory of the witness.

- A witness asked if the person who perpetrated the crime is present in the courtroom may be automatically drawn to identifying the person in the dock flanked by police or custody officers[59]. This likelihood is increased by the anxiety that many witnesses feel when giving evidence at the trial and the pressure to identify *someone* at that point, leading to identification of the person in the dock.

- Unlike the situation at a pre-trial identification parade, there may be no-one in court who could possibly be the perpetrator other than the accused and so mere resemblance of the accused to the perpetrator might be sufficient to prompt the witness to make a positive identification at the trial, particularly given the pressure to make an identification at that point.

6.5 There is also some force in the view that the cumulative impact of witnesses repeatedly pointing out the accused in the dock may tend to foster a pro-prosecution atmosphere which it is difficult for the defence to counteract.

6.6 Dock identification has been a contentious part of Scottish criminal practice for some years now, with various reviews, committees and judges in recent decades taking opposing sides in debating its merit. In 1975 the matter was considered by the Thomson Committee,[60] which recommended that pre-trial parades should replace dock identification in Scottish solemn criminal cases, and that dock identification should not be permitted where the witness had failed to identify the accused at a parade. In 1976, the Devlin Committee[61] recommended (for England and Wales) that prosecutions should not be brought on eye witness evidence only. The Working Group set up to consider the relevance of the Devlin recommendations to Scotland, which produced the Bryden Report[62], regarded the Practice Note issued

[58] Chapters 4 and 5 of the Academic Expert Group Report

[59] See Holland v HM Advocate [2005] UKPC D 1, 2005 1 SC (PC) 3, 2005 SCCR 417 at para 47, and NC v HM Advocate [2012] HCJAC 139, 2013 JC 99, 2012 SCCR 702 at para 12. Note also the terms of Chapter 16:2 of the Jury Manual, where the suggested Direction to the jury in cases where dock identification was made but there was no pre-trial identification procedure is: "There has been no identification parade held in this case. If such a parade had taken place... any identification of the accused by the witness would have taken place in more testing circumstances. When an accused person is in the dock he is between two custodial officers which may mean that the identification of the individual is not as difficult."

[60] Criminal Procedure in Scotland (Second Report) (Cmnd. 6218: 1975) paras 46.10 and 46.13.

[61] Report of the Departmental Committee on Evidence of Identification in Criminal Cases (HC338, 1976).

[62] Cmnd 7096; 1978.

by Lord Justice General Emslie in 1977[63], recommending that judges should issue suitable directions to juries, as the appropriate way to deal with the issue. As is pointed out in the Report of the Academic Expert Group, the potential unfairness of allowing witnesses to make dock identifications has featured in many recent appeal cases in Scotland[64] and has been considered by the Judicial Committee of the Privy Council[65]. The report of the Carloway Review[66] did not address dock identification.

6.7 Despite the problematic nature of dock identification, it must be acknowledged that there are a number of judgements which conclude that the current Scottish practice of dock identification is fair[67] and compatible with the ECHR. Critically, however, those conclusions proceed on the basis of a general requirement for corroboration being applicable; see, for example, Lord Rodger's Opinion in Holland v HM Advocate[68], and Robson v HM Advocate[69], where Lady Paton cites with approval the comments of the Lord Justice Clerk (Gill) in Brodie v HM Advocate[70], where he said:

> "Dock identification evidence is held to be admissible partly because of safeguards such as the judge's directions…and the requirement of corroboration…".

6.8 Whilst acknowledging the history of contrasting opinion, the Reference Group formed the provisional view that the clearly documented risk of misidentification that exists where the perpetrator of an offence is not known to the witness could be further reduced by abolishing the practice of dock identification and included in the Consultation Document a question whether dock identification should be generally inadmissible.

Consultation Responses

6.9 Respondents to the Consultation were not unanimous in their views. Whilst a clear majority (24 out of 29) of respondents[71] agreed that dock identification should be generally inadmissible, the Crown Office and some of the Senators of the College of Justice opposed this. Both envisaged difficulty in dealing with any proposed exceptions to the rule. However, the clear view of the majority of respondents was that the practice of dock identification should end.

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[63] Issued 18 February 1977. Read short, the Practice Note states that, in cases where acceptance by a jury of evidence of visual identification is essential to a conviction, in order to reduce the risk of miscarriage of justice, the judge should remind the jury of the vital importance of approaching the assessment of the weight which ought to be given to the evidence in question with particular care, and should assist the jury by indicating or suggesting for their consideration the tests which in the particular circumstances of the case they could usefully apply to that evidence to measure its quality and reliability, and thus reach a sound conclusion on whether to accept or reject it.

[64] At page 50 of the Report of the Academic Expert Group

[65] See, e.g. Holland v HM Advocate [2005] UKPC D 1, 2005 1 SC (PC) 3, 2005 SCCR 417.

[66] The Carloway Review: Report and Recommendations, published 17 November 2011.

[67] Docherty v HM Advocate [2014] HCJAC 71, 2014 SCCR 495.

[68] Holland v HM Advocate [2005] UKPC D 1, 2005 1 SC (PC) 3, 2005 SCCR 417, particularly at para 57.

[69] Robson v HM Advocate [2014] HCJAC 53 at para 15.

[70] Brodie v HM Advocate [2012] HCJAC 147, 2013 JC 142, 2013 SCCR 23, at para 15.

[71] 24 out of 29 respondents answered yes to the question "Do you agree that dock identification evidence should be generally inadmissible?"

How Does Scotland Compare With Other Systems?

6.10 In order to try to prevent misidentification, legal systems typically utilise a range of safeguards to ensure the reliability of their identification procedures. Such measures include imposing stringent standards in relation to pre-trial identification, requiring additional evidence to support identification, allowing expert testimony about eyewitness identification evidence, and requiring specific judicial directions regarding potential misidentification to be given to juries[72]. Some of these are employed in Scotland. In addition, as noted in paragraph 6.1, corroboration of identification is always required.

6.11 In marked contrast to the position in most of the other jurisdictions studied in the Report of the Academic Expert Group, in Scotland reliance is still routinely placed on dock identification. In England and Wales dock identification, whilst still legally permitted, is almost never resorted to. That is a major change which has come about since 1976. One text[73] puts it in this way: "…the dock identification…referring to the identification of an accused for the first time during the course of the trial itself (i.e. by a witness who has not previously…identified him by means of a Code D identification procedure)…has long been considered potentially unreliable". The same text cites cases in which the Court has rejected the notion that less strict identification rules should apply in summary cases. Today the practice followed in summary cases mirrors that followed in cases on indictment.

The Changes Required

6.12 Judging by experience in other jurisdictions, any heightened risk of misidentification arising from the abolition of the general requirement for corroboration can be mitigated by ending the practice of dock identification and instead extending the use of robust, prescribed pre-trial identification procedures, already in use, which are carried out to high standards and which are recorded for the Court to view at trial if need be. It is recognised that this would require a change in culture as well as practice, and might necessitate accused persons and their representatives playing a part in assisting the Court to clarify, at a suitably early stage, whether identification is or is likely to be in issue in the case. This is no more than the Thomson Committee recommended in 1975[74].

6.13 The Thomson Committee reluctantly confined their recommendation of pre-trial identification procedures to solemn cases, citing difficulties in extending the proposal to summary cases due to the greater volume of such cases and the impact on the court timetable. Summary cases make up the vast bulk of court business. Following the abolition of the general requirement for corroboration, there are likely to be far more summary trials than solemn trials involving a single witness making a positive identification of an accused.

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[72] For an overview of the position in other jurisdictions, see Table 5, at page 222 of the Report of the Academic Expert Group.
[73] *Blackstone's Criminal Practice 15th Edition*, at F18:6.
[74] Criminal Procedure in Scotland (Second Report) (Cmnd. 6218: 1975) para 46.10.

6.14 In view of the significance of identification in establishing guilt, and the importance to the criminal justice system of having sound identification practices, there is no proper basis for applying different rules in summary and solemn cases. The existing right of an accused under section 290 of the Criminal Procedure (Scotland) Act 1995 to apply to the sheriff to order an identification parade where the prosecutor has not arranged one should be retained.

6.15 Although it initially seemed likely that the ending of dock identification would inevitably have to be subject to exceptions for cases in which that would be the only possible course, it emerged, from consideration of practice in England and Wales, that reference to specific exceptions might be unnecessary. Since the possibility of dock identification has not been abolished by law in England and Wales, it can be relied upon in "exceptional circumstances" as stated in the undertaking by the Attorney General and the Director of Public Prosecutions. However, few in practice in England and Wales today have any experience of dock identification actually occurring in a trial even as a formality where identification has been adequately established at a pre-trial procedure.

6.16 In a number of situations a formal identification is quite unnecessary. It is not necessary where witness and accused are related and live together, such as in many cases involving sexual offences and domestic abuse. The accused may be recognised as someone well-known to the witness making further identification procedure unnecessary. Where a formal process is necessary to establish identification, a number of forms of procedure already exist in Scotland for that purpose, such as showing of photographs, informal identification, a video identification parade (VIPER) in which rotating images of the head and shoulders of a suspect and a series of "stand-ins" are shown, a traditional line up of suspect and stand-ins, group identification, confrontation, voice identification, fingerprint comparison and DNA analysis. All are mentioned in the existing Lord Advocate's Guidelines on the Conduct of Visual Identification Procedures[75]. The problem will lie in changing from a system in which reliance can be placed on dock identification, and it is not necessary to have identification addressed formally at an early stage in the investigation, to one in which it is necessary at an early stage to know or decide whether identification is likely to be a contentious issue and, if so, to arrange an appropriate pre-trial identification procedure.

How Change Might be implemented

6.17 The ending of dock identification might be achieved in one of two ways. The Lord Advocate might elect to follow the course taken by the Attorney General and the Director of Public Prosecutions in England and Wales and give an undertaking in relation to the practice. On the other hand, it might be provided by statute that evidence of in-court identification of the accused is inadmissible except on special cause shown, to allow for exceptional circumstances.

6.18 The Reference Group were fairly evenly divided over which course was preferable, and so both courses are presented as possible ways of ending the

[75] Lord Advocate's Guidelines to Chief Constables – Guidelines on the Conduct of Visual Identification Procedures, issued February 2007

practice. Those who favour an undertaking consider that this provides the best means of ensuring a complete change in practice. If the Lord Advocate were to accept that the practice should be ended and were to take the initiative and oblige the Crown to refrain from using dock identification except in exceptional circumstances, the Lord Advocate and COPFS could be expected to do all in their power to make it work and to avoid circumstances in which the issue might arise by devising comprehensive guidance for police and prosecutors. They fear that imposing the change in practice by legislation will lead to the development of a whole jurisprudence around the interpretation of "exceptional circumstances" as both Crown and defence test the new provisions. An undertaking would also have the benefit of enabling the immediate implementation of the change. The Lord Advocate has indicated he is willing to consider proceeding in that way.

6.19 Those who favour legislation do so because they consider that it will ensure clarity and consistency in practice. They regard the imposition of a plain rule as necessary in order to effect a change in the mindset of prosecutors. They consider the status of an undertaking to be unclear and fear that a subsequent Lord Advocate might revoke the undertaking. One member also feared that an undertaking might not be seen by the ECtHR as an effective provision of domestic law. However, it should be noted that previous Crown undertakings not to institute proceedings in certain categories of case, such as drink-driving cases where test results were marginally in excess of the legal limit, have operated successfully in practice. This undertaking held good until the limit was recently reduced[76] and the undertaking withdrawn[77].

6.20 It was widely recognised among members of the Reference Group that the drafting of legislative provisions around what amounts to "exceptional circumstances" could be complex and would require consultation with interested groups such as COPFS, the Law Society of Scotland, the Faculty of Advocates, and Victims Groups. Against that background it has not been possible to provide draft legislative proposals to give effect to the change.

6.21 In view of the spilt among members of the Reference Group on the better way to deal with this, both options are presented.

Pre-Trial Identification Procedures

6.22 The Reference Group recognise the resource and logistical issues which would arise (for all concerned) if the police were to be required to hold out-of-court identification procedures in every summary case. That is not what is proposed. The police would, however, be required to conduct such a process in all cases where identity genuinely is, or is likely to be, in dispute. That would mean the police having to consider whether to hold a pre-trial identification process in far more cases than

[76] The Road Traffic Act 1988 (Prescribed Limit) (Scotland) Regulations 2014, SSI 2014/328.
[77] Letter from Crown Agent 27 November 2014 "Lord Advocate's Guidelines on Breath Test Devices" http://www.copfs.gov.uk/images/Documents/Prosecution_Policy_Guidance/Lord_Advocates_Guidelines/Crown%20Agents%20Letter%20to%20the%20LSS%2027%2011%202014.pdf

they currently do[78]. It may be that the investigative liberation provisions in the Criminal Justice (Scotland) Bill[79] will give the police greater scope and flexibility to conduct pre-trial identification procedures at the investigation stage of cases in future.

6.23 There may be a role for more proactive case management in the summary courts, which would in turn provide the driver for both sides to focus the critical issues (including that of the identity of the accused) more clearly and at an earlier stage in the process, allowing time and scope for additional pre-trial out-of-court identification procedures to be completed if necessary. The issue of case management is considered more fully later in this Chapter.

6.24 With the removal of the corroboration requirement, it is appropriate to review existing pre-trial identification practices to ensure that they apply recognised best practice. Identification procedures should allow a witness an adequate opportunity to make a positive identification in a context in which any factor or feature that might undermine the reliability of the identification has been eliminated as far as possible. Fair and properly conducted out-of-court identification procedures are recognised as decreasing the risk of miscarriage of justice[80].

6.25 In Scotland the Lord Advocate has issued Guidelines[81] to the police on the conduct of visual identification procedures. In England and Wales the rules for the conduct of identification procedures are codified in Code D, issued under part VI of the Police and Criminal Evidence Act 1984 (PACE); these include measures such as allowing defence solicitors to be present during the process, prescribing the number of stand-ins during a line-up and directing that identification procedures should generally be audiovisually recorded, so that the Court can assess their fairness.

6.26 There is a considerable degree of similarity between the contents of the Scottish Guidelines and Code D in England and Wales. For reasons set out in Chapter 7 it is recommended that the Lord Advocate should be bound by statute to issue a Code for the conduct of identification procedures. At this point in this Chapter the issue is whether provisions in addition to those in the current Guidelines should be added to the proposed Code.

6.27 Under reference to the suggestions set out in the Report by the Academic Expert Group, the Reference Group consider that in any new Code the provisions which are currently contained in the Lord Advocate's Guidelines should be expanded to include a number of provisions that would provide additional safeguards of value in the absence of the corroboration requirement including:

- A requirement that there should be a minimum of eight stand-ins or images other than that of the suspect in any identification procedure (at present in

[78] The Reference Group noted that, in England and Wales, a VIPER type parade is required in a greater volume of cases than in Scotland, and that police forces in England and Wales appear to be able to cope with this.
[79] Sections 14 – 17 of the Criminal Justice (Scotland) Bill as introduced.
[80] Chapter 5 of the Report of the Academic Expert Group.
[81] Lord Advocate's Guidelines to Chief Constables – Guidelines on the Conduct of Visual Identification Procedures, issued February 2007

Scotland, while there are commonly eight, the number can be as low as five)

- A requirement that the entire procedure should be recorded by audiovisual means

- A requirement that witnesses who have made a positive identification at a pre-trial identification process should be asked (normally immediately following the end of the identification process) why they selected a particular image or individual. That question and answer process should be conducted by an officer other than the investigating officer, and should be audiovisually recorded.

6.28 Of course, it is for the Lord Advocate, following appropriate consultation, including with Police Scotland, to formulate the terms of the Code. In doing so, it would be appropriate to have regard to the very detailed discussion of the provisions that may be incorporated into such a Code set out in Chapter 5 of the Report of the Academic Expert Group. Some of those provisions, which are being widely adopted in the USA, proved controversial among the Reference Group, but did receive some support. These included double-blind testing, where the police officer conducting the parade does not know which of those involved is the suspect, asking witnesses immediately following the identification procedure about their "level of confidence" in their identification and the presentation of each participant or image one at a time rather than simultaneously.

Addressing the Need for Pre-trial Identification

6.29 Such a major change as ending dock identification would inevitably give rise to resource and logistical issues, particularly for the police and especially if an out-of-court identification procedure were required in every summary case. However, the police should be required to conduct such procedures only where identification of the accused as the perpetrator of an offence genuinely is, or is likely to be, in dispute. Investigating police officers would be required to make a judgment about the need to carry out a pre-trial identification procedure in many more cases than at present, but by no means in all.

6.30 Bearing in mind the inevitable lapse of time between initial detection and the institution of proceedings along with the adversarial nature of the criminal case process, it may not be possible for the investigating officer to obtain any indication at an early stage of whether identification is likely to be an issue. It would be necessary, therefore, to provide a pre-trial mechanism to establish that formally in cases where no identification procedure has been carried out, either by devising a form of procedure or refining existing procedure.

6.31 The Consultation Document outlined a possible process, in terms of which a statement of the nature of a Statement of Uncontroversial Evidence in terms of section 258 of the 1995 Act might be served on the defence early in proceedings (perhaps along with the complaint or indictment), stating that identification is not an issue. In the absence of proper challenge, the facts stated relating to identification would be deemed to have been conclusively proved as section 258 currently

provides. If the defence were to object to the statement, then identification procedures could take place before the trial. That is one possible route to ensure that, in cases where identification is or is likely to be in issue, steps can be taken prior to a trial to ensure that the person who ultimately stands trial has been adequately identified.

6.32 The legislative provisions introducing such procedure would require to be robust enough to ensure their routine observance; it may be that measures would be required to counteract a perceived tendency for accused persons or their representatives routinely to object to anything contained in a Statement of Uncontroversial Evidence, such as a requirement to state the reason for challenging identification, so that steps may be taken timeously to address any concerns[82]. Failure to state a proper challenge would have the result that the facts relating to identification would at the trial be deemed to have been conclusively proved. It is likely that any unreasonable failure by an accused to engage with the prosecution to resolve the issue of identification, which resulted in unnecessary procedure, could have an adverse impact on any discount on sentence that might otherwise be appropriate. It is, of course, important that victims of crime are not required to participate unnecessarily in the investigative process, in particular by having to attend identification procedures that prove in the end to have been unnecessary.

Case Management

6.33 In England and Wales case management procedures include requiring the accused at a pre-trial hearing to state whether identification as the perpetrator or presence at the locus are disputed. That system works well in practice. The result is that either before or at the case management hearing the defence position in relation to identification is clear. If it emerges that it will be necessary for the prosecution to arrange an identification procedure, then arrangements can be made for that to be done and, if necessary, for the trial to be adjourned.

