

THE LAW SOCIETY OF SCOTLAND

NATIONAL UPDATE

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Access to a Lawyer in Scotland

The Law Society of Scotland welcomes the opportunity to contribute to the ongoing debate relating to convention rights and in particular the draft directive with regard to the right of access to a lawyer (Measure C).

Prior to 2010 the impact of the European Convention on Human Rights was significant in areas related to delay in the prosecution of cases and in the disclosure of material relating to the Crown case and exculpatory evidence.

Looking back it is perhaps difficult to believe that the consequence of even the most extreme undue delay in Scotland was in effect nothing and failure by the Crown to disclose material to the defence was regarded as being unheard of.

One of the complications of the significant changes introduced to the Scottish criminal justice system was that the High Court of Justiciary in Scotland and the United Kingdom Supreme Court had some difficulty in reaching a view on what the consequence of a breach of these obligations on the prosecuting authority would be. Initially, at least so far as delay was concerned there was a view that the case required to be stopped, more recently the UK Supreme Court has concluded that delay of itself is not a basis for stopping a case.

The Law Society of Scotland had taken the view that the opt in to Measure C which was supported by the Law Society of England and Wales should have been voted for by MPs. An opt in to the proposed directive would have answered two fundamentally important issues that are still giving cause for concern in the Scottish criminal justice system.

The first of these is when the right of access to legal advice actually commences. In a series of recent cases in the UK Supreme Court, the answer given to this question appears to depend on whether or not a suspect is actually in custody or in a position comparable to custody, the Supreme Court left open the question of whether evidence in any particular case might be objected to on the basis that legal advice had not been obtained but made it clear that in its view the right of access should be linked to deprivation of liberty. Obviously it would be preferable for the law to be clear on this point and in supporting the opt in to this directive the Law Society of Scotland had in mind that there would be greater clarity both for law enforcement professionals and for those who require to deal with cases as lawyers, be it prosecution, defence or indeed judges.

The second issue at present is the issue of waiver of right of access to a lawyer. It should be borne in mind that the Scottish criminal justice system for 30 years since the introduction of the Criminal Justice (Scotland) Act 1980 did not make provision for legal advice prior to police interview. The culture here is that requesting access to legal advice prior to interview is the exception and not the norm. That may change over time, but the procedures in place at the moment comprise the filling in and reading out of various documents which purport to satisfy the requirement of properly informed consent. There is not a whisper in that documentation of the consequence of waiving the right to a solicitor. The English legal system has much greater appreciation of the issues surrounding waiver of the right of access to a solicitor. In Scotland the current practice is not even to question why a suspect has decided to waive his rights. Such a straightforward addition to the current procedures would be welcome but appears to be unlikely to be forthcoming in the near future.

The rules surrounding the provision of legal advice to suspects are in their infancy in Scotland. The Law Society of Scotland has attempted to commence a debate within the profession about precisely what requires to be done and is permissible in the interview and surrounding advice context. Without a proper background in such procedures, the Law Society of Scotland is suggesting borrowing wholesale from the English legal system and it is fortunate that fairly clear and strong rules are in place in that neighbouring jurisdiction.

A final point that might be made is that the introduction of emergency legislation, the Criminal Procedure (Legal Assistance, Detention and Appeals) (Scotland) Act 2010 immediately following upon the judgement of the United Kingdom Supreme Court in the reference of *Cadder v HMA* [2010] UKSC43 in 2010 of the right to have legal advice has triggered significant consequences on the rest of the legal system. A judge of the High Court was commissioned by the Scottish Government to provide a detailed report within a very short space of time on the impact of advice which was convention compliant and in so doing Lord Carloway reviewed the law of evidence in Scotland. It may not be well known that Scotland has an absolute rule at present that no criminal conviction can follow in the absence of corroboration or evidence from an independent source.

In fairness that rule has been watered down to such an extent that it was giving rise to concerns that artificial distinctions were being made to bypass the requirement of corroboration.

Lord Carloway has recommended the abolition of the requirement for corroboration and the matter is at present with the Scottish Government for consideration. The law officers and in particular the Lord Advocate are very strongly in favour of that proposal and there is press briefing suggesting that such a change would have retrospective effect and is capable of affecting cases where the rule relating to access to a solicitor is not in any way involved.

Critics of the proposed reform point to the fact that Scotland has a rather unique jury system whereby only 8 out of 15 people require to be satisfied of guilt before a conviction can be brought in. It is not known whether criticism of this proposed reform will have any impact on government thinking and the knock-on effect is that at some point in the future an accused person may be tried on the evidence of only one witness without ever having been interviewed by the police in connection with an alleged crime that occurred prior to 2010.

From this it can be seen that the European Convention on Human Rights has had huge and will continue to have potentially greater consequences for the whole criminal justice system of Scotland and the rights of accused persons and suspects thereunder.

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