6.34 In Sheriff and Jury and High Court cases there are preliminary hearings or first diets at which such issues can be addressed. Section 257 of the Criminal Procedure (Scotland) Act 1995 obliges the prosecutor and the accused to take all reasonable steps to agree facts which are in dispute. It is already provided in relation to solemn proceedings in section 70A of the Criminal Procedure (Scotland) Act 1995, albeit currently purely for the purpose of ensuring adequate disclosure, that the accused must lodge a defence statement at least 14 days before the preliminary hearing or first diet and that that defence statement must set out any particular defences on which the accused intends to rely or any matters of fact on which the accused takes issue with the prosecution and the reason for doing so. In addition, if an accused wishes to rely on the defence of alibi, that is at the time of the offence he was not at

[82] See MacDonald v HM Advocate [2014] HCJAC 121, 2015 SCL 189, where the defence refused to agree identification for "tactical reasons"; at para 13: "Had the defence been prepared to agree the evidence of identification the trial could have gone ahead. As already noted, we were given to understand that the charge was of a domestic nature and the appellant lodged a special defence of self-defence. Identification could not have been in issue. Mr Dempsey, who appeared on behalf of the appellant, told us that the decision not to agree the evidence had been made for 'tactical reasons'. He was unable to expand on that explanation and we have some difficulty in understanding what was meant by it."

the place libelled but at some other specified place, he must give notice of that seven days before the preliminary hearing in the High Court or at or before the first diet in the Sheriff Court. Notice of the alibi may also be given in the defence statement.

6.35 So provisions exist which could be adopted and used to establish at or before such a hearing that identification is an issue. It would be possible by minor revisal of these statutory provisions to give the Court power to ensure that the accused's position in relation to identification is established so that any further steps necessary and appropriate to prove identification can be undertaken prior to the trial[83]. Reliance might also be placed by the Crown on section 281A of the Criminal Procedure Scotland) Act 1995 by lodging as a production a report naming the accused as a person identified at an identification procedure, thus invoking the presumption that that person is the person of the same name who appears in answer to the indictment or complaint.[84]

6.36 The intermediate diet in summary criminal proceedings might be the appropriate case management hearing at which such an issue could be addressed. However, the current arrangements whereby very large numbers of intermediate diets are assigned for hearing on one day would require to be reviewed to allow adequate time for proper management of the caseload. Only then would there be adequate time for judges to undertake the necessary proactive case management required to provide the driver for both sides to focus the critical issues, particularly that of the identification of the accused, clearly at a stage early enough in the proceedings to allow for a pre-trial identification procedure to be conducted if it emerges, contrary to prosecution expectation, that identification of the accused as perpetrator is in dispute.

6.37 Such an approach would only work if sufficient information were provided in advance of the diet to enable productive case management to be undertaken. A uniform approach to judicial case management of summary cases in all Sheriff Courts should be developed, including the introduction of standard case management forms. The current situation whereby issues often cannot be addressed when a case calls at an intermediate diet because of problems with legal aid or Crown disclosure is a major impediment to successful judicial case management. It is difficult to see that anything more than sound administration and the will to make the relevant systems work efficiently is required.

6.38 Section 125 of the Criminal Justice and Licensing (Scotland) Act 2010 makes provision, in similar terms to those made for solemn cases by Section 70A of the Criminal Procedure (Scotland) Act 1995, for the accused to lodge a defence

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[83] In Barclay v HM Advocate [2012] HCJAC 47, 2013 JC 40, 2012 SCCR 428, the Court describes a defence statement as a "procedural step designed to ensure that the Crown's duty of disclosure is appropriately directed to such defence, positive or negative, as the accused may adopt at his trial", and noted that the statute did not expressly authorise any wider use of the statement.

[84] Section 144(4) of the Criminal Procedure (Scotland) Act 1995 is to the effect that in summary proceedings any denial that the accused is the person charged by the police shall be stated before the accused pleads to the charge or any plea of guilty is tendered on his behalf. Section 280(9) Criminal Procedure (Scotland) Act 1995 provides that at any trial of an offence it shall be presumed that the person who appears in answer to the complaint is the person charge by the police with the offence unless the contrary is proved. Both subsections apply to summary proceedings only, but could be amended to apply to proceedings on both complaint and indictment.

statement at any time during summary proceedings, but leaves it to the accused to decide whether to do so. Were that to be a mandatory requirement, the statement could be adapted as suggested above in relation to solemn cases. In summary cases it would also greatly assist judicial case management if witness statements were available to the presiding Sheriff prior to the intermediate diet.

6.39 This brief review of existing forms of procedure and changes that could be made demonstrates that a scheme for ensuring that the issue of identification is addressed fully before the trial can be devised by imaginative adaptation of existing procedures. Designing a scheme that will work well in practice will require careful consideration following consultation with those who will be charged with operating it in practice. As with many forms of court procedure, its successful introduction will depend on the willingness of the Crown and defence practitioners to make it work.

6.40 With the increasing use of special measures for taking the evidence of vulnerable witnesses, which have the effect that the witness is unable to see the accused, prosecution and defence practitioners and the Court are used to ensuring that any issue over identification is resolved pre-trial. Extending the current practices in these cases so that they are applied universally should present no difficulty.

6.41 The significance of proactive and consistent judicial practice and timely and meaningful disclosure by the Crown to the successful implementation of case management cannot be overstated.

Judicial Directions to Juries About Identification

6.42 It is already routine for judges to give specific directions to juries about the need to take care in considering visual evidence of identification where the alleged perpetrator is someone who was not previously known to the witness. Reference was made earlier in this Report to the Practice Note of 1977. The Jury Manual contains guidance identifying circumstances in which it is appropriate for specific directions to be given, under reference to opinions of the High Court such as that in Farmer v HM Advocate[85] in which the directions given by the trial judge are approved and set out at length. This is an important and obvious safeguard. Appropriate directions should be crafted according to the circumstances of the case[86]. The particular issues to focus and how to address them are for the trial judge to determine.

6.43 The Academic Expert Group pointed out in their Report (pages 57 to 61) that the discretion of trial judges is greater than in many other jurisdictions. As a result practice is not uniform. The High Court has, in a significant number of cases, held it to be unnecessary for the trial judge to warn the jury of the risk of misidentification[87]. In reliance upon practice in other jurisdictions, in particular England and Wales where the guidance set out by the Court of Criminal Appeal in R v Turnbull[88] is invariably followed, the suggestion was made that trial judges should be required by

[85] Farmer v HM Advocate 1991 SCCR 986
[86] See Lord Rodger's opinion in Holland v HM Advocate [2005] UKPC D 1, 2005 1 SC (PC) 3
[87] Chalmers v HM Advocate 1994 SCCR 651; Ferguson v HM Advocate 2000 SCCR 954; Toal v HM Advocate [2012] HCJAC 123, 2012 SCCR 735
[88] R v Turnbull [1977] QB 224

statute to direct juries of the risks of convicting in cases involving uncorroborated identification evidence, where identification of the accused as the perpetrator is an issue at the trial.

6.44 It is self-evident that the absence of the corroboration requirement will give rise to situations in which evidence of identification by a single eyewitness who is not familiar with the person seen will be sufficient evidence, and that, depending upon the circumstances, detailed directions about the risks inherent in convicting on the strength of that evidence will require to be given. The Review is content to rely on the Judicial Institute to take steps to provide such training and guidance as is considered appropriate in light of any changes that are ultimately enacted. In doing that the Institute would be expected to have regard to the very thorough review of the problems of visual identification in the Report of the Academic Expert Group when revising the Jury Manual.

6.45 One particular point worthy of consideration is the guidance in R v Turnbull that, whenever the case against an accused depends wholly or substantially on the correctness of one or more identifications of the accused which the defence alleges to be mistaken, the judge should warn the jury of the special need for caution before convicting the accused in reliance on the correctness of the identification or identifications; in addition he should instruct them as to the reason for the need for such a warning and should make some reference to the possibility that a convincing witness can be a mistaken one and that a number of such witnesses can all be mistaken. The trial judge is clearly best placed to decide in any given case what directions are appropriate, having regard to the circumstances of the case and the guidance provided in the Jury Manual as revised in the context of the Criminal Justice (Scotland) Bill once enacted.

Conclusion

6.46 Mistaken identification is a well-recognised cause of wrongful conviction. Every effort should be made to minimise the possibility of mistaken identification occurring. That includes taking the steps outlined in this Chapter to improve the practices and procedures utilised to identify and then to prove the identification of the perpetrator of a crime.

6.47 The most immediate need is to end the practice of dock identification, a recommendation which the members of the Reference Group support unanimously. That can be achieved either by the Lord Advocate undertaking that the use of dock identification will cease other than in truly exceptional circumstances, and putting in place appropriate instructions for police and prosecutors to bring about that result, or Parliament enacting appropriate legislation.

6.48 Effective case management in which the parties engage positively will also be required in order to ascertain in every case whether identification is in issue and to ensure that it is addressed before the trial.

6.49 Forms of procedure should be devised or existing forms refined to facilitate that objective. A number of possibilities are discussed above.

6.50 In summary cases sufficient time should be allocated for the intermediate diet or another court management hearing to enable that objective to be achieved.

6.51 Pre-trial identification procedures should be reviewed in light of the discussion of measures that might be introduced in this Chapter and Chapter 5 of the Report of the Academic Expert Group and should be incorporated into a Code of Practice as detailed in the following Chapter.

6.52 Out-of-court identification procedures should be audiovisually recorded, with the recording being made available to the Court if necessary.

7. CODES OF PRACTICE

Introduction

7.1 Chapters 5 and 6 above contain recommendations for significant changes to be made in two important areas of the investigation and proof of criminal cases, that is suspect interviews and identification. The changes proposed involve following, as a matter of routine, some practices which are either not followed at present or are followed but not in every case. This Chapter focusses on what might be done to improve practices and procedures during these two aspects of the investigation of an offence in view of the significance of both to investigations in general and the greater potential for either to provide decisive incriminating evidence if the general requirement for corroboration is abolished.

Current Practice

7.2 The conduct of identification procedures is the subject of guidance by the Lord Advocate to Chief Constables set out in a document entitled "Guidelines on the Conduct of Visual Identification Procedures"[89] published in February 2007. These were followed in practice by each of the eight pre-unification police forces which generally converted them into Force Standing Operating Procedures issued to officers. The Guidelines continue to be applied in practice by Police Scotland. The position is different in relation to suspect interviews. There are no Lord Advocate's Guidelines. Standard Operating Procedures and practices followed in the eight forces were not uniform. Such differences as existed among the eight forces, though not major, have largely continued to feature in practice, according to legacy force area, since unification in April 2013.

7.3 It has already been recognised in Chapters 5 and 6 above that the conduct of both identification procedures and suspect interviews should be further regulated. It is a fairly widespread feature of legal systems that procedures of that nature are the subject of guidance, protocols, operating procedures, or codes of practice. It is self-evident that the conduct of both identification procedures and suspect interviews should be regulated in a way that applies throughout the country. It is also important that every effort is made to follow the prescribed procedures and that courts should only infrequently have to adjudicate on the admissibility of evidence obtained where there has been a failure to comply strictly with the procedural guidance. Predictability and consistency are features that generally enhance public confidence in the criminal justice system.

7.4 Finding appropriate sanctions for breaches of rules of criminal procedure is notoriously difficult. It is generally necessary to find other means of ensuring general adherence to procedural rules as well as guidance. Recent experience in the High Court indicates that the approach taken by judges can be one such means. The system of preliminary hearings in High Court cases introduced in 2004 operated with mixed success until judges took a more proactive role in ensuring that the steps expected of solicitors and counsel were in fact taken timeously. As a result the case

[89] Lord Advocate's Guidelines to Chief Constables – Guidelines on the Conduct of Visual Identification Procedures, issued February 2007

management system now works more effectively than before, and has resulted in a substantial reduction in the number of adjournments of preliminary hearings required. The parties clearly understand what is expected of them by the judiciary and endeavour to satisfy these expectations. This is a clear example of the benefits of predictability and consistency. There may also be something about the format in which the procedure is set out that affects the way in which it is applied in practice.

Forms of Regulation

7.5 The Academic Expert Group considered the regime for the conduct of suspect interviews and identification procedures in England and Wales. These and other aspects of English and Welsh police investigative practices are the subject of Codes issued in accordance with the provisions of the Police and Criminal Evidence Act 1984 (PACE). The Codes provide a sound framework for the conduct of police investigations. That emerged from discussions with members of the Judiciary, the Crown Prosecution Service (CPS), and senior English legal academics. The Codes are perceived to have been beneficial in improving the standard and the consistency of police practices when interacting with suspects and witnesses.

7.6 As indicated in Chapter 6 above, there is a considerable degree of similarity between the contents of the Lord Advocate's Guidelines on the Conduct of Visual Identification Procedures and Code D of PACE which applies to identification procedures in England and Wales. However, they appear to operate differently in practice. The key difference is difficult to articulate. It appears to relate to the status of the English rules as a "Code" compiled in accordance with a statutory obligation to have a Code, as against "Guidelines" which the Lord Advocate has chosen to issue although not obliged by law to do so.

7.7 Section 66 of PACE provides that the Secretary of State "shall issue Codes of practice in connection with – …(b) the detention, treatment, questioning and identification of persons by police officers". Section 67(4) provides that, before issuing a Code or any revision of a Code, the Secretary of State must consult a wide range of groups involved in the criminal justice process and "such other persons as he thinks fit". Section 67(7) provides that an order bringing a Code into operation may not be made unless a draft of the order has been laid before Parliament and approved by a resolution of each House. Section 67(10) provides that a failure on the part of a police officer to comply with any provision of a Code shall not of itself render him liable to any criminal or civil proceedings. Section 67(11) provides that in all criminal and civil proceedings any Code shall be admissible in evidence, and if any provision of a Code appears to the court or tribunal conducting the proceedings to be relevant to any question arising in the proceedings it shall be taken into account in determining that question.

7.8 So the obligation to have a Code is clearly stated in statute, but no consequences of failing to comply with it are specified[90]. However, the consequence of any breach of a Code that must be viewed with the greatest concern by any investigating police officer is the exclusion of relevant evidence in circumstances to

[90] Further provisions relating to Codes are to be found in sections 60 and 60A of PACE.

which the breach applied. The approach of the Courts in England and Wales to a breach of a provision of a Code has been summarised as follows:

> "Whether a breach of the Codes results in evidence being excluded is a matter for the judges. Frequently they rule that the breach of the rules can be overlooked. But given their somewhat lax pre-PACE attitude to the Judges' Rules, commentators (including the writer) were surprised that the judges have often been prepared to rule that a breach of a provision in a Code results in evidence being held to be inadmissible or results in the conviction being quashed"[91]

7.9 That approach differs from the more liberal approach taken in the High Court to breaches of the Lord Advocate's Guidelines as manifested in the opinions issued in the following cases:

> NC v HM Advocate[92] - Lord Brodie at paragraph 11 - "The Lord Advocate has issued the Guidelines to Chief Constables on the conduct of visual identification procedures …albeit….these are only guidelines issued by the executive to police officers with no legal status beyond that."
>
> McFadden v HM Advocate[93] - Lady Paton at paragraph 32 - "The Guidelines record best practice, but alternative procedures may not necessarily be unfair…"
>
> Hanif v HM Advocate[94] - Lord Eassie at paragraph 27 - "… the guidelines to which we were referred are, of course, only guidelines by the executive branch of government to police forces and beyond that have no legal status"

These two approaches reflect the difference between the effect of a Code which the Court is statutorily required to take into account and that of a voluntary Code.

Consultation Responses

7.10 The following question was posed in the Consultation Document; "Whether…Codes of Practice governing keys 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". The vast majority of those respondents who answered this question agreed[95].

How Scottish Practice Should be Developed

7.11 All of this points persuasively towards the inclusion in the Bill of a statutory requirement that there should be Codes of Practice relating to the interviewing of

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[91] Professor Zander QC in the 6th Edition of *Zander on PACE* at para 6.06.
[92] NC v HM Advocate [2012] HCJAC 139, 2013 JC 99, 2012 SCCR 702
[93] McFadden v HM Advocate [2009] HCJAC 78, SCCR 902, 2009 SCCR 902
[94] Hanif v HM Advocate [2008] HCJAC 47, 2009 JC 191, 2009 SCCR 38
[95] 25 out of 27 of those that answered the question agreed 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

suspects and identification procedures. Indeed, there is a persuasive argument that such Codes should be introduced regardless of the abolition of the corroboration requirement. Under PACE there are three Codes which address interviews with suspects, namely C, E and F. E and F deal with audio and visual recording respectively. Since the recommendation of this Review is that all interviews should be audiovisually recorded, only one Code might be necessary, depending upon how quickly the change to general audiovisual recording is made. Under PACE, Code D is the only Code relating to identification. As is discussed in Chapters 5 and 6, the applicable Codes in England and Wales provide a useful reference point in drafting Codes for Scotland.

7.12 There were differing views expressed in the Consultation responses about whether the Lord Advocate or Scottish Ministers should take forward the development of Codes. Issuing guidance to the police and other investigating agencies has traditionally been the role of the Lord Advocate[96]. The only procedural guidance set out in a form resembling a Code is that relating to identification procedures in the Lord Advocate's Guidelines. In the absence of good reason for departing from traditional practice, it would be appropriate for the statutory obligation to issue the Codes of Practice to be placed upon the Lord Advocate.

7.13 It is envisaged that Codes should be developed via extensive consultation with relevant experts, including Police Scotland and other agencies in the justice sector. There should then be full public consultation on the proposed Codes before they are finalised and laid before Parliament. There should also be a clearly defined process for their modification which should also involve full consultation.

Specialist Reporting Agencies

7.14 There are over one hundred Specialist Reporting Agencies (SRAs) which can submit crime reports to COPFS. All operate within their own distinct legal framework. The types of offence reported can range from benefit fraud to pollution of drinking water, from illegal dumping of waste to infringement of trading standards. The list of reporting agencies includes bodies such as the Health and Safety Executive, the Scottish Environment Protection Agency (SEPA) and the Maritime and Coastguard Agency, as well as Local Authority departments such as Environmental Health and Trading Standards. Although these agencies investigate allegations of criminality, they often have different powers from the police and, in particular, only a small number have powers of arrest. However, many of these agencies will conduct interviews of suspects, usually on the basis of voluntary attendance.

7.15 Criminal reports by Specialist Reporting Agencies (SRAs) to COPFS account generally for between 7% and 9% of all criminal reports received. A significant volume of all SRA reports are dealt with by way of direct measures, such as fiscal fines, as opposed to prosecution in court. Only about 2% of prosecutions in court are the result of reports by SRAs. Having regard to the relatively small number of cases in which reports by SRAs lead to court proceedings compared to the number

[96] See for example section 12 of the Criminal Procedure (Scotland) Act 1995, section 17(3) of the Police and Fire Reform (Scotland) Act 2012

taken up following investigation by Police Scotland, and bearing in mind the varied nature of SRAs, the Review has concentrated attention on the Police and the exercise of their powers.

7.16 A number of respondents to the Consultation raised the issue of how Codes of Practice might apply to SRAs. Concerns were expressed about the practical and financial implications of the introduction of Codes, particularly the suggestion that all interviews should be audiovisually recorded. In England and Wales, section 67(9) of PACE applies to SRAs[97] and states:

> "Persons other than police officers who are charged with the duty of investigating offences or charging offenders shall in the discharge of that duty have regard to any relevant provision of a code".

7.17 No principled reason was advanced to the Review for not according the same protections to all persons subject to investigation for an offence, so far as reasonably practicable. In England and Wales section s67(9) of PACE governs the position. It appears that "have regard to" is interpreted in England and Wales as meaning something very close to "must follow".[98] The Lord Advocate should set out in the Codes the extent to which provisions should be applied to SRAs.

Breaches of Codes

7.18 Whatever the final formulation of a statutory Code of Practice, the consequences of any failure to follow the Code have to be addressed. Potentially, breaches of a Code could render evidence obtained inadmissible, no matter how minor the breach. This would place a significant responsibility on the police to ensure that the Code is rigorously followed but could also result in patent injustice if the breach was minimal and had no adverse effect on the proceedings.

7.19 Currently, non-statutory guidance, such as Guidelines issued by the Lord Advocate, are regarded as good or best practice but have no legal status beyond that[99]. Breaches of such Guidelines will be considered by the Court in light of the best practice laid out by the Guidelines themselves but, as has been stated[100], alternative procedures may not necessarily be regarded as unfair and so may not impact on the admissibility of evidence obtained.

Consultation Responses

7.20 Respondents to the Consultation were divided on the basic question of whether a breach of a Code should automatically render the evidence obtained inadmissible. On the one hand, it was suggested that, since the purpose of the Codes would be to

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[97] For example, in England and Wales Codes have been held to apply to officers of customs and excise (R v Okafor [1994] 3 All ER 741, R v Sanusi [1992] Crim LR 43, CA); a store detective (R v Bayliss (1994) 98 Cr. App. R. 235, CA); an RSPCA inspector (RSPCA v Eager [1995] Crim LR 59); and officers of the Serious Fraud Office (R v Director of Serious Fraud Office, ex parte Saunders ([1988] Crim LR 837).

[98] *Zander on PACE*, at para 6.09

[99] See paragraph 6.12 supra and also discussion of Lord Advocate's guidance at paras 143-144 of Dyer v Watson 2002 SC (PC) 89.

[100] Lady Paton at para 32 of McFadden v HM Advocate [2009] HCJAC 78, 2009 SCCR 902

ensure uniformity of practice, provide clarity and transparency as to processes and to facilitate a suspect's recourse to Article 6 rights, breaches of the Codes should be dealt with robustly. On the other hand, concerns were expressed that the imposition of an overly strict rule might result in a technical breach of the Codes leading to otherwise fairly obtained evidence being excluded.

7.21 The predominant theme from respondents was that a "fairness test" should be applied in such circumstances. Such a test would involve the trial judge weighing up whether the breach of the Code was of such significance that to allow the evidence flowing from that breach to be led at trial would be unfair to the accused.

The Test to be Applied

7.22 So far as statements made at interview are concerned, the current law is stated in Renton and Brown's Criminal Procedure (para 24-39) as follows[101]:

> "In so far as generalisation is possible in this field, it may be said that any statement by a suspect in answer to police questions will be inadmissible in evidence at the subsequent trial of that suspect unless it has been obtained fairly, and that all the circumstances of the questioning (apart from whether or not a caution was given to a person accused of a crime) are relevant in so far, and only in so far, as they indicate the presence or absence of unfairness to a person who has exercised or waived his right to legal assistance"

7.23 In addition Scottish judges have power at common law to exclude evidence which has been obtained as a result of an unlawful or irregular act, which could arise in relation to the way in which an identification procedure is conducted. However, the evidence will be admitted if the irregularity is excused by the Court, having regard to the nature of the irregularity and the circumstances under which it was committed, balancing the protection of the liberties of the individual citizen and the interest of the State in securing evidence to enable justice to be done, and applying the principle of fairness to the accused. That test was outlined in the seven judge opinion in Lawrie v Muir [102] in 1950 and has been consistently applied since then[103]. As Lord Justice General Cooper, delivering the opinion of the Court, said:

> "…the law must strive to reconcile two highly important interests which are liable to come into conflict—(*a*) the interest of the citizen to be protected from illegal or irregular invasions of his liberties by the authorities, and (*b*) the interest of the State to secure that evidence bearing upon the commission of crime and necessary to enable justice to be done shall not be withheld from Courts of law on any merely formal or technical ground. Neither of these objects can be insisted upon to the uttermost. The protection of the citizen is

[101] See also Report of the Academic Expert Group at page 68.
[102] Lawrie v Muir 1950 JC 19.
[103] For example see KB v HM Advocate [2015] HCJAC 17; Freeburn v HM Advocate [2012] HCJAC 135, 2013 SLT 170; HM Advocate v Baillie [2012] HCJAC 158, 2013 SCCR 285; HM Advocate v Rudling 2010 SCCR 155. See also Henderson v HM Advocate [2005] HCJAC 47, 2005 1 JC 301, 2005 SCCR 354 - per Lord Hamilton at para 36: "I see no reason why in Scotland the admissibility of evidence obtained irregularly should not be addressed by reference to the common law principles set out definitively in Lawrie v Muir".

> primarily protection for the innocent citizen against unwarranted, wrongful and perhaps highhanded interference... On the other hand, the interest of the State cannot be magnified to the point of causing all the safeguards for the protection of the citizen to vanish...extreme cases can easily be figured in which the exclusion of a vital piece of evidence from the knowledge of a jury because of some technical flaw in the conduct of the police would be an outrage upon common sense and a defiance of elementary justice…Irregularities require to be excused, and infringements of the formalities of the law in relation to these matters are not lightly to be condoned. Whether any given irregularity ought to be excused depends upon the nature of the irregularity and the circumstances under which it was committed. In particular, the case may bring into play the discretionary principle of fairness to the accused"

7.24 Fairness is at the heart of both tests, but what constitutes unfairness varies according to the circumstances of the case and the test in issue[104].

7.25 In Reference Group discussions the question arose whether a test other than that of fairness should be applied in the event of a breach of the terms of the Codes of Practice. There was also concern that breach of a Code might not be regarded by the Court as an "unlawful" or "irregular" act. Consideration was given to the introduction of a provision in terms similar to section 78 of PACE which provides as follows:

> "(1)In any proceedings the court may refuse to allow evidence on which the prosecution proposes to rely to be given if it appears to the court that, having regard to all the 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.
>
> (2) Nothing in this section shall prejudice any rule of law requiring a court to exclude evidence."

The admissibility of evidence affected by a breach of a PACE Code is often addressed under that provision[105]. Numerous reported authorities deal with the application of section 78 but, as in the application of the "fairness" test in Scotland, these cases are very much "fact-specific" and dependent on the circumstances of

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[104] Comments made in relation to statements include: Miln v Cullen 1967 JC 21, Lord Strachan at 27: "The whole circumstances must be taken into account, and the test in every case is whether in the particular circumstances there has been unfairness on the part of the police"; *Renton and Brown, "Criminal Procedure" 6th edition*, paragraph 24-40 - "What, then, constitutes unfairness? This question is almost impossible to answer, especially as it is apparently not a question of law, but one of fact and degree". In relation to evidence obtained as the result of an unlawful or irregular act, Lord Carloway said at paragraph para 27 of HM Advocate v Baillie [2012] HCJAC 158, 2013 SCCR 285: "…they will only be admitted in evidence if the seizure is excused applying the principles of fairness, including the balancing of public and private interests, set out in Lawrie v Muir".

[105] Cf one approach in the USA - Rule 403 of the US Federal Rules of Evidence – "The court may exclude relevant evidence if its probative value is substantially outweighed by a danger of one or more of the following: unfair prejudice, confusing the issues, misleading the jury, undue delay, wasting time, or needlessly presenting cumulative evidence".

each case. It is not clear that the adoption of such a statutory test would improve the position of a suspect in Scotland and thus be an added safeguard.

7.26 Another approach would be to attempt to capture the principles applicable to the determination of the admissibility of a statement made at interview and evidence obtained as a result of an unlawful or irregular act in legislation that would also resolve any doubt over the question whether the Court would apply them in situations where a Code has not been followed. A fairly general provision might be in these terms:

> "Where a police officer or other person charged with the duty of investigating offences fails to comply with any provision of such a Code the Court may refuse to admit any evidence to which that failure is relevant. In making that decision, the Court shall have regard to the nature of the failure, the circumstances under which it occurred, and the question whether to admit the evidence would be unfair."

That or a similar provision should ensure that the Court takes any failure to observe the applicable Code into account in determining whether to admit evidence and applies the appropriate test in accordance with the guidance provided by the existing relevant authorities. Attempting to draft a much more detailed provision would run the risk of complicating an exercise that is well understood by our Courts.

Minority View

7.27 Shelagh McCall considers this approach to be unduly restrictive. She argues that this report should recommend a legislative provision similar to that contained in section 78 of PACE as an additional safeguard. In English common law, the method by which evidence was obtained was traditionally irrelevant. Section 78 of PACE introduced the equivalent of the Scots common law test of whether evidence was unlawfully, or irregularly or unfairly obtained. In fact it goes further and confers a wider discretion on the Court which enables the Court in appropriate circumstances to refuse to admit relevant evidence that has not been tainted by any irregularity in obtaining it, where its prejudicial effect on the minds of jurors outweighs its probative value. Section 78, therefore, permits exclusion of evidence on a prejudice versus probative value basis as is stated in Blackstone's Criminal Practice:

> "…in the case of (a) any admissible evidence which is likely to have a prejudicial effect out of proportion to its probative value, and (b) admissions, confessions and other evidence obtained from the accused after the commission of the offence by improper or unfair means and which might operate unfairly against the accused…, the court (in England) may now exclude either under its powers at common law or pursuant to section 78."[106]

The introduction of such a statutory provision would not only address the situation of failure to comply with a Code but also give the Court power to exclude evidence where the fairness of the trial would be at risk as the result of the unduly prejudicial effect of otherwise relevant evidence. This would provide a procedural safeguard in

[106] *Blackstone's Criminal Practice 2015* para F2.10.

situations, beyond those specifically addressed by this Review, where the rights of the defence are in some way restricted, such as evidence of undercover police officers and anonymous witnesses.

Conclusion

7.28 It is accordingly recommended that the Lord Advocate should be bound by statute to issue Codes of Practice in connection with identification procedures and interviewing of suspects. The Codes of Practice should set out the procedures to be followed by the police, such other matters as the Lord Advocate considers appropriate, and the extent to which they should apply to Specialist Reporting Agencies.

7.29 The Lord Advocate should be bound by statute to regularly review the Codes to reflect changes in law and practice.

7.30 The Lord Advocate should be bound to consult widely before issuing or revising a Code, and should lay any resulting Code before Parliament.

7.31 The test to be applied in considering the admissibility of evidence obtained following a breach of a Code of Practice should, consistently with the current law, be one of fairness. There should be a statutory requirement obliging the Court to take into account any breach of a relevant provision of an applicable Code in determining the admissibility of evidence.

8. PROSECUTORIAL TEST

Introduction

8.1 The independence of the public prosecutor is widely recognised as an important safeguard against miscarriages of justice[107]. Historically, in Scotland, this is reflected in the independence of the Lord Advocate, as head of the system of prosecution:

> "…the great strength of our system of criminal law still resides in the role of the Lord Advocate, as the impartial and wholly independent prosecutor in the public interest."[108]

The Lord Advocate is supported in the role by the Crown Office and Procurator Fiscal Service (COPFS), all of whose professional staff must display in their decision-making the same impartiality and independence. It cannot be stressed too highly that COPFS is not an arm of Police Scotland or any other SRA. COPFS prosecutes in the public interest rather than acting on behalf of individual victims. In exercising that responsibility they have regard to the interest of individual complainers and the right of accused persons to a fair trial. In deciding whether or not to bring a prosecution, COPFS applies a prosecutorial test, which is publicly available.

8.2 Having a test against which decisions to prosecute are made is a safeguard for the accused in that proper application of the test should ensure that proceedings are only taken in cases which meet the publicly stated criteria for prosecution. Some support for this assertion may be found in the statistical information published by COPFS[109] which indicates that on average about 4% of all cases reported to COPFS by the Police and Specialist Reporting Agencies each year are marked for no action due to insufficient admissible evidence, that is, a lack of admissible, corroborated evidence.

Features of the Current Test

8.3 The current test for prosecution is set out in the COPFS Prosecution Code which was published in 2001[110]. It is put this way at page 6: "assuming the report discloses sufficient admissible, reliable and credible evidence of a crime committed by the accused, the prosecutor must consider what action is in the public interest".

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[107] "Standards of professional responsibility and statement of the essential duties and rights of Prosecutors" adopted by the International Association of Prosecutors on 23 April 1999 http://www.iap-association.org/getattachment/34e49dfe-d5db-4598-91da-16183bb12418/Standards_English.aspx e.g. paragraph 1 – "Prosecutors shall strive to be, and to be seen to be, consistent, independent and impartial"; paragraph 4 – "Prosecutors shall perform an active role in criminal proceedings….in the institution of criminal proceedings, they will proceed only when a case is well founded upon evidence reasonably believed to be reliable and admissible, and will not continue with a prosecution in the absence of such evidence; throughout the course of the proceedings, the case will be firmly but fairly prosecuted; and not beyond what is indicated by the evidence".

[108] X v Sweeney 1982 JC 70 per Lord Justice General Emslie at 87.

[109] http://www.copfs.gov.uk/publications/statistics

[110] http://www.copfs.gov.uk/images/Documents/Prosecution_Policy_Guidance/Prosecution20Code20_Final20180412__1.pdf

The test, which applies to Crown Counsel as well as COPFS staff, has two parts: an evidential test and a public interest test. This Chapter is primarily concerned with the first part of this test, namely the evidential test.

8.4 That evidential test has a limited qualitative element in that the evidence in question may not be available to provide a sufficiency if its probative value is undermined by matters affecting its credibility and reliability. Evidence which is not apparently credible or reliable cannot be relied upon to provide a sufficiency of evidence. In practice, finer matters of credibility and reliability are generally left to the fact-finder to assess. However, grave and substantial concerns as to the reliability of essential evidence will lead to the evidence in question being disregarded[111].

8.5 Apart from this inevitably crude assessment of credibility and reliability, there is no other defined qualitative aspect to the test. If there is a sufficiency of evidence and no grave and substantial concern about its quality, prosecutorial action should follow (subject of course to prosecution being in the public interest). As the Lord Advocate has pointed out[112]

> "When we consider a case, the primary focus—an undue focus, in my view—is currently on quantity. Is there corroborated evidence? If the answer is yes, we then consider credibility and reliability, but no test of reasonable prospect of conviction is currently applied by prosecutors."

8.6 While COPFS currently applies a single Prosecutorial Test for all offences which is predicated upon a sufficiency of evidence, different types of offence present different evidential challenges. The practical application of the Prosecutorial Test has been finessed to recognise that a more nuanced approach may be required in the consideration of evidence in respect of certain types of offending. That is addressed by providing internal guidance, which is not publicly available, but which provides additional guidance to prosecutors on the application of the evidential sufficiency test in various specific situations. A large volume of Prosecution Policy Guidance is publicly available on the COPFS website.

8.7 If a case meets the evidential test, the prosecutor must then consider the public interest test. This involves an assessment of competing interests, including those of the victim, the accused and the community, in order to decide upon the appropriate action to take in a case[113].

8.8 All cases are subject to on-going review by reference to both aspects of the prosecutorial test. If the evidential position changes during the life of a case, then the case should be re-considered to assess if the evidential test is still met. If it is not,

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[111] "Where there are grave and substantial concerns as to the reliability of essential evidence, criminal proceedings will not be appropriate… Where there are concerns regarding the credibility of the evidence the Procurator Fiscal may take account of this in assessing whether there is sufficient evidence" – pages 4-5 of the Prosecution Code

[112] See Scottish Parliament Official Report 20 November 2013 col 3755

[113] See pages 6-8 of the Prosecution Code for the factors to be considered which include, inter alia, the nature and gravity of the offence; the impact of the offence on the victim and other witnesses; the attitude of the victim etc.

then proceedings should be discontinued. Likewise if there are significant developments which have an impact on the public interest aspect of the proceedings, the case will also be re-considered in light of the additional information. It is not unusual for cases to be discontinued as a result of developments in the evidence or in respect of matters which affect the public interest[114]. For example, in solemn proceedings, the precognition process along with preparation for first diet or preliminary hearing provide opportunity for review. In summary proceedings this might be done at the intermediate diet stage. In addition, section 134 of the Criminal Justice and Licensing (Scotland) Act 2010 imposes a continuing duty on the prosecutor to consider disclosure, which again focuses attention on the evidential basis for proceedings.

Proposed Prosecutorial Test

8.9 COPFS has recognised that the abolition of the requirement for corroboration will have a significant impact on the way that cases are considered for prosecution and will require a revised Prosecutorial Test with a greater emphasis on quality of evidence rather than quantity. As COPFS stated in their written evidence to the Justice Committee of 12 September 2013:

> "The new test will focus on the credibility of the allegation and the quality of evidence which supports the allegation, requiring prosecutors to assess all available evidence with regard to its admissibility, credibility and reliability."[115]

8.10 COPFS has indicated that their proposed new Prosecutorial Test will, as at present, have an evidential test and a public interest test. Whilst the public interest test will remain the same, the evidential test will now be a qualitative test based on a reasonable prospect of conviction. The test will require the following assessments:

(i) a quantitative assessment – is there sufficient evidence of the essential facts that a crime took place and the accused was the perpetrator?

(ii) a qualitative assessment – is the available evidence admissible, credible and reliable?

(iii) on the basis of the evidence, is there a reasonable prospect of conviction in that it is more likely than not that the court would find the case proved beyond reasonable doubt?[116]

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[114] See statistical information from COPFS which shows the number of cases marked for No Further Action. http://www.copfs.gov.uk/publications/statistics - The footnotes explain "No Further Action = Cases which were closed after proceedings had been commenced or attempted (e.g. cases which were closed because the accused died, the accused could not be traced, a key witness was not available, etc.) These figures also include Direct Measure cases where no further action was taken. A proportion of the cases marked for No Further Action will be as a result of changes in the evidential or public interest aspects of the prosecutorial test.

[115] http://www.scottish.parliament.uk/S4_JusticeCommittee/Inquiries/CJ46._COPFS.pdf, paragraph 5

[116] http://www.scottish.parliament.uk/S4_JusticeCommittee/Inquiries/CJ46._COPFS.pdf at Paragraph 4 and see also the Lord Advocate's evidence to the Justice Committee - Scottish Parliament Official Report 20 November 2013 at cols 3741-3

8.11 With the abolition of the requirement for corroboration, "sufficient evidence" will have an entirely different meaning, namely that, as a minimum, there is a single source of evidence establishing the essential elements of the crime and a single source identifying the accused as the perpetrator. The second aspect of the test, a crude qualitative assessment, is carried out at present as noted above and prosecutors already have considerable experience of considering the quality of evidence at all stages of the process.

8.12 It is the third aspect of the test which brings an entirely new assessment into the process, requiring consideration of whether there is a reasonable prospect of conviction on the basis of the evidence which has already been assessed for quantity and quality. The assessment of whether there is a reasonable prospect of conviction is explained further by reference to whether it is "more likely than not" that the court would find the case proved.

8.13 This aspect of the test is in similar terms to the Prosecutorial Test used in other jurisdictions, including by the Crown Prosecution Service in England and Wales[117] (although the CPS test is referred to as a "realistic prospect of conviction" test). In respect of the CPS test, the Report of the Academic Expert Group[118] noted that:

> "…the Glidewell Committee, which reviewed the performance of the CPS just over ten years after it was created, appeared to assume that the "realistic prospect of conviction" test was unproblematic …there has been little adverse criticism of this test from the academic community…..In our view, COPFS could adopt the realistic or reasonable prospect of conviction test because it is sensible, readily understandable and is clearer than the rather vague criteria set out in the current COPFS Prosecution Code."

8.14 The proposed Prosecutorial Test compares favourably with those applied in other jurisdictions[119] and is, on the face of it, a greater safeguard than that applied at present as it involves a more considered qualitative assessment of the available evidence against a "reasonable prospect of conviction" standard and thus should avoid action being taken in poor quality cases following the abolition of the requirement for corroboration.

Consultation Responses

8.15 A number of those who responded to the consultation recognised this fact. For example, in respect of the "reasonable prospect "aspect of the test, one response stated:

> "It will protect against cases being brought which do not have sufficient merit to justify: (i) putting the accused to trial; and (ii) the expenditure of public resources (including the resources of police, prosecutor and court, as well as the legal aid fund, where the accused is legally aided). It will also provide a safeguard against potential overloading of the system with all the concomitant dangers which that would pose to the general administration of justice."

[117] http://cps.gov.uk/publications/docs/code_2013_accessible_english.pdf at paragraph 4.5
[118] See page 126
[119] Report of the Academic Expert Group, Chapter 16 page 207

This response also stressed the importance of the introduction of a statutory duty on the Lord Advocate to publish the test.

Applying the Prosecutorial Test

8.16 The proposed Prosecutorial Test will be the sole test for prosecution. Whether there is a reasonable prospect of conviction will depend on the circumstances of each individual case. That the test is that of "reasonable" prospect of conviction allows for cases involving different types of offending to be addressed on their individual merits.

8.17 The duty on prosecutors to review the evidence during the lifetime of a case, discussed above**,** will remain under the proposed new test. That is reassuring since the Reference Group are aware of anecdotal evidence expressed during the public discussion events and elsewhere which suggested that prosecutors are now perceived as being more reluctant to exercise discretion and discontinue proceedings due to evidential issues once a trial has commenced. Cases should proceed as expeditiously as possible. Individual prosecutors have a continuing duty throughout the course of the proceedings to assess the case against the Prosecutorial Code. Where it is evident, due to a lack of evidence emerging from witnesses, that the standard specified in the Code cannot be met, then prosecutors must exercise their discretion properly and should no longer seek convictions on those charges[120].

8.18 Prosecutorial vigilance is a vital safeguard against miscarriage of justice. That is entirely consistent with the development over recent years of a robust approach to prosecution of cases of domestic and sexual abuse where the prosecution test is met. The abolition of the corroboration requirement will enable individual prosecutors to instruct proceedings in cases where presently there would be insufficient evidence. It is important that case-marking in accordance with the new test is from the outset done in a way that will maintain public confidence in the criminal justice system. It is envisaged that COPFS will keep under review the way in which the fundamental change in the law of evidence is given effect to in the marking of cases for prosecution. Robust monitoring by the Inspectorate of Prosecution in Scotland of the application of the new test would provide reassurance about, and increase public confidence in, the new test as a safeguard.

Terms of Reference

8.19 The terms of reference of the Review contain two issues to which the discussion in this Chapter is relevant:

- whether a formal statutory test for sufficiency based upon supporting evidence and/or on the overall quality of evidence is necessary
- whether any proposed prosecutorial test or a requirement for publication of any such test should be prescribed in legislation.

[120] See paras 23.01 and 23.03 of COPFS Book of Regulations, which will of course require to be revised and updated in light of the adoption of the new test.

One response to the Consultation was in favour of a statutory supporting evidence requirement. During his evidence to the Justice Committee on 20 November 2013, the Lord Advocate repeatedly indicated that the prosecution would always look for supporting evidence in every case[121]. The Academic Expert Group notes that:

> "…none of the other Commonwealth jurisdictions has a statutory sufficiency test to guide the prosecution service; in all cases, a sufficiency test is contained in prosecution codes or guidelines." [122]

No particular benefit was identified as likely to be derived from introducing a statutory test for sufficiency.

8.20 In England and Wales, the CPS regularly review their Prosecution Code, publicly consult and revise their test in light of developments. It is flexible and can be adjusted to meet the needs of the justice system. A test or Code enshrined in statute would be inflexible and require primary legislation to allow for amendment. It would be unable to react to changes in the law.

8.21 In their written evidence to the Justice Committee of 12 September 2013, COPFS stated their intention to publish the Prosecutorial Test:

> "The full details of this test will be published in due course in an updated COPFS Prosecution Code which will inform all prosecutorial decision making including the wider decisions that prosecutors make which do not involve a decision to prosecute."[123]

That is obviously conducive to transparent and consistent decision-making.

Conclusion

8.22 An appropriate prosecutorial test is a safeguard if it is independently, transparently and consistently applied.

8.23 Arguments in support of a sufficiency test defined by statute were rejected in discussion by the Reference Group which favoured the route already embarked upon by COPFS of revising the Prosecutorial Test to reflect the changed circumstances combined with the indication given by the Lord Advocate about requiring supporting evidence. A statutory requirement to publish the terms of the Prosecutorial Test is a more appropriate way of ensuring transparency and consistency of decision-making.

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[121] Scottish Parliament Official Report 20 November 2013 e.g. Col 3735 - "…I would not—and prosecutors would not—take up a case without any supporting evidence. However, that is different from a legal requirement for corroboration"; Col 3755 – "To give some reassurance to the committee and the Parliament, I am saying that, if the Parliament chooses to abolish corroboration, we will apply a reasonable prospect of conviction test where there is supporting evidence for an allegation"

[122] Report of the Academic Reference Group p127

[123] http://www.scottish.parliament.uk/S4_JusticeCommittee/Inquiries/CJ46._COPFS.pdf at paragraphs 4 and 34

8.24 It is recommended that the Lord Advocate should be bound by statute to publish the terms of the Prosecutorial Test, but the terms of the test itself should be left to the Lord Advocate and the test should be subject to regular review involving public consultation.

8.25 It is recommended that the application of the new Prosecutorial Test in practice should be monitored by the Inspectorate of Prosecution in Scotland which should report annually to the Lord Advocate.

Footnote

8.26 Concern was expressed at public discussion events that, once the corroboration requirement was abolished, police investigative practices would change and become less thorough.

8.27 When that point was raised with the Lord Advocate during his appearance before the Justice Committee, he responded by stressing that the police are under a common law duty to investigate a case fully and bring forward all relevant evidence. Police Scotland wrote[124] to the Committee to provide an assurance that "the abolition of requirement for corroboration in Scots Law will make absolutely no difference to the levels of diligence" the police currently demonstrate while investigating crime or otherwise discharging their responsibilities. The letter further stressed that there is absolutely no prospect of Police Scotland diluting their current standards of practice. The reassurance provided by these statements was noted by the Review.

[124] http://www.scottish.parliament.uk/parliamentarybusiness/CurrentCommittees/66584.aspx

9. HEARSAY EVIDENCE

9.1 Hearsay evidence is the account given by a witness in court of the terms of a statement made by another person on an occasion prior to the trial[125]. The general rule is that hearsay evidence is not admissible in court. This Chapter is concerned with one particular form of hearsay - a previous statement of fact led as evidence of the truth of its contents. That is quite different from evidence led to establish simply that a particular statement was made rather than whether it was true, or evidence of a statement which is the equivalent of behaviour, such as an expression of distress or gratitude.[126]

The Current Position

9.2 There have always been exceptions to that rule which allow the Court to take account of certain forms of hearsay, the list of which has been expanded over time. At common law evidence was, and continues to be, admitted of statements which form part of the res gestae, that is things said which form part of what occurred during an incident. Similarly statements made by victims of crime or child witnesses shortly after the offence have long been admissible as evidence that may enhance the credibility of the evidence given by the witness in Court. Since the late 19th Century there have been statutory provisions defining other purposes for which statements made by witnesses might be admitted, starting with prior inconsistent statements and progressing to the admission of statements as evidence of fact in certain circumstances. The evidential status of any statement made by an accused prior to the trial has changed over time and currently depends upon the nature of the contents of the statement.

9.3 These developments have produced a complex patchwork of rules governing the admissibility and application of hearsay evidence. Section 62 of the Criminal Justice (Scotland) Bill addresses one particular issue and provides that in future any statement made by an accused when being questioned by a police officer or any other official investigating an offence will be admissible evidence of any fact contained in the statement. The Bill contains no other provision relating to hearsay.

9.4 Another long-standing common law rule is that a statement is admissible as evidence of the truth of its contents where the maker of the statement is dead, permanently insane or (possibly) a prisoner of war.

9.5 Following a report by the Scottish Law Commission[127], these categories were codified and expanded. Section 259(2) of the Criminal Procedure (Scotland) Act 1995 provides that hearsay may be admitted where the person who made the statement:

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[125] Hearsay is defined in the Academic Expert Group Report at page 93 as “an assertion other than one made by a person while giving oral evidence in the proceedings”.

[126] It is not envisaged that evidence led in terms of section 271M of the Criminal Procedure (Scotland) Act 1995 would fall within this chapter.

[127] Scottish Law Commission, *Evidence: Report on Hearsay Evidence in Criminal Proceedings*, Scot Law Com No 149

(a) is dead or is, by reason of his bodily or mental condition, unfit or unable to give evidence in any competent manner;
(b) is named and otherwise sufficiently identified, but is outwith the United Kingdom and it is not reasonably practicable to secure his attendance at the trial or to obtain his evidence in any other competent manner;
(c) is named and otherwise sufficiently identified, but cannot be found and all reasonable steps which, in the circumstances, could have been taken to find him have been so taken;
(d) having been authorised to do so by virtue of a ruling of the court in the proceedings that he is entitled to refuse to give evidence in connection with the subject matter of the statement on the grounds that such evidence might incriminate him, refuses to give such evidence; or
(e) is called as a witness and either –
(i) refuses to take the oath or affirmation; or
(ii) having been sworn as a witness and directed by the judge to give evidence in connection with the subject matter of the statement refuses to do so.

9.6 There are various other legal qualifications as to the admissibility of hearsay evidence but, laying the details aside, the crucial point is stark. The blanket abolition of the corroboration requirement would raise the prospect of an accused person being convicted on the strength of a statement given before the trial without the opportunity of challenging by cross-examination the person who gave the statement, subject to the Lord Advocate's statement to the Justice Committee that in general prosecutions would not be initiated in the absence of supporting evidence.[128]

Recent ECtHR Case Law

9.7 The Academic Expert Group Report suggests that there is a danger that Scots Law will be found to be incompatible with the ECHR where an accused is convicted on the strength of hearsay evidence which is the sole or decisive evidence in the case. The Review has addressed two questions. The first is whether safeguards already exist to deal adequately with the risk of miscarriage of justice in the absence of a corroboration requirement. The second question is what, if any, other safeguards ought to be considered. Recent jurisprudence of the ECtHR goes some way towards answering these questions.

9.8 The presentation of significant evidence against an accused by way of a witness statement in a criminal trial engages Article 6, particularly 6.3(d), of the ECHR, which provides that "[e]veryone charged with a criminal offence [must be permitted] …to examine or have examined witnesses against him". The general rule developed and applied by the ECtHR is that a conviction based solely or to a decisive extent on evidence provided by a witness or witnesses whom the accused is unable to question at any stage of the proceedings is likely to be unfair[129]. Evidence against an accused may be "designedly untruthful or simply erroneous"[130]. Unsworn statements often appear to be cogent and compelling, making it

[128] See Scottish Parliament Official Report, Justice Committee, 20 November 2013 Col 3736
[129] Doorson v Netherlands (1996) 22 EHRR 330
[130] Kostovski v Netherlands (1990) 12 EHRR 434 at para 42.

"seductively easy"[131] to conclude that there can be no answer to the charge against the accused. The risk of miscarriage of justice lies in the possibility that undue weight might be given to the statement in the absence of challenge. That rule has been subject to detailed analysis in the cases of Al-Khawaja and Tahery, and Horncastle referred to below.

9.9 While there are differences in the Scottish and English rules for the admission of witness statements as evidence of the facts stated therein, there are many similarities. Over the course of the hearing of these two cases tensions emerged between the approach of the English courts and that of the ECtHR. Those tensions appear to have been resolved in a way that makes it possible to state the applicable principles clearly and to judge whether the current Scottish provisions are likely to comply.

9.10 The latest word and the clearest statement of the law is to be found in the unanimous judgment of the Fourth Section of the ECtHR in Horncastle and Others v UK[132], applying the principles set out by the Grand Chamber in Al-Khawaja and Tahery v UK[133]. The Court said this:

> "131…… Article 6.3(d) enshrines the principle that, before an accused can be convicted, all evidence against him must normally be produced in his presence at a public hearing with a view to adversarial argument. Exceptions to this principle are possible but must not infringe the rights of the defence, which, as a rule, require that the accused be given an adequate and proper opportunity to challenge and question a witness against him, either when that witness makes his statement or at a later stage of proceedings.
>
> "132 The Grand Chamber set out two requirements which flow from the general principle identified. First, it has to be established that there was a good reason for the non-attendance of the witness. Second, even where there was a good reason, where a conviction is based solely or to a decisive extent on statements made by a person whom the accused has had no opportunity to examine, the rights of the defence might be restricted to an extent incompatible with the guarantees of Article 6. Accordingly, when the evidence of an absent witness is the sole or decisive basis for a conviction, sufficient counterbalancing factors are required, including the existence of strong procedural safeguards, which permit a fair and proper assessment of the reliability of that evidence to take place".

9.11 The effect of this is that, where previously the fact that a hearsay statement was the sole or decisive evidence against an accused was likely to result in a finding that the accused's right to a fair trial had been infringed, the sole or decisive nature of the hearsay statement is now recognised as merely the first of three questions to be posed. The two others are whether there was a good reason for the non-attendance of the witness and whether the proceedings included sufficient counterbalancing factors, including the existence of strong procedural safeguards, to permit a fair and proper assessment of the reliability of that evidence to take place. The answers to

[131] Al-Khawaja and Tahery v UK (2012) 54 EHRR 23 at para 142.
[132] Horncastle and Others v UK (Application no.4184/10) 16 December 2014
[133] Al-Khawaja and Tahery v UK (2012) 54 EHRR 23

the latter two questions do not depend upon a general assessment of the circumstances in which a statement might be tendered and the totality of counterbalancing factors available. They depend on an analysis of the circumstances of the particular case to determine whether there was good reason for the non-availability of the witness and whether the counterbalancing factors engaged enabled a fair and proper assessment of the reliability of the statement to be made.

9.12 Consideration of the different outcomes for Al Khawaja and Tahery is instructive. In Al-Khawaja the crucial witness had died. The trial judge was satisfied her evidence was sole and decisive. He observed: "no statement, no count 1". However, although the statement was seen to be the sole and decisive evidence, the statement-maker had made her complaint to two friends promptly after the attack upon her and there were only minor inconsistencies between her statement and that account. Both friends gave evidence at the trial. The statement-maker's account bore strong similarities to the description of another attack by a different witness. There was no evidence of any collusion. Both attacks involved indecent assault by doctor on patient during a private consultation. The Court held that there had been no violation of Article 6. In Scotland the Moorov doctrine[134] might well apply to enable such a case to proceed as the law stands at present.

9.13 In the case of Tahery the witness was absent on account of fear, which is one of the qualifying grounds for witness absence in England and Wales but not in Scotland. The witness had observed a stabbing. The victim had not seen who stabbed him. The eyewitness statement was the decisive evidence. However, the view of the Court was that, even though it bore the appearance of being coherent and convincing, the statement could not be said to belong to the category of evidence that can be described as "demonstrably reliable" such as a dying declaration. Two counterbalancing factors were relied upon: (i) the fact that the trial judge concluded that no unfairness would be caused by admitting the statement, since the accused was in a position to challenge or rebut it by giving evidence himself or calling other witnesses who were present, one of whom was his uncle; and (ii) a warning given by the trial judge to the jury that it was necessary to approach the evidence given by the absent witness with care. The Court concluded that these measures could not provide a sufficient counterbalance to the handicap under which the defence laboured. Even though the accused might himself give evidence, the defence were not able to call any other witness to contradict the testimony provided in the hearsay statement. There was no criticism of the judge's directions. The court expressed its determination as follows:

> "165. The Court therefore considers that the decisive nature of T's statement in the absence of any strong corroborative evidence in the case meant the jury in this case was unable to conduct a fair and proper assessment of the reliability of T's evidence. Examining the fairness of the proceedings as a whole, the Court concludes that there were not sufficient counterbalancing factors to compensate for the difficulties to the defence which resulted from the admission of T's statement. It therefore finds that there has been a violation of Article 6…"

[134] Under the Moorov doctrine the facts of one offence (most often a sexual offence) may be corroborated by the facts of another involving a different victim where both offences are part of a single course of criminal conduct; (Moorov v HM Advocate 1930 JC 68).

9.14 The foregoing comparison of the circumstances of the cases against Al Khawaja and Tahery respectively tends to indicate that the different outcomes resulted from the presence of corroborative evidence in the former but not the latter. The strength of the other prosecution evidence was an important factor in the finding that the trial of Horncastle and his co-accused was not unfair. In subsequent cases, as is observed in the Academic Expert Group Report, the focus for the ECtHR has been almost exclusively on the presence of other corroborative evidence in adjudicating on the fairness of a trial involving decisive hearsay.

Consultation Responses

9.15 The overwhelming majority of those who responded to the Consultation[135] favoured a requirement for corroboration where hearsay evidence would be the sole or decisive evidence on which a conviction would be based. Five respondents did not favour a requirement for corroboration. The reasons for their opposition related primarily to a desire for clarity and consistency – corroboration should be abolished across the board. The COPFS response stated that the rules on corroboration were technical and complicated, and that retaining a corroboration requirement in certain classes of cases would retain these elements and so counteract one of the reasons for abolition. Some respondents took the view that, as a result of the proposed Prosecutorial Test, there was no likelihood of convictions based on hearsay evidence being the sole or decisive evidence on which a conviction would be based. Those who supported retaining the requirement for corroboration where hearsay evidence would be the sole or decisive evidence pointed to the increased risk of miscarriage where hearsay evidence was relied upon. Many respondents indicated that their support for the retention of the requirement for corroboration was on the basis of the arguments set out in the Report by the Academic Expert Group and/or in the Consultation Document. The Law Society raised the importance, as a safeguard, of the right to cross-examine witnesses. Some respondents also addressed the issue of counterbalancing measures, with the Faculty of Advocates taking the view that, on balance, the cautious and correct approach would be to retain the requirement of corroboration rather than to seek to identify additional counterbalancing measures which would run the risk that Scots law might be non-compliant with Article 6 of the ECHR.

Other Counterbalancing Measures

9.16 Corroboration aside, there is a degree of similarity in Scotland on the one hand and England and Wales on the other between the safeguards which may have a part to play in ensuring a fair trial where hearsay may be the sole or decisive evidence. For example, the situations in which a statement might qualify for admission, set out in section 259(2) of the 1995 Act quoted above, are similar but with two significant differences. In England and Wales hearsay may be admitted where a witness is

[135] 22 out of 27 of those who responded to the question agreed corroboration should be required in cases where hearsay evidence would be the sole or decisive evidence on which a conviction would be based.

absent through fear[136], and the court has a general power to admit hearsay in the "interests of justice"[137]. There is controversy surrounding the "fear" category in England and Wales[138]. Unsurprisingly, the "interests of justice" test is the one most frequently applied in admitting hearsay evidence. However, the absence from Scots criminal procedure of these two additional categories does not give rise to any issue flowing from the abolition of the corroboration requirement.

9.17 The position may be different in relation to other counterbalancing measures. As is the case in England and Wales, it is possible in Scotland to admit evidence relevant to the statement-maker's credibility/consistency and capacity even if that evidence would not be admissible had the statement-maker given evidence. However, a number of bases for excluding evidence are provided for by legislation in England and Wales where no similar statutory provision exists in Scotland, although there may be an applicable common law rule.

9.18 In England and Wales section 126(1) of the Criminal Justice Act 2003 (the 2003 Act) provides for the exclusion of hearsay evidence if the Court is satisfied that the case for excluding it, taking account of the danger that to admit it would result in undue waste of time, substantially outweighs the case for admitting it, taking account of the value of the evidence. That would normally be addressed in a Scottish Court by reference to the relevance of the evidence to an issue at the trial. Section 125 of the 2003 Act allows the Court in solemn cases to order acquittal of the accused where the case is based wholly or partly on hearsay which is so unconvincing that, considering its importance to the case against the accused, a conviction would be unsafe. A proposal in chapter 11 below to extend the basis on which an accused might be acquitted on a motion that there is no case to answer would provide a similar safeguard without encroaching on what is seen in Scotland as the jury's territory, the quality of the evidence.

9.19 A Scottish Court has no discretion to refuse to admit the statement of a witness where one of the sub-paragraphs of section 259(2) applies, unlike the equivalent position in England and Wales where the court has discretion under section 114 of the 2003 Act to decide whether to admit hearsay evidence, having regard to various specified matters, and to exclude evidence where its admission would impact adversely on the fairness of the proceedings. Section 126(2)(a) of the 2003 Act specifically provides that the power in section 126(1)(b) does not prejudice the power to exclude evidence under section 78 of PACE or at common law. In N v HM Advocate[139] the Lord Justice Clerk (Gill) at para 24, with the support of Lord MacLean, expressed the view that the Court should have discretion to exclude hearsay in such circumstances. He expressed the opinion that, before the categories were extended and the criteria for admission of the evidence codified, such discretion to exclude the evidence existed where there were grounds for reasonable suspicion that the evidence was false or biased.

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[136] The Criminal Justice Act 2003 section 116(2)(e) and (4). Where the witness is absent through fear, the statement is also admitted only where the Court considers that it ought to be admitted in the interests of justice.
[137] Criminal Justice Act 2003 section 114(1)(d) and (2).
[138] The Report of the Academic Expert Group page 97, para 8.2; J R Spencer, *Hearsay Evidence in Criminal Proceedings,* 2nd edn (2014) paras 6.27-6.41.
[139] N v HM Advocate 2003 JC 140.

9.20 As it was, a solution was found by reference to the continuing duty of the trial judge under Article 6 of the ECHR to consider the fairness of the proceedings in light of the admission of the hearsay evidence. The Lord Justice Clerk gave the following guidance for the future at para 36:

> "If it should later become clear that the hearsay evidence is unfair to the party against whom it is led, the trial judge will have a number of options. Where the hearsay evidence has been led by the defence, he will be entitled to direct the jury to disregard it. Where the evidence has been led by the Crown, he may have to uphold a submission of no case to answer; or desert the diet at his own hands; or direct the jury to disregard the hearsay; or direct the jury to acquit".

9.21 Gratifying though it is to note that the Court was able to rectify a miscarriage of justice in that case, the inclusion in the Lord Justice Clerk's menu of options for the trial judge of the possibility of directing that the hearsay should be disregarded provides an argument for revisiting the mandatory terms of section 259(1). It also indicates that the absence of discretion to refuse to admit the statement in the first place may render a trial incompatible with Article 6.

9.22 The on-going obligation of the trial judge to monitor the effect of any hearsay evidence on the fairness of the trial as it progresses could also be the subject of statutory provision. The Lord Justice Clerk's robust language masks widespread judicial reluctance to disregard evidence entirely or direct a jury that it should be disregarded. It is generally seen as a matter for the Crown to invite the Court to disregard evidence, rather than for the Court to take the initiative. Judges are wary of encroaching upon the fact-finding function of the jury. In the exceptional circumstances addressed in this chapter, where hearsay is the sole or potentially decisive evidence, the Court could be given a clearly defined power to determine that evidence should not be taken into account and coincidentally with that whether the proceedings should be terminated. That would involve redefining the circumstances in which a no case to answer submission made at the close of the Crown case can be sustained, as further discussed in Chapter 11. The result of introducing these additional powers would be to create a more comprehensive, and indeed robust, scheme of counterbalancing measures applicable where hearsay evidence might be the sole or decisive evidence in any case.

Conclusion

9.23 In every case the ultimate question is whether the accused had a fair trial. Where hearsay is involved that will include the opportunity for a fair and proper assessment of the reliability of that evidence to be made. As has already been stated, the determination of whether there were sufficient counterbalancing measures depends upon a consideration of the effectiveness of the applicable rules of evidence and procedure in the whole circumstances of the case. It does not simply involve addressing measures, such as those considered above, specifically applicable to hearsay. There will inevitably be factors which have a part to play in this assessment which arise as the result of the conduct of the case in accordance with the rules of evidence and procedure as a whole, including the particular

directions given to the jury about how to evaluate the hearsay evidence, and even universally applicable rules such as the requirement for proof beyond reasonable doubt. Factors which may be considered to be indicators of reliability include the proper recording of the statement, the circumstances in which the statement was made (e.g. was it spontaneous?), any motivation/opportunity to lie on the part of the statement maker, the existence of independent supportive evidence or evidence with which the statement can be tested, the existence of evidence to test the credibility of the statement maker, and the presence of witnesses who observed the statement being made or to whom something similar was said and who can be cross-examined.

9.24 The foregoing analysis has identified a limited number of areas where legislative provisions clarifying and extending the powers of the Court could enhance the prospects of a trial involving decisive hearsay being conducted in compliance with Article 6. However, having reviewed the developing jurisprudence of the ECHR and the significance attached by the ECtHR to corroborative evidence in cases involving hearsay evidence that is crucial, the Reference Group concluded that the appropriate way to safeguard those faced with the prospect of conviction on the basis of decisive hearsay evidence and to avoid the proceedings failing ultimately on account of the absence of adequate safeguards would be to provide for an exception to the abolition of the corroboration requirement. This could be achieved by providing that evidence is insufficient in law for conviction if it is hearsay and uncorroborated, and redefining the test for sustaining a no case to answer submission addressed in Chapter 11.

Minority View

9.25 Jim Andrews, Sandie Barton and Louise Johnson oppose the retention of the corroboration requirement in cases of sole or decisive hearsay. They stress that the recommendation of the Carloway Review was that corroboration should go across the board, and this approach should be adopted, rather than retaining it on a piecemeal basis for some categories of evidence. Given the existing issues with the definition of corroboration, and for all the reasons justifying its removal, it would be counter- productive to introduce another set of rules for certain classes of evidence and a process that would have to be debated, interpreted, disputed and subject to appeal. The COPFS have indicated that under the new Prosecutorial Test, a person should not be convicted on the basis of confession evidence alone. COPFS clearly state that they would always look for other supporting evidence in relation to confession evidence. There are already existing additional safeguards against miscarriages of justice occurring via confession and hearsay evidence, namely the statutory “post-Cadder” requirement that suspects be given access to a solicitor; restrictions on, and protections for suspects around, police questioning and detention; no case to answer submissions and jury directions.

9.26 Shelagh McCall supports the retention of the corroboration requirement but also suggests the introduction of a provision similar to section 126 of the Criminal Justice Act 2003, a provision similar to section 78 of PACE, and the amendment of section 259(1) of the Criminal Procedure (Scotland) Act 1995 to give the Court discretion to refuse to admit evidence of the statement. She contends that while corroboration is undoubtedly a safeguard because it is a means by which the reliability of impugned

evidence may be assessed, the ECtHR also requires that there should be effective rules for the exclusion of evidence and, where it is admitted, for challenging its authenticity and reliability. In her view section 126 of the 2003 Act provides a broader basis for excluding evidence than the common law test of relevancy and would allow for the exclusion of otherwise relevant evidence. She is also of the view that the adoption of a statutory provision similar to section 78 of PACE (dealt with in Chapter 7 above) would provide a safeguard which could be invoked in the case of hearsay. The amendment she proposes to section 259(1) would provide the Court with the discretion which the Lord Justice Clerk (Gill) advocated in N v HM Advocate[140]. While acknowledging that it is clear from Tahery that corroboration may make the difference between a fair trial and an unfair trial, she considers that the introduction of these additional counterbalancing measures would give Scots law a better chance of being seen to guarantee a fair trial.

[140] 2003 JC 140.

10. CONFESSION EVIDENCE

Introduction

10.1 For the purposes of this Report, the term “confession” should be understood broadly to mean any out-of-court statement made by a person which is susceptible of being regarded as incriminatory of the person who makes that statement. Subject to certain legal rules, the statement can be founded on in criminal proceedings brought against its maker. While evidence of the contents of the statement is hearsay, in respect that the person who speaks to hearing the statement was not the person who made it, as a matter of law that evidence is admissible against the maker of the statement simply because of its incriminating nature.

10.2 A confession to the commission of a crime can be powerful evidence of guilt, provided it is credible, reliable and either wholly voluntary or untainted by any unfairness in the means by which it has been obtained. This is so whether the confession is made to the police, another person in authority, a family member, a friend or the world at large through social or other media. And yet the confession may be a work of fiction. It may have been concocted, either by the person who has confessed, or by someone else whose words are attributed to that person. This is why the present law of Scotland does not allow someone to be convicted on the basis of his confession alone, no matter how often it is repeated; it requires independent corroboration. If, however, the confession is thought to be reliable, not much other evidence is required to corroborate it; and how much is in fact required in any particular case depends on the circumstances.

10.3 As the Reference Group observed in the Consultation Document, it is a fact that (however perplexing this might appear to the casual observer) the phenomenon of the false confession is well-recognised. Such a confession may be made by someone who is mentally ill, or psychologically disturbed, or of low intellect or otherwise vulnerable; or it may be made by an attention-seeker or by a malicious person determined to waste the time of the police. Sometimes, a person in such a category will enter a police office unannounced, in order to confess either to a crime the occurrence of which was previously unknown, or to one which has achieved wide publicity. Such confessions are not uncommon in Scotland. Initially the police tend to adopt an understandably sceptical approach to what is said to them. Alternatively, a false confession may be made as a result of extraneous factors, such as threats or other coercive behaviour on the part of criminal associates; or it may result from unfair police practices, whether in the course of questioning or other investigative procedures.

10.4 These were the kinds of consideration which led the Reference Group to the provisional view that, in order to minimise the potential for miscarriages of justice, the requirement for corroboration ought to be retained in the case of confession evidence. That view was reached after a full consideration of the detailed contents of Chapter 6 of the Report by the Academic Research Group and in the light of the individual experiences and perspectives of the Reference Group members themselves.

10.5 However, the final adoption of this provisional view would lead to a further recommendation at odds with Section 57 of the current Criminal Justice (Scotland) Bill, which permits of no exceptions to the proposed abolition of the corroboration requirement. To propose such an exception would be a major step. For that reason, included in the Consultation Paper was the question: "Should corroboration be required in cases where otherwise a confession would be the sole evidence?".

Consultation responses

10.6 There was strong support[141] among those who responded to this question for the retention of the corroboration requirement in this area. Almost all legal respondents were in agreement that corroboration should be required in cases where otherwise a confession would be the sole evidence: all individual respondents shared that view, as did the Police and all academic respondents. The main theme which emerged on this side of the argument was simply the need to avoid miscarriages of justice. The President of the Mental Health Tribunal for Scotland raised specific concerns about the risk of persons suffering from mental disorder confessing falsely, and supported retention of the corroboration requirement. However, two particular points ought to be noted in relation to the views of two of the legal respondents.

10.7 Firstly, although the majority of the Senators of the College of Justice were in favour of retaining corroboration irrespective of the person to whom the confession was made, a significant minority did not agree that this requirement was necessary. Dealing with confessions made to the police, the minority believed that a range of safeguards in relation to solicitor access and changes in police practice might lessen the risk of miscarriages of justice. But in relation to confessions made to other persons, such as a cellmate, where such safeguards would not apply, the minority believed that juries would be alive to the dangers of accepting such confessions, something which could be emphasised by judicial directions.

10.8 Secondly, while COPFS supported the abolition of the requirement for corroboration in cases of confession evidence, they did so in the light of (i) the publicly-expressed commitment by the Lord Advocate that the Crown and the police would always look for supporting evidence in the case of a confession; and (ii) the proposed Prosecutorial Test. The first of these points is addressed later in this Chapter, while the second is dealt with in Chapter 8.

"Special knowledge" Confessions

10.9 It was also decided to raise an additional question relating to one particular form of corroboration of a confession, that of "special knowledge". Put very simply, this is the situation where a confession contains details about the circumstances of the crime which can be proved to be true from other sources, thus confirming the truth of the confession itself. In the view of the Reference Group, the law in this area has drifted somewhat in recent years. Since its provisional view on the general retention of corroboration for confessions was already being tested in the consultation, it

[141] 25 out of 30 who answered the question agreed that corroboration should be required in cases where otherwise a confession would be the sole evidence

seemed appropriate to seek views on where the law on special knowledge should settle down. The current difficulty was focussed in the question: “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) knowledge of a fact or facts relating to the crime which were not in the public domain; (c) some other formulation?”

Consultation Responses

10.10 Although a majority of those who responded to this question opted for the first of these options, not everyone who responded expressed a view, one way or the other. Interestingly, the Faculty of Advocates believed that the answer lay somewhere between (a) and (b), observing that a requirement that the facts could only be known to the accused might be a difficult requirement to satisfy unless at the time of the confession the crime has not been detected, but once a crime has been detected by the police, then other persons would become aware of some of the facts surrounding it. In these days of saturation news coverage and the widespread use of social media, such points have obvious validity.

10.11 Towards the end of the Review, discussion with Swedish experts visiting Scotland to study recent sex offence legislation brought to the attention of the Review an egregious Swedish example of a false confession which led to a man named Sture Bergwall (for a period known as Thomas Quick) being convicted of murder on eight occasions, with all eight convictions now having been quashed[142]. Bergwall, who had been sentenced to psychiatric care following an earlier conviction for theft and robbery, confessed to a whole series of murders, only a fraction of which led to prosecution. In all cases, those prosecutions were based on his own confessions. The confessions were regarded as sufficient for conviction because they displayed what would in Scots law be considered "special knowledge". It now appears clear that the appearance of "special knowledge" was in fact the result of Bergwall (who was receiving an extensive quantity of narcotic medication during the relevant period) gradually adapting his account of events to information which he gleaned during the process of investigation and interview. The commission of inquiry, which is considering whether the case requires changes in the legal process, is expected to report by June of this year.

10.12 The case is a striking illustration of the dangers of relying on confession evidence in isolation, and also how a special knowledge requirement may be of limited value unless rigorously applied. It also illustrates vividly how permitting a prosecution to proceed on the basis of a confession alone may not be in the interests of victims (in one case, the victim's family did not accept the confession, going so far as to attempt to appeal against Bergwall's conviction).

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[142] Details of the commission's work are available (in Swedish) at http://www.regeringen.se/sb/d/108/a/229441. A book written by the journalist whose researches led to Bergwall's convictions being quashed has been translated into English (H Råstam, *Thomas Quick: The Making of a Serial Killer (2013)),* and a second book, dealing with the therapeutic process which led to Bergwall's confessions, is expected to be published in English later in 2015 (D Josefsson, *The Strange Case of Thomas Quick (*forthcoming)).

Are False Confessions a Problem in Scotland?

10.13 The problems which have occurred in Sweden and many other jurisdictions in relation to false confessions are highlighted in the extensive academic literature on the subject set out in Chapter 6 of the Report of the Academic Expert Group. In light of that, efforts were made to gauge the extent to which similar problems may arise here. While it is undoubtedly true that the Scottish Criminal Cases Review Commission (SCCRC) have referred to the High Court a number of confession cases in recent years in which miscarriages of justice were held to have occurred, the alleged confessions which came under scrutiny in these cases were often made many years ago, long before the impact of human rights legislation, the case of Cadder[143], subsequent improvements in solicitor access to suspects and changes in police practice. The self-incriminating statements in issue in notorious cases such as Gilmour, and Campbell and Steele occurred in 1981 and 1984 respectively, but their convictions were not finally quashed until over 20 years later, following references by the SCCRC[144].

10.14 No reported case was traced in which a conviction was quashed solely on account of a false confession or one which was manufactured and falsely attributed to the suspect that was made or concocted within the last 10 years. Likewise, no such cases are pending before the SCCRC. On the other hand, the absence of any prominent recent cases does not mean that false confessions do not occur. There are a number of possible explanations.

10.15 First, it may simply be that the incidence of false confessions has diminished in Scotland; unsurprisingly there are no statistics. Next (and related to the foregoing), it may be that the present state of the law and practice is satisfactory, in that sufficient safeguards (including corroboration) are now in place, having the effect of "weeding out" the doubtful cases before or at trial. In relation to police investigation procedures, the Reference Group noted the view of the SCCRC that the existence and enforcement of PACE Codes of Practice in England and Wales appeared to have been a major driver in achieving improved standards and consistency of police practices. Although police investigative practices have undoubtedly improved, there is no way of telling whether doubtful cases are in fact being weeded out.

10.16 Quite apart from that, the present law does not prevent a plea of guilty being accepted from someone who is in fact innocent. A striking example is the case of Boyle v HM Advocate[145], a soldier who pled guilty to a robbery in order to be sent to a civilian, rather than a military, prison. The discovery of that miscarriage led to the Crown Agent issuing an instruction that no one should be prosecuted on the basis of a letter offering to plead guilty unless the Crown are satisfied that there is sufficient evidence of guilt. Finally, it may be that if the further safeguards to reduce the risk of

[143] Cadder v HM Advocate [2010] UKSC 43, 2011 SC (UKSC) 13
[144] Gilmour v HM Advocate [2007] HCJAC 48, 2007 SCCR 417, 2007 SLT 893; Campbell v HM Advocate 2004 SCCR 220, 2004 SLT 397
[145] 1976 JC 32.

miscarriages of justice suggested in this Report are put in place now, the corroboration requirement could safely be removed even in confession cases. The most that can probably be said is that none of these conclusions has a strong evidential base and that it would not be safe to assume that any of them is justified.

The Crown Position

10.17 In its Response to the Consultation Document, COPFS indicated that, without supporting evidence, a simple admission on its own with nothing to support it would not be sufficient under the new Prosecutorial Test to meet the standard of proof beyond reasonable doubt. This test is discussed in Chapter 8 of this Report. However the COPFS response continues:

> "In our supplementary written evidence to the Justice Committee of 15 November 2013 we said:
>
> > The Lord Advocate agrees with Lord Hope's comments in the recent article from Holyrood magazine that no-one should ever be convicted on the basis of a simple confession alone. Therefore it is essential that there is evidence to prove that a confession is true. The police and the Crown will always look for supporting evidence which in cases of confession evidence will be evidence which supports the truth of the confession.
> >
> > This is therefore in line with our proposed prosecution test and our commitment always to look for supporting evidence. We would not be in favour of retaining a technical requirement for corroboration where the prosecution relies on confession evidence."

10.18 It is not clear that, at least in relation to a confession, there is any meaningful distinction between "supporting evidence" and corroboration as presently understood. Although COPFS presented to the Justice Committee[146] examples of cases which have not been prosecuted because of a lack of corroboration, but which do display elements of "supporting evidence", none of these examples was a case where the primary source of evidence was a confession. To have any value, evidence which "supports the truth of the confession" must confirm the accused's involvement in committing the crime. On the face of it, that would be evidence corroborating both the commission of the crime and that the accused was the perpetrator. It may be that one additional source of evidence could cover both of these aspects (as often happens at present), or there may be elements of "special knowledge" in the confession. It is not immediately obvious what it is that might amount to evidence "supporting" a confession but fall short of satisfying the current requirement for corroboration. It is also difficult to see how the Court could monitor such a policy.

[146] COPFS written submission to the Scottish Parliament Justice Committee CJ 46A http://www.scottish.parliament.uk/S4_JusticeCommittee/Inquiries/CJ46a._COPFS.pdf

The Issues

10.19 The Reference Group addressed at some length the proposition that, where it is possible to display by audiovisual means a police interview with a suspect, who has either had, or waived the right to, legal assistance, who has been cautioned, and who has made an apparently credible and reliable confession, perhaps even displaying appropriate remorse, surely that is sufficient evidence of guilt. The conclusion reached was that, even in such an apparently clear-cut situation, some further safeguard would be required for the reasons now discussed.

10.20 First, it would be wrong to conclude that, because there appears not to be a current problem with fabricated confessions in Scotland, the requirement to corroborate a confession could be abolished without further ado, having regard to recent developments in relation to solicitor access, interviewing techniques and police practice. As Chapter 6 of the Report of the Academic Expert Group makes clear at page 77, the general Scots "fairness test" and associated protections, such as the right to legal assistance, cannot be expected to address all false voluntary confessions in the police office. This seems equally true of the reliability of confessions made outwith the police interview room or to persons other than police officers, even where the fact of the confession is later put to the suspect in formal interview.

10.21 Next, even if it is true to suggest that, because only a small number of confessions in Scotland have, after conviction, been found to have been false, there are not many more cases where an innocent person has been convicted, no-one knows for sure; and the very fact that false confessions do occur calls for an adequate response. In this regard the Lord Advocate's commitment always to seek "supporting evidence", while somewhat vague, at least responds to these concerns.

10.22 What is particularly troubling in the case of confessions is the intuitively damning nature of the evidence. The existence in some jurisdictions of special evidential or procedural requirements reflects concern about ensuring the reliability of confession evidence. In England and Wales special provisions apply where the reliability of a confession is contested and its admissibility challenged. In terms of section 76 of PACE[147], the prosecution are required to prove beyond reasonable doubt that the confession was not obtained by means which cast doubt on its reliability. In Scotland, it is not necessary that all the sources of evidence used to prove a case require to be of equal character, quality and strength; many cases rest wholly on circumstantial evidence of various types. But where one source of evidence is the accused's own confession, the view prevailed that, absent the corroboration requirement, none of the existing safeguards would be a sufficient protection against the risk that the confession is false and that wrongful conviction may result.

10.23 That leaves a stark choice: either a corroboration requirement should be retained in the case of confession evidence, thus taking cases where a confession is the sole or decisive evidence out of any general abolition regime; or alternatively, further safeguards should be identified which might lessen the risk of wrongful

[147] Section 76 of the Police and Criminal Evidence Act 1984.

conviction. Following the latter course would only be appropriate if the safeguards proposed were adequate to counter the risk of miscarriage of justice. Those discussed in the Report of the Academic Expert Group[148], namely jury directions and expert evidence on the dangers of false confessions, are insufficient to achieve that objective for the reasons set out in that Report.

Conclusion

10.24 It is the conclusion of the Review that retention of the corroboration requirement, where a confession would otherwise be the sole or decisive evidence against the accused, is essential to ensure public confidence in convictions based on confessions and consequently public confidence in the criminal justice system absent a general corroboration requirement. It should never be forgotten that some individuals are either practised liars, plausible rogues, consummate actors, or combinations of one or the other, or that those suspected of a crime and in custody may be in a particularly vulnerable position. In Scotland, unlike in some other jurisdictions, where an accused person pleads guilty the Court does not enquire further into the veracity of the accused's guilty plea.

10.25 The law must be vigilant to ensure that justice does not miscarry as a result of complacency, far less gullibility or naivety, or even malpractice, on the part of those charged with the investigation and prosecution of crime. Retention of the corroboration requirement would ensure that adequate investigation is carried out to seek out other evidence confirming the truth of any confession. It would also render it unnecessary to address separately the issues raised where evidence of a confession comes from an informer or accomplice as discussed at Chapter 7 of the Report of the Academic Expert Group, e.g. exclusion of the confession on grounds of the type provided in section 76 of PACE. Since a confession is a form of hearsay evidence, this will be achieved by the provision relating to hearsay recommended in Chapter 9.

Minority View

10.26 Jim Andrews, Sandie Barton and Louise Johnson are not persuaded that confession evidence requires to be treated differently from other forms of evidence and oppose the retention of the corroboration requirement for confession evidence. Their reasoning in relation to hearsay, set out at para 9.25 above, applies with equal force to confession evidence.

Confessions Corroborated by Special Knowledge

10.27 The drift in the law in relation to "special knowledge" or "self-corroborating" confessions is outlined in section 3.5 of the Report of the Academic Expert Group. There the point is made that the current law seems to be that it is for the jury to determine whether the accused is aware of the particular facts which he relates in his confession because he was the perpetrator or because he has picked up the relative knowledge from other sources. This is a far cry from the traditional

[148] Section 6.5 and 6.6 of the Report by the Academic Expert Group

requirement that the only explanation for the special knowledge is that the accused was the perpetrator.

10.28 Be that as it may, it is beyond the remit of the Review to re-write the existing law of corroboration. On the other hand, since it is recommended that corroboration of a confession should continue to be required, it is thought appropriate to voice the concerns expressed in Reference Group discussions about the developments in the law of "special knowledge", simply as a contribution to the current debate.

10.29 The present law seems very unsatisfactory. It has even led to the expression of a view that it throws pressure on the accused to show how he came by knowledge of the facts he relates if he was not involved in the crime[149]. It should always be for the Crown to establish positively that the element or elements of special knowledge were not in the public domain, nor were known to, or reasonably discoverable by, the accused if he was not the perpetrator.

[149] Discussed at para 3.5 of the Report of the Academic Expert Group

11. THE NO CASE TO ANSWER SUBMISSION

11.1 The power of the Court to give effect to a submission, made at the close of the Crown case, that there is no case for the accused to answer, is a well-established safeguard against miscarriage of justice. First introduced in Scotland by the Criminal Justice (Scotland) Act 1980, following a recommendation of the Thomson Committee, the current statutory provisions are to be found in section 97 (Solemn Proceedings) and section 160 (Summary Proceedings) of the Criminal Procedure (Scotland) Act 1995, which both provide:

> "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…..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..."

The rule reflects both the burden of proof on the Crown and the accused's right of silence. The accused should be called upon to answer only when the Crown have led sufficient evidence on the basis of which the judge or jury would be entitled to convict.

11.2 At present the Court is generally concerned to establish whether there is corroborated evidence of each essential element of the crime charged and of the identification of the accused as the perpetrator. There are inevitably related questions of whether the evidence founded upon does actually amount to proof of the essential element in issue. Basically, however, the search is for corroborated evidence.

11.3 There are two distinct views about the impact of abolishing the corroboration requirement on the effectiveness of the no case to answer submission. On the one hand, the Carloway Review[150] observed that the issue for the trial judge would be the same as it is at present – has sufficient evidence been led? – except that there would be no need for corroboration. On the other hand, the Academic Expert Group Report concluded[151] that the meaning of "sufficiency" would have radically changed and the substantive question for the trial judge would be very different. The no case to answer submission would succeed only if there was no evidence of a material element of the offence, raising the prospect of the case proceeding on evidence of the most unsatisfactory nature on the basis of which no rational decision to convict could be made. There is force in both points of view.

11.4 The no case to answer submission is a feature of common law jurisdictions throughout the world. However, the test varies. In Australia and Canada such submissions are generally restricted to cases where there is simply no evidence against the accused in respect of a crucial element of the prosecution case. In other jurisdictions, evidence is not "sufficient" where a judge or jury could not reasonably convict on the strength of it. That approach is based on the view that, if it is wrong to

[150] The Carloway Review: Report and Recommendations, published 17 November 2011
[151] At para 12.2

call a person to account on the basis of no evidence, it is equally wrong to call a person to account on the basis of evidence which could not on any view be said to be reliable. A decision to that effect is one based on an objective assessment of the evidence and is not to be confused with an evaluation of the credibility and reliability of the evidence. Non common law European jurisdictions may also apply similar rules allowing for the case against the accused to be discontinued where the evidence is weak, but the different procedures of investigation and trial render direct comparisons inappropriate.

11.5 The way the test[152] operates in England and Wales is neatly encapsulated in the following quotation from the leading case of R v Galbraith[153], where it was said that the trial judge should approach a submission of no case to answer as follows:

> "(1) If there is no evidence that the crime alleged has been committed by the [accused], there is no difficulty. The judge will of course stop the case.
>
> (2) The difficulty arises where there is some evidence but it is of a tenuous character, for example because of inherent weakness or vagueness or because it is inconsistent with other evidence.
>
> (a) Where the judge comes to the conclusion that the prosecution evidence, taken at its highest, is such that a jury properly directed could not properly convict upon it, it is his duty, upon a submission being made, to stop the case.
>
> (b) Where however the prosecution evidence is such that its strength or weakness depends on the view to be taken of a witness's reliability, or other matters which are generally speaking within the province of the jury and where on one possible view of the facts there is evidence upon which a jury could properly come to the conclusion that the [accused] is guilty, then the judge should allow the matter to be tried by the jury".

11.6 As is the case in Scotland, the judge in England and Wales must take the prosecution case at its highest and assume that the evidence will be given the most favourable consideration by the jury. It is only where the judge concludes that no jury properly instructed could reasonably convict on the basis of the evidence presented that the submission can be sustained. In summary cases in England and Wales, the Criminal Procedure Rules provide at r37.3(3)(c)(ii) that the Court may sustain a no case to answer submission "on the ground that the prosecution evidence is insufficient for any reasonable court properly to convict".

11.7 At present a test in similar terms may be applied by the High Court sitting as a Court of Criminal Appeal in quashing a conviction. The Criminal Procedure (Scotland) Act 1995 provides at section 106(3)(b) that "By an appeal under subsection (1) above a person may bring under review of the High Court any alleged miscarriage of justice based on …(b) the jury's having returned a verdict which no reasonable jury, properly directed, could have returned". That power has been exercised on very few occasions and only in exceptional cases. However, it is

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[152] See Criminal Procedure Rules r.38.9(2)(d)(i)
[153] R v Galbraith [1981] 1 WLR 1039 at 1042.

impossible to say how significant the corroboration requirement has been in ensuring that it has been necessary to exercise the powers so seldom. The power is also confined to solemn cases.

11.8 In the recent case of McKinnon v HM Advocate[154] Lady Dorrian, delivering the Opinion of the Court, noted at paragraph 5:

> "The test set by section 106(3)(b) is….. both an objective one and a high one. An appeal is likely to succeed in relatively rare circumstances".

Lady Dorrian then defined the applicable test, under reference to Wilson v HM Advocate[155], in the following terms:

> "...the court has to be satisfied that there was no cogent framework of evidence that the jury were entitled to accept as credible and reliable and which would have entitled them to return the verdict..."

11.9 This is not the first time that consideration has been given to refining the terms of the no case to answer submission. In 2008 the Scottish Law Commission proposed in its paper on Crown Appeals[156] that the no case to answer submission "be extended to permit a submission at the end of the Crown case that, on the evidence led, no reasonable jury, properly directed, could convict of the offence charged". The Scottish Government did not take this recommendation forward. The ensuing Criminal Justice and Licensing (Scotland) Act 2010 provided expressly that it is not open to a judge to uphold a submission on this basis. However, the Government later recognised, in its 2012 Consultation on additional safeguards[157] in light of the removal of the corroboration requirement, that the recommendation to introduce such a test had been strengthened by the removal of that requirement.

Consultation Responses

11.10 A large majority[158] of those that responded to this Review's consultation saw merit in the proposal to extend the no case to answer in such a way. Comments included:

- The judge is the best person to gauge where a case is going and should be able to halt proceedings at any stage where it is believed that it would be unreasonable to convict the accused.
- It is essential that this test is applied before conviction.

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[154] McKinnon v HM Advocate [2015] HCJAC 6.
[155] Wilson v HM Advocate [2010] HCJAC 43, 2010 SCL 1042.
[156] Scottish Law Commission, Report on Crown Appeals (Report 212)
[157] Reforming Scots Criminal Law and Practice: Additional Safeguards Following the Removal of the Requirement for Corroboration
[158] 21 out of 25 respondents that answered the question agreed 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. The Senators of the College of Justice were equally divided.

- This provides a direct and powerful check in relation to the quality of evidence that is placed before a jury in a solemn trial or a judge in a summary trial.
- This availability would impose a discipline on the prosecution and could be significant in any consideration of whether the Scottish trial was compatible with Article 6 of ECHR.
- Without this safeguard, there is a risk that the quality of evidence could become a matter which was unregulated by the Court.

11.11 Points made against change were that it would add nothing to the system but an additional layer of procedure and that it would usurp the function of the jury or blur the distinction between the role of the jury and that of the judge.

11.12 The absence of any power in a trial court to decide that the evidence presented does not on any reasonable view warrant conviction also means that cases can be extended unduly. The removal of the corroboration requirement raises the prospect of that occurring more frequently if the Court is powerless to bring to a conclusion a case insisted upon by the prosecution on the basis of tenuous and inherently inconsistent evidence, or even evidence which is self-contradictory. Prosecutors are increasingly seen to be reluctant to withdraw charges even where a realistic objective assessment demonstrates how unjust a conviction would be and demands the exercise of a wise discretion to proceed no further. A case often bears a quite different appearance when the evidence has been led from that which it bore on paper. Leaving the no case to answer submission rule unchanged would prevent judges from acting on the basis of their training and experience to bring proceedings in which, on any objective assessment of the evidence, it would not be reasonable to convict, to an early but proper conclusion, and prevent a miscarriage of justice. Without change to allow that to happen, the removal of the corroboration requirement would be likely to weaken the effect of the no case to answer submission.

Conclusion

11.13 It is recommended that the basis on which a motion that there is no case to answer may be sustained should be extended to include circumstances where it would not be proper to convict on the evidence presented. The appropriate test would be as follows:

> "If, after hearing both parties, the judge is satisfied that the evidence led by the prosecution, taken at its highest, is insufficient in law to justify the accused being convicted of the offence charged, or is such that no judge or jury acting reasonably could properly convict upon it, the judge shall acquit the accused."

11.14 The Crown have a right under section 107A of the 1995 Act to appeal the decision of the trial judge to acquit on the ground that there is no case to answer. This right should apply to any acquittal on the ground of no case to answer.

12. JURIES – MAJORITY, SIZE, AND THE THREE-VERDICT SYSTEM

Introduction

12.1 The Review's non-exhaustive Terms of Reference specifically included "Jury majority and size". The Report by the Academic Expert Group went further, and also considered Scotland's three-verdict system and whether the Not Proven verdict should be abolished. It has been necessary for the Review to take into account the three-verdict system because consideration of the size of the jury and the majority required for a conviction is inextricably linked to the number of verdicts available to a jury.

12.2 Of all the matters this Review has specifically been asked to consider, the relationship among the various distinctive features of the Scottish jury system is perhaps the most complicated to unravel when trying to determine what additional safeguards may be required following the removal of the requirement for corroboration. This is neatly illustrated in the Consultation exercise conducted as part of the Review in which no fewer than seven different questions in relation to jury majority/size/verdicts were posed.

The Simple Majority

12.3 It was agreed that conviction on the basis of a simple majority of 8 out of 15 jurors would not be an adequate reflection of the principle that guilt must be established beyond reasonable doubt in a system in which the essential elements of the commission of a crime do not require to be proved by corroborated evidence. At the same time it was noted that any weighting of the majority required for a guilty verdict would raise the prospect of an accused being acquitted where a majority of the jury considered the accused to be guilty[159].

12.4 The Report by the Academic Expert Group stated that "the simple majority jury verdict is an anomaly out of step with the common law world, difficult to reconcile with the presumption of innocence and the requirement of proof beyond reasonable doubt[160]". The Academic Expert Group went on to suggest that "the simple majority verdict may, exceptionally, be justified because of Scots law's equally exceptional requirement of corroboration" and "the simple majority verdict may also be viewed as something of a trade-off against the not proven verdict".

12.5 The majority who responded to the Consultation question addressing this point believed that the simple majority rule should be changed[161]. The general view was that in the absence of the corroboration requirement it is necessary to increase the majority required for a guilty verdict to guard against miscarriages of justice and maintain public confidence in the criminal justice system.

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[159] For example, where a majority of 10 out of 15 is required and 9 jurors vote for guilty, there would be no conviction despite the majority believing the accused to be guilty of the offence.
[160] Report of the Academic Expert Group, 13.10
[161] 15 out of 27 respondents answered "unanimous" to the question "Should a jury be required to strive to achieve a unanimous verdict or is a verdict by a weighted majority acceptable?"

12.6 In considering this, the Reference Group were conscious of the difficulty posed by the absence of reliable evidence about the way in which the various unique facets of the Scottish jury system impact on each other. A number of issues arose in relation to each.

The Unique Size of the Scottish jury

12.7 The Academic Expert Group noted that other common law jury systems have generally consisted of 12 members and have started from the principle that jury verdicts ought to be returned unanimously. Over time most have qualified this to allow a verdict to be returned despite one or two jurors dissenting, to ensure, for example, that a jury is not held to ransom by a very small minority of jurors acting irrationally.

12.8 The Academic Expert Group were attracted to the idea of adopting a jury system similar to that used in other common law jurisdictions such as England and Wales, with a jury of 12 initially directed to return a unanimous verdict and only after the lapse of a certain period of time being authorised to return a verdict by 11 votes to 1 or 10 votes to 2. They favoured that approach because the evidence from common law jurisdictions provides a basis for confidence that such a system would work, whereas there is no empirical evidence as to how a system requiring unanimity or near-unanimity would operate in the context of a 15 person jury.

12.9 The Academic Expert Group also referred to some psychological research, carried out in circumstances quite different from those of a jury, suggesting tentatively that a group of 12 might have advantages over one of 15, ensuring adequate opportunity for all to contribute to the discussion. Against that, there is convincing empirical evidence cautioning that a group significantly smaller than 12 is likely to be unrepresentative and to deliberate for a shorter time than a larger group[162]. Taking these factors along with the general acceptance of a jury of 12 within common law criminal justice systems, the Academic Expert Group suggested that a jury of that size might be adopted in Scotland.

12.10 However, absent from the Report of the Academic Expert Group is a clear case for abandoning the traditional Scottish 15 person jury. It should be recognised that there are benefits in having a larger jury. More people have to consider the case, and society is, arguably, better represented.

The Options for a Majority in Future

12.11 Two possible approaches to the question of the number required to return a guilty verdict were identified by the Reference Group, (i) unanimity/near unanimity or (ii) a weighted majority such as two thirds or three-quarters.

12.12 It was noted that requiring a jury to strive to reach a unanimous verdict and allowing the jury to return one by a qualified majority only after their efforts have failed would encourage full debate of the issues arising. That reflects the notion that the jury should act as a unit seeking to come to an agreed view about the truth.

[162] Report of the Academic Expert Group, page 156

12.13 On the other hand, a requirement for unanimity has never been a feature of the Scottish criminal justice system. It has traditionally been for the jury as masters of the facts, and with the guidance given in the judge's charge, to decide how to go about reaching their verdict and what time they require to do so. It is consistent with that approach that the jury may reach a verdict by a majority.

The Not Proven Verdict

12.14 The Scottish three verdict system has provoked much comment and has, on occasion, given rise to controversy, especially where a high-profile trial has ended in a verdict of Not Proven.

12.15 It is thought to be unsatisfactory to have two verdicts of acquittal where, as at present, a trial judge or sheriff is discouraged from explaining the distinction between them. While one might be thought to be more emphatic than the other, the fact that the legal effect of both is the same means that any attempt to explain the difference is fraught with the risk of causing confusion in the mind of jurors. There is a belief, for which there is anecdotal evidence as well as some research evidence[163], that jurors do on occasion mistakenly think that a Not Proven verdict leaves open the possibility of a retrial. That is not the case.

12.16 The reputation of our criminal justice system requires that there should be public confidence that verdicts are returned by juries on a sound, rational basis. It is important that any apparent source of confusion should be eliminated.

12.17 As a respondent to the consultation stated cogently, "It (the Not Proven verdict) cannot be explained to jurors, so it is not possible for them to know when to properly use it, or for us to understand if it is being used consistently". Dissatisfaction with a three-verdict system was expressed by respondents to the consultation, with the majority of those who answered the question preferring to have only two verdicts. On the other hand, there is a view that the Not Proven verdict operates as an important safeguard against wrongful conviction.

12.18 Members of the Reference Group referred to the view, commonly expressed by prosecutors, defence agents and counsel alike, that a particular case has "not proven written all over it", on account of the nature of the circumstances. However, that is no more than a reflection of the potential for "reasonable doubt" created by the particular circumstances of the case, such as the existence of evidence which could undermine the crucial evidence in the Crown case, including the nature of any connection between the complainer and the accused, based on experience of the operation of our unique system. If this is the case, then the Not Proven verdict should not be removed, as it is acting as a safeguard.

12.19 One additional argument that is on occasion advanced in support of the abolition of the not proven verdict is that it may contribute to wrongful acquittals in cases of domestic abuse and sexual abuse. It was submitted in a response to the Consultation that jury members can be reluctant to convict in rape cases even where

[163] Report of the Academic Expert Group pages 158-159

there is significant evidence and may feel reassured, in a way that it is not easy to express clearly, by being able to return a verdict of Not Proven. Some support for this view can be found in statistics which show that the Not Proven verdict is more frequently applied in cases of rape than it is in all cases in general[164]. The question arises whether the impersonal nature of the verdict, in that it relates to the charge rather than to the individual as the other two verdicts do, has a bearing on the choice of verdict. It should be noted, however, that in comparable jurisdictions (such as England and Wales) which have two verdicts, the conviction rate for rape is not markedly different[165].

12.20 While a significant number of those who responded to the Consultation Document supported the view that there should be two verdicts rather than three, those who responded to the question about what those two verdicts should be were equally divided between Guilty/Not Guilty and Proven/Not Proven. Since the ultimate issue in any criminal trial is whether guilt has been proved beyond reasonable doubt, the logical case for the latter is obvious. This also reflects the historical position in Scotland. On the other hand, adopting the latter would involve a departure from universal practice elsewhere in the common law world and the abandonment of verdicts with which the Scottish public are currently familiar.

The Way Forward

12.21 The issues raised in relation to jury size, majorities and verdicts having been debated at length, the view was reached that no immediate change should be made to the size of the jury or the number of verdicts available.

12.22 The unique features of Scottish juries discussed above form important parts of a balanced system which, until now, has included the corroboration requirement, a 15 person jury, 3 verdicts, and the possibility of conviction by simple majority. Insufficient is known at this stage about the relationship among them, and in particular about the use in practice of the Not Proven verdict, to enable any firm evidence-based conclusion to be drawn about the likely impact of reducing the size of the jury, changing from a system with three verdicts to one with two, and requiring unanimous or near unanimous verdicts.

12.23 It may be that, if the names given to the two verdicts were “Proven” and “Not Proven”, the effect would not be to reduce the safeguards for accused persons against miscarriage of justice, but simply to maintain them.

12.24 The time is right to undertake research into jury reasoning and decision-making. Simultaneous changes to several unique aspects of the Scottish jury system should only be made on a fully informed basis.

12.25 That research would include asking jurors at least the following:

- What jurors understand to be the difference between Not Guilty and Not Proven

[164] Criminal Proceedings in Scotland, 2013-2014 p 3.2.4 www.gov.scot/Resource/0046/00469252.pdf
[165] Crown Prosecution Service: Violence Against Women and Girls Crime Report 2013-14 www.cps.gov.uk/publications/docs/cps_vawg_report_2014.pdf

- Why they choose one over the other
- Why, and to what extent, do jurors alter their position as regards Not Proven and Not Guilty as a result of deliberations
- The extent to which the members of a jury of 15 (as compared with a jury of 12) actually participate in deliberations
- The differences in outcome (assuming an identical factual matrix) as between a 12 person jury with only 2 possible verdicts and a 15 person jury with 3 verdicts, and the reasons for those differences; and
- Whether there are benefits in requiring the jury to attempt to reach a unanimous verdict.

Other questions could possibly be added, including whether the same majority should be required for acquittal as for conviction, and whether the votes for each verdict should be disclosed in court.

12.26 Unfortunately it has not been possible within the timescale of this review to arrange the research necessary to provide the evidence base required to make informed decisions which would have far-reaching and long-lasting consequences for the criminal justice system. The study sample must be broad enough to enable firm conclusions to be drawn with confidence.

12.27 However, the Review is satisfied that it is perfectly feasible, within the boundaries of the existing legislative framework, including the Contempt of Court Act 1981, to undertake meaningful research which would provide a proper evidential foundation on which informed decisions about jury size, majority and verdicts could be made. It is estimated that to conduct research with a sufficiently large sample of juries and jurors to provide reliable results would take up to two years.

Conclusion

12.28 Having regard to the facts that jury unanimity has never been a requirement in Scots law, and that the Scottish jury of 15 is larger than juries in common law jurisdictions, it should remain open to a jury to return their verdict by a majority. The change provided for by section 70(2) of the Criminal Justice (Scotland) Bill (10 out of 15 required for a guilty verdict), is appropriate, in the interim, pending further research.

12.29 It is strongly recommended that research should be undertaken in early course to ensure that decisions about what, if any, appropriate changes to jury size, majority and verdicts may be appropriate are made on an informed basis. The Chair and members of the Reference Group are willing to re-convene to consider the research findings, and to make such further recommendations as are appropriate in light of those findings.

13. COMMUNICATION WITH THE JURY

Introduction

13.1 The directions given by the trial judge to the jury, commonly referred to as 'the charge', have a significant bearing on the outcome of a trial. It is the responsibility of the judge to state to the jury the rules of law that they require to know to determine the case before them. It is customary also to impart guidance to the jury on how to assess the credibility and reliability of evidence. It is vital that each of the jurors understands as fully and as clearly as possible what the judge is endeavouring to communicate to them. The effective communication of these judicial directions to jurors provides a safeguard against miscarriage of justice.

13.2 The absence of analysis of the jury decision-making process, as discussed in Chapter 12, means that it is impossible to say authoritatively how well Scottish jurors understand these directions in practice. Research in other jurisdictions has produced a body of evidence which suggests that certain factors, for example simplification of language and providing written directions, will increase the likelihood of judicial directions being accurately recalled and fully understood by jurors.

The Jury Manual

13.3 The importance of clear communication to juries has for long been recognised by the judiciary. This is illustrated by the existence and content of the Jury Manual[166] and prior to that of "Notes for the Guidance of a High Court Trial Judge". The Jury Manual was first published in 2000 and has been developed over the last fifteen years to provide judges with comprehensive guidance on directing juries in criminal trials. It is subject to regular revisal to reflect changes and developments in law and practice. It explicitly recognises the importance of using words and expressions that are clear and simple. The Manual, which is produced by the Judicial Institute[167] and is publicly available, contains wide-ranging 'sample directions' ranging from fundamental rules that apply in every case, through rules about the status in law of certain types of evidence, to an explanation of what is required to establish the elements of each crime charged, which judges can use in their charge.

13.4 While the Reference Group note and appreciate the continuing evolution of the Jury Manual, it was accepted from evidence produced in the Report by the Academic Expert Group, and from responses received to the Review's consultation, that there is scope for clarifying and simplifying the language used in some aspects of jury directions, and varying the means of communicating these directions.

Consultation Responses

13.5 Out of 36 responses to the Consultation, 28 echoed the views of the Academic Expert Group and supported the proposition that further work should be done to improve the quality and effectiveness of the information that is communicated to jurors. Responses primarily focussed on the need for simplification of the language

[166] The Jury Manual 2015.
[167] Formerly known as the Judicial Studies Committee.

used in jury directions and the provisions of directions in writing. However, two other significant suggestions emerged:

- Using flowcharts and diagrams. This is sometimes described as a "route to verdict" approach, where a diagram outlines to a jury what parts of the evidence must be believed if they are to convict the accused of a particular offence.

- Making better use of technology. For example providing electronic tablets so that jurors can see pictures of the evidence/productions, and can re-examine these during their deliberations[168].

Ideas for Enhancing the Effectiveness of Judicial Directions

13.6 Ensuring use of plain language is a priority. Research studies suggest that jurors frequently do not understand the directions given[169]. That led to the New Zealand Institute of Judicial Studies employing editors with expertise in writing plain English in the preparation of their Criminal Jury Trials Bench Book. That is an idea that the Judicial Institute may wish to consider.

13.7 It should be recognised that people learn or absorb information in different ways; some people learn effectively from listening to speech, which is the traditional way in which a judge directs a jury in Scotland, and some find the written word more satisfactory. In keeping with that, the Academic Expert Group suggest more widespread use of written directions. This approach is already used by judges on occasion. Wider use is likely to result in better quality deliberations. Studies discussed in the Report by the Academic Expert Group show that written directions improve juror comprehension of key issues and provide greater confidence to jurors by giving them guidelines to follow.

13.8 While judges in Scotland only occasionally issue written directions to juries and practice in other jurisdictions is variable, it is plain from the many examples that the Reference Group have seen and from reviewing Scottish practice that there is considerable scope for providing directions in writing to Scottish juries. An example of the usefulness of written directions is in cases involving the possibility of alternative verdicts. There are several circumstances in which, where the jury are not satisfied that the accused is guilty of the whole terms of the charge as set out against him, an alternative verdict of guilty of a lesser charge may be returned. That may arise in a charge of murder where culpable homicide may be an alternative. It also arises in road traffic cases where the accused is charged principally with causing death by dangerous driving in terms of section 1 of the Road Traffic Act 1988; there may be several possible lesser verdicts. A document in the form of a template, sometimes referred to as a "route to verdict", may be distributed to the jury to indicate the order in which they should address the issues in the case, usually by addressing first of all the question whether the accused ought to be acquitted and, if not, addressing the possible verdicts in order of gravity, starting with the most

[168] The Rt Hon Sir Brian Leveson, Review of Efficiency in Criminal Proceedings, published January 2015 (see paras 288 and 18).
[169] Section 9.3 of the Report by the Academic Expert Group.

serious. Such an approach may prove particularly helpful in some sex offence cases involving a range of possible verdicts. There is clearly scope for extending that approach to include definitions of the various offences of which the accused might be convicted and a statement of the elements that must be proved.

13.9 It is now customary for judges to give a fairly full outline of the procedure to be followed in the case to the jury at the very start of the case before evidence is presented. It is difficult to say anything at that stage about the issues that the jury should have in mind as they listen to the evidence. They have seen and heard the indictment read, along with any special defence, and these will remain their only beacons so far as the issues in the case are concerned. On the other hand there are basic rules of law on which they will inevitably be directed in the trial judge's charge. The crimes in the indictment will then be defined and explained to them. There are cases involving charges in simple terms where it might be helpful for the jury to have that information at the outset in writing and to be able to retain it throughout the proceedings. In any case where it might be thought to be inappropriate for this to happen, then counsel could have the opportunity of addressing the judge on that matter.

13.10 These are simply suggestions made to the Reference Group in which they saw some merit. They viewed the provision of material in writing as being supplementary to rather than in lieu of those parts of the judge's charge that they replicate.

13.11 While it may not be long before there exists in our courts a level of technological sophistication and efficiency that will facilitate the more widespread use of technology such as computer PowerPoint displays by counsel, the use by individual jurors of tablet computers to view and store productions, and other applications of technology, that day has not yet come. Mention has already been made in Chapter 5 to the Scottish Government's Digital Strategy for Justice in Scotland. There is every reason to be confident that the scope, vision and objectives of that strategy will lead to the welcome expansion of the use of technology in the criminal justice system.

13.12 If trials are to be routinely recorded (and broadcast), as suggested in the recent Review led by Lady Dorrian[170], then consideration could also be given to enabling the jury to view the judge's directions again as part of their deliberations.

Conclusion

13.13 Beyond noting suggestions that could be of assistance in enhancing the communication of directions by judges to juries, it is not considered appropriate to make specific recommendations as to how directions should be given to jurors.

13.14 Any decision on how to charge the jury is for the trial judge who, having heard all the evidence in the case, is best placed to decide what directions are best suited to those specific circumstances. It is therefore best left to the Judicial Institute, as it

[170] Report of the Review of Policy on Recording and Broadcasting of Proceedings in Court, and the Use of Live Text-Based Communications.

further develops the Jury Manual, to note the research produced in the Report of the Academic Expert Group, the views of the Reference Group relating to the use of plain language, and the other suggestions noted in this Report and made by respondents to the Consultation, and to devise appropriate training programmes and guidance Ultimately, whether changes in the delivery of directions to jurors are effective will depend on the support of the High Court as the Court of Criminal Appeal for any measures adopted by trial judges and on the guidance given both by that Court and by the Lord Justice General in any Practice Note which is issued.

Specific Jury Directions

13.15 While it is part of the Review's Terms of Reference to consider whether any specific jury directions are required in light of the removal of the requirement for corroboration, the conclusion has been reached that being prescriptive about such directions, e.g. about the inherent unreliability of certain types of evidence or categories of witness, would unnecessarily constrain the discretion of the trial judge who is best placed to assess what directions are required in the specific circumstances of a case. However, it was thought that it would be helpful if the Judicial Institute were to address at an early date the currently controversial questions whether in sexual offence and domestic abuse cases robust directions about delayed reporting and lack of resistance should generally be given to juries on which there is currently on-going Government consultation[171]. In such cases there are also other aspects about which more explicit directions than are generally given might be considered and possibly developed, such as common misconceptions about the relevance of clothing and social interchanges to the question of consent. Therefore no recommendation is made regarding specific jury directions.

[171] *Equally Safe - Reforming the criminal law to address domestic abuse and sexual offences,* published 26 March 2015: http://www.gov.scot/Publications/2015/03/4845

14. REASONS FOR VERDICTS IN SUMMARY PROCEEDINGS

14.1 Although some of the work of the Review has, of necessity, focussed on solemn proceedings, to address distinct issues which arise in the context of jury trials, the majority of recommendations in this Report apply to both summary and solemn proceedings.

14.2 While the Academic Expert Group did not make any proposals relating exclusively to summary proceedings, the Reference Group posed a question in its Consultation Document asking for views on whether any additional matters should be considered in relation to safeguards in summary cases that had not been raised in the Consultation Document or in the Report of the Academic Expert Group.

Reasons for Verdicts

14.3 One suggestion made was that in summary proceedings Sheriffs, Stipendiary Magistrates and Justices should give, and have recorded, reasons for the final determination of the trial, whether conviction or acquittal.

14.4 While many judges already provide reasons for decisions, that is far from a universal practice. Introducing such a requirement would add consistency and further transparency to the judicial decision-making process. It is self-evident that the interests of justice are served best when anyone involved or taking an interest in a case understands clearly what has been decided and why. It is wrong that anyone convicted should be given no indication of the basis on which such an important decision was made.

14.5 For accused persons in solemn cases, the indictment specifying the factual basis of the allegations, the power of the court to uphold a no case to answer submission, counsel's speeches to the jury and the judge's charge to the jury are seen as factors enabling the accused to understand the jury's decision[172].

14.6 In summary proceedings the position is different. There is no jury, and consequently no charge. Whether sufficient is said to enable the accused or an observer to understand the reasons for the conviction is entirely dependent on whether the presiding judge explains the decision. Failing that, the accused can only find out the reasons for his conviction by appealing and requesting a stated case requiring the Court to explain the decision. That deficiency should be rectified and reasons should be given in open court and minuted when the verdict is pronounced. That recommendation is in keeping with the provisions of section 6 of the Victims and Witnesses (Scotland) Act 2014 giving alleged victims, witnesses and certain other persons a right to request information about criminal proceedings including the final decision and the reasons for it.

14.7 The removal of the corroboration requirement will result in cases where the principal evidence in a trial may on occasion be simply the complainer's word against that of the accused. When this situation arises, it is in the interest of transparency

[172] Taxquet v Belgium (2012) 54 EHRR 26; Judge v United Kingdom (2011) 52 EHRR SE17; Transco (No. 2) v HM Advocate 2005 JC 44; Beggs v HM Advocate [2010] HCJAC 27, 2010 SCCR 681.

and fairness for the presiding judge to state why either version of events has been preferred.

Conclusion

14.8 In many summary courts, judges give sufficient reasons to enable the participants to understand why a particular decision has been made, but the practice is not universal. It should be universal, and accordingly it is recommended that it should be mandatory for the presiding judge to deliver orally in open court, and have minuted, brief reasons for the verdict, whether conviction or acquittal, including on the sustaining of a no case to answer submission, in every summary case. No such requirement arises in solemn cases, given the information already available from the sources set out above.

14.9 In light of the foregoing it would also be appropriate for reasons to be delivered by the presiding judge as part of any findings at the conclusion of an Examination of Facts under section 55 of the Criminal Procedure (Scotland) Act 1995.

15 MISCELLANEOUS ISSUES

INDEPENDENT LEGAL REPRESENTATION

15.1 While the primary focus of this Review has been to identify safeguards against wrongful conviction of an accused person, the Reference Group has remained alert to the possibility of unintended consequences of the removal of the corroboration requirement or the introduction of additional safeguards following this Review. As part of the Review's non-exhaustive Terms of Reference members of the Reference Group, and those responding to the public consultation, were asked if any other issues should be considered as safeguards. One suggestion from within the Reference Group was the provision through legal aid of Independent Legal Representation (ILR) for victims of crime in relation to issues affecting their rights, including their privacy.

15.2 ILR can arise in a wide range of circumstances, but in the context of this Review it was taken to relate to legal aid funding for legal advice and representation for victims, who are not usually legally represented in criminal proceedings, about whom documentary evidence may be sought by the defence during either the pre-trial or trial process. When such evidence is sought, victims would have access to independent legal representation to advise them of their rights and how the process of the recovery of evidence in criminal proceedings operates. Representation, funded by legal aid, would be confined to procedural issues and hearings relating to recovery and disclosure of confidential information about them. It would not involve representation at the trial. An analysis of how ILR might be applied in Scotland is provided in the Report by the Academic Expert Group.

15.3 A form of ILR was proposed to the Scottish Parliament in January 2014 as part of an amendment to the Victims and Witnesses (Scotland) Bill, but was rejected at the time.[173]

Why Might ILR be Relevant?

15.4 It was suggested that, absent a corroboration requirement, and particularly in sexual offences and offences of domestic abuse, a witness may be more rigorously cross-examined, especially if that witness is the sole witness in a case. There is also concern that increased efforts may be made to obtain information relating to that witness, such as by recovering confidential records to aid that cross-examination. That might in turn lead to more frequent resort by defence counsel to applications under section 275 of the 1995 Act to present evidence otherwise rendered inadmissible by section 274 of the Act.

15.5 For example, in rape cases which depend upon the acceptance of the evidence of one person, the complainer, as against that of another, the accused, the complainer might face greater scrutiny from the accused's legal representatives who might make even greater effort than at present to secure background information from confidential records.

[173] See Scottish Parliament Official Report 12 December 2013 cols 25733-25740.

Conclusion

15.6 The Reference Group are not persuaded that, simply because the requirement for corroboration is removed and the complainer may be the only witness in a case, that witness would be under increased scrutiny, or that the Court would fail to protect complainers' private information and apply different standards to issues arising under sections 274 and 275 of the Act. It was therefore decided to make no recommendation[174]. However the Reference Group are supportive of the general principle of ILR to ensure that a victim/witness is fully advised of his/her rights in relation to any application for the recovery and potential use in court of personal information.

15.7 The way in which the Court has dealt with applications under section 275 to lead evidence otherwise inadmissible under section 274 was previously reviewed[175]. It would be appropriate to carry out a further review after the lapse of a suitable period following the abolition of the corroboration requirement to establish whether there is a move towards closer scrutiny of complainers as suggested, but more particularly to establish whether there is any cause for concern about the way in which the Court deals with recovery and disclosure of confidential information relating to complainers and with section 275 applications.

WITNESS STATEMENTS – INTRODUCTORY UNDERTAKINGS

15.8 The standard practice for the taking of a witness statement by a police officer is to make a written record of the statement and have the witness sign it. On occasions the taking of the statement is audio or audiovisually recorded, but even then there is always a written record.

15.9 It is hoped that developments in technology, discussed in Chapter 5, will lead to increasing use of digital recording devices to record witness statements and supplement the written record. Witness statements are increasingly shown to witnesses to prompt their recollection, or challenge their oral evidence, or as a record of the detail they can no longer recall. Since it is not uncommon for witnesses, often in very serious cases, to fail to repeat or confirm in court what they said in their statement, consideration was given to means of enhancing the prospects of ensuring that a reliable account which will be repeated in court is recorded at the outset. With the abolition of corroboration giving rise to the potential for future cases to be one-witness cases, it is vital to take all possible steps to ensure the reliability of statements taken in the investigative phase.

15.10 Currently, witnesses are invited to sign a statement at the end of the process which states: "I confirm that this statement is a true and accurate record".

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[174] Those on the Reference Group from Victims Groups disagreed and thought that complainers may be subject to closer scrutiny.

[175] M Burman, L Jamieson, J Nicholson and O Brooks, *Impact of Aspects of the Law of Evidence in Sexual Offence Trials: An Evaluation Study* (Scottish Government Social Research, 2007).

15.11 One suggestion proposed to the Reference Group to improve current practice is that, before the statement-taking process begins, a witness should be asked to sign an undertaking that the statement that the witness is about to make must be a true and accurate account of the facts and that the witness must not say anything that the witness knows to be false or does not believe to be true.

15.12 There were mixed views among the Reference Group about the value of this. Some consider that a formal process in which the witness recognises the obligation to give a true and accurate account to the best of the witness's knowledge and belief would enhance the prospects of securing an account that the witness would adhere to at the trial, especially if that process involved acknowledging liability to prosecution in the event that false information is provided. In their view the execution by a witness of a declaration to that effect at the outset of the statement-taking process is likely to focus the mind of the witness on the fact that what the witness is about to say, regardless of what may already have been said to an officer, may be used in court proceedings, and thus on the importance of giving an accurate account.

15.13 On the other hand a number of the Reference Group are of the view that being asked to sign such an undertaking would deter vulnerable witnesses including women from reporting domestic abuse and sexual offences, due to the nature of these offences, the impact of the offence on complainers and the possible presence of threatening behaviour and coercion by the accused or other parties before and after reporting, and that the same could apply in cases, including those involving organised crime groups.

15.14 Whether such an introductory undertaking would act as a deterrent is likely to depend on the nature of the case involved. Following full debate it was decided to make no recommendation but simply to reflect the opposing views for further consideration by Police Scotland.

APPROPRIATE ADULTS

15.15 In relation to child and other vulnerable suspects, it is generally accepted that, in addition to a solicitor being present during the course of any interview, another person should be present to support the suspect, and to ensure that the suspect understands what is happening and to facilitate, where necessary, communication between the suspect and the police. In the case of a child under 16 years of age, that is generally a person who has care of the child. That person is referred to as a "Responsible Person". In the case of anyone aged 16 or over, that person is called an "Appropriate Adult", and is likely to be a person unconnected to the suspect.

15.16 The value of the Appropriate Adult system is recognised by the Scottish Government which, in the Criminal Justice (Scotland) Bill[176], has introduced provisions to Parliament to place the already existing Appropriate Adult system on a statutory footing. However, the Bill does not identify where responsibility for ensuring the availability and adequate provision of suitability trained persons lies.

[176] See sections 33 and 34 of the Criminal Justice (Scotland) Bill

Concerns Raised to the Reference Group

15.17 During the Consultation, Police Scotland expressed concern that the current provisions do not go far enough in ensuring that the provision of an Appropriate Adult is guaranteed as it does not create a duty on a body or an organisation to lead, organise or fund the provision of Appropriate Adults. Instead, the Bill presumes that the provision of Appropriate Adults will continue in its current format of being provided on an informal basis by different organisations and funded, to differing degrees, by local authorities around the country. As a result the provision is patchy, and frequently unsatisfactory.

15.18 Similar concerns were raised by the Justice Committee during its Stage 1 consideration of the Bill. The Scottish Government in response[177] has given a commitment to the Committee to keep the situation under review.

15.19 Section 33(1)(c) of the Bill provides that a vulnerable suspect should have support where "…owing to mental disorder the person appears to the constable to be unable to understand sufficiently what is happening or to communicate effectively with the police". The inclusion of the phrase "owing to a mental disorder[178]" imposes on a police officer the responsibility of making a diagnosis that he is not qualified to make. As the Bill progresses, consideration should be given to whether that phrase serves any useful purpose, and whether the real issue is the inability of the person to understand or communicate at the time rather than the reason for that.

Conclusion

15.20 It is recommended that the Bill be amended to identify a body or organisation with responsibility for ensuring adequate provision of persons with appropriate skills or qualifications to provide support for vulnerable persons in custody. The attendance of an Appropriate Adult at a police interview is a vital safeguard for a vulnerable suspect.

FORENSIC SCIENCE AND OTHER EXPERT EVIDENCE

15.21 Although unreliable or discredited forensic science and other forms of expert evidence have caused or contributed to miscarriages of justice as explained in Chapter 4 above and in the Report of the Academic Expert Group, no particular safeguards to counter the risk of miscarriage in this context in future appear to be necessary. As has been observed earlier, the Lord Advocate has committed COPFS to always seeking supporting evidence. In addition the removal of the need for corroboration should not in any way affect the requirement that forensic science and other expert evidence must be demonstrably reliable. It has not been considered necessary, nor would it have been possible within the scope of this Review, to consider the practices of forensic science and other expert witnesses in detail.

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[177] Scottish Government's response to the Justice Committee's stage 1 report

[178] Mental disorder has the meaning given in section 328(1) of the Mental Health (Care and Treatment) (Scotland) Act 2004 and means "any mental illness, personality disorder, learning disability, however caused or manifested."

15.22 In response to the consultation document JUSTICE proposed that the rules for the admission of expert evidence should be "put on a statutory footing". However, JUSTICE, like the Reference Group, recognised that the High Court has recently addressed this question in Young v HM Advocate[179] and set out clear guidance for trial judges. It is accordingly not necessary for any recommendation to be made in relation to forensic science and other expert evidence.

[179] Young v HM Advocate (2014) 113

16. DRAFT PROVISIONS

16.1 The Terms of Reference include drafting legislation required to give effect to proposed changes. The Review has been very ably assisted by members of the Scottish Government's Parliamentary Counsel Office who have drafted provisions designed to give effect a number of the recommendations of the Review where legislation is required. It is instantly recognised that, while these are the result of careful consideration following upon the work of not only the Academic Expert Group but also the Reference Group, they have not been exposed to wider public comment. Any further debate may well result in some revision of the provisions. The draft provisions are set out below:

1 Corroboration of hearsay

(1) The [Criminal Justice Bill currently before the Scottish Parliament] is amended as follows.

(2) In section 57, in subsection (1)(b), for the words "58 and" there is substituted "57A to",

(3) After section 57 there is inserted—

"**57A Exception for hearsay**

(1) Despite section 57, evidence is insufficient in law for conviction if it is—

(a) hearsay, and

(b) uncorroborated.

(2) For the purpose of this section, evidence is not to be regarded as hearsay if it is contained in a statement—

(a) made by a witness before giving evidence in a trial, and

(b) adopted by the witness when giving evidence in the trial.

(3) For the avoidance of doubt, nothing in this section affects—

(a) the ability of hearsay evidence to corroborate other hearsay evidence,

(b) the operation of any rule of law in accordance with which evidence contained in a statement made by an accused person may in particular circumstances be held to be corroborated.".

2 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.".

3 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.

4 Reasons for verdict in summary cases

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

(2) After section 162 there is inserted—

"**162A Reasons for verdict**

(1) When delivering the court's finding at the end of a summary trial, the judge is to give the reasons for reaching the finding (including by explaining for each charge how the evidence relates to the finding).

(2) The reasons are to be stated in the record of proceedings in such terms as the judge directs.".

5 Reasons following examination of facts

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

(2) After section 55 there is inserted—

"**55A Reasons for determination under section 55**

(1) When delivering the court's determination under section 55(1), the court is to give the reasons for reaching the determination (including by explaining for each charge how the evidence relates to the determination).

(2) The reasons are to be stated in the record of proceedings in such terms as the court directs.".

6 Publication of prosecutorial test

(1) The Lord Advocate must make available to the public a statement setting out in general terms the matters about which a prosecutor requires to be satisfied in order to initiate, and continue with, criminal proceedings in respect of any offence.

(2) The Lord Advocate must—

(a) regularly review the statement, and

(b) consult publicly when reviewing it.

(3) The reference in subsection (1) to a prosecutor is to one within the Crown Office and Procurator Fiscal Service.

7 Codes of practice about investigative functions

(1) The Lord Advocate must issue a code of practice about each of the following—

(a) the questioning, and recording of questioning, of persons suspected of committing offences,

(b) the conduct of identification procedures involving such persons.

(2) The Lord Advocate—

(a) must keep a code of practice under review,

(b) may revise a code of practice.

(3) A code of practice is to apply to the functions exercisable by or on behalf of—

(a) the Police Service of Scotland,

(b) such other bodies as are specified in the code (that is, bodies responsible for reporting offences to the procurator fiscal).

(4) For the purposes of this section and sections 8 to 10, a code of practice—

(a) is a code required by subsection (1),

(b) includes a revised code allowed by subsection (2)(b).

8 Consultation on codes of practice

(1) Before issuing a code of practice, Lord Advocate must consult publicly on a draft of the code.

(2) When preparing a draft of a code of practice for public consultation, the Lord Advocate must consult—

(a) the Lord Justice General,

(b) the Faculty of Advocates,

(c) the Law Society of Scotland,

(d) the Scottish Police Authority,

(e) the Chief Constable of the Police Service of Scotland,

(f) the Scottish Human Rights Commission,

(g) the Commissioner for Children and Young People in Scotland,

(h) such other persons as the Lord Advocate considers appropriate.

9 Parliamentary laying of codes of practice

Whenever a code of practice is issued, the Lord Advocate must lay a copy of the code before the Scottish Parliament.

10 Legal status of codes of practice

(1) Where a court determines in criminal proceedings that evidence has been obtained in breach of a code of practice, the evidence is inadmissible in the proceedings unless the court is satisfied that admitting the evidence would not result in unfairness in the proceedings.

(2) Breach of a code of practice does not of itself give rise to grounds for any legal claim whatsoever.

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