



THE LAW SOCIETY
of SCOTLAND
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Brief

Proposal for a Directive on the strengthening of certain aspects of the presumption of innocence and of the right to be present at trial in criminal proceedings

**The Law Society of Scotland's response
November 2014**

Introduction

The Law Society of Scotland aims to lead and support a successful and respected Scottish legal profession. Not only do we act in the interests of our solicitor members but we also have a clear responsibility to work in the public interest. That is why we actively engage and seek to assist in the legislative and public policy decision making processes.

Background

On 27 November 2013, the European Commission presented its proposal for a Directive on the strengthening of certain aspects of the presumption of innocence and of the right to be present at trial in criminal proceedings. The aim of the Directive is to lay down minimum rules concerning certain aspects of the right to be presumed innocent and the right to be present at trial.

This Directive is presented as part of a package of instruments to guarantee fair trial rights for all citizens in criminal proceedings and builds on previous measures adopted as part of the Roadmap for strengthening procedural rights of suspected or accused persons in criminal proceedings. .

Position of the Law Society of Scotland

The Law Society of Scotland (the Society) has examined the provisions of the proposed Directive and welcome the Directive's intentions, as set out in the Explanatory Memorandum. The presumption of innocence and the right to be present at trial are fundamental principles of a civilised justice system. We view this measure as essential for achieving the overall aim of strengthening procedural rights throughout the European Union

The presumption of innocence is a principle at the heart of the criminal justice system. This right is also enshrined in the European Convention on Human Rights (ECHR) and is enacted domestically in the Human Rights Act 1998. Article 6 of the ECHR provides that "everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law", with Article 6, paragraph 2 stating that "Everyone charged with a criminal offence shall be presumed innocent until proved guilty according to law".

While we consider the proposal to be necessary to guarantee the right to be presumed innocent throughout all EU Member States, the proposal only deals with certain aspects of the presumption of innocence.

Key issues

The main provisions in the Directive that are of concern to the Society are as follows:

Questioning under Compulsion

Recital 17 of the proposal relates to compulsion. The text states the following: "Any compulsion used to compel the suspect or accused person to provide information should be limited. To determine whether the compulsion did not violate these rights, the following should be taken into account, in the light of all circumstances of the case: the nature and degree of compulsion to obtain the evidence, the weight of the public interest in the investigation and punishment of the offence at issue, the existence of any relevant safeguards in the procedure and the use to which any material so obtained is put. However, the degree of compulsion imposed on suspects or accused persons with a view to compelling them to provide information relating to charges against them should not destroy

the very essence of their right not to incriminate one-self and their right to remain silent, even for reasons of security and public order".

As already stated by the CCBE, we are concerned with the wording of the recital, particular with regard to the following sentence: "Any compulsion used to compel the suspect or accused person to provide information should be limited". The implication is that compulsion can be legitimate in certain instances. This would not comply with the jurisprudence of the European Court of Human Rights where the Court has never allowed any compulsion in order to achieve a statement from a suspect or accused person. In terms of section 14(9) of the Criminal Procedure (Scotland) Act 1995, a detained person to be questioned by the police is under no obligation to answer any question other than name, address, date of birth, place of birth and nationality and the police must inform the suspect that he's under no such obligation, both on detaining him and on arriving at the police station or other premises.

It would be preferable to have an explicit prohibition on all evidence obtained by compulsion where that means the threat of physical/mental violence and would fall under the principle of the "fruit of the poisoned tree". In Scotland, however, even if a confession were to be obtained by compulsion, it would be necessary, under Scots law, for there to be evidence from another source in order to corroborate that confession.

Public references to guilt before conviction

The proposal places an obligation on Member States to ensure that "before a final conviction, public statements and official decisions from public authorities do not refer to the suspects or accused persons as if they were convicted". Member States are required to take appropriate measures in the event of a breach of this requirement. The CCBE in its position states that "It would be advisable and more effective to specify that the reference to

guilt before conviction applies to all Public Authorities in any circumstances (including interviews and communications through media, not affecting the freedom of the press), especially in Countries where, pending the trial, to give information to the public does not constitute a contempt to Court". The Society agrees with the approach of the CCBE.

Burden of proof and standard of proof required

Article 5 of the proposal provides an obligation on the Member States to ensure that the burden of proof is placed on the prosecution to establish the guilt of suspects or accused persons. In Scotland, the burden of proof is placed on the Crown to establish guilt beyond reasonable doubt.

In paragraph 2 of this Article, the Commission's proposal allows presumptions which shift the burden of proof to the suspects or accused persons. In order to rebut the presumption, the defence must adduce "enough evidence as to raise a reasonable doubt regarding the suspect or accused person's guilt." A reverse burden of proof exists for some offences in Scotland. For example, Section 57(1) of the Civic Government (Scotland) Act 1982 provides that "Any person who, without lawful authority to be there, is found in or on a building or other premises, whether enclosed or not, or in its curtilage or in a vehicle or vessel so that, in all the circumstances, it may reasonably be inferred that he intended to commit theft there shall be guilty of an offence". The burden is therefore placed on the accused to prove that he/she did not have the intent to commit an offence. A reverse burden of proof is also a mechanism used in Scotland for road traffic offences (e.g. lack of insurance) where it is routine for a case to be dealt with administratively rather than appear in court.

Admissibility of evidence

Provisions are made regarding the admissibility of evidence in paragraphs 4 of Articles 6 (Right not to incriminate oneself and not to cooperate) and 7 (Right to remain silent) of the proposal. These provisions state the following: "Any evidence obtained in breach of this Article shall not be admissible, unless the use of such evidence would not prejudice the overall fairness of the proceedings".

The wording of these provisions reflect the jurisprudence of the ECtHR. Concerns have been raised by the CCBE that this wording would permit too much discretionary interpretation by the national court which is contrary to the aim of the proposal which is to harmonise the practical procedural standard that applies in each Member State in order to have a fair trial. We consider that it will be difficult to assess the overall fairness of a proceeding before questioning a suspect or accused person.

Right to remain silent

Article 7 of the proposal provides for the right to remain silent, with Member States obliged to ensure that "suspects or accused persons have the right to remain silent when questioned, by the police or other law enforcement or judicial authorities, in relation to the offence that they are suspected or accused of having committed".

Paragraph 2 provides that Member States shall promptly inform the suspect or accused persons of their right to remain silent, and explain the content of this right and the consequences of renouncing or revoking it. We are of the opinion, however, that further specification is required. While the suspect will be informed of the right to remain silent when they are detained, there is no requirement for such a caution to be given or repeated at the commencement of the interview.

It is suggested, therefore to insert the following at the end of Article 7(2): "The suspect or accused person shall also be informed of this right immediately prior to the commencement of any interview".

Article 7(3) of the proposal provides that "Exercise of the right to remain silent shall not be used against a suspect or accused person at a later stage in the proceedings and shall not be considered as a corroboration of facts".

This article is compatible with national law in Scotland and we refer to our comments above.

Right to be present at one's trial (Article 8)

Article 8 of the Proposal states that "Member states shall ensure that suspects have the right to be present at their trial but Member States may provide for a possibility under which the trial court may decide on the guilt in the absence [...] of the accused provided that the accused was notified in due time [...] and it was unequivocally established that he or she was aware of the scheduled trial" and is aware that judgment may be passed in their absence or that the accused person has appointed legal counsel to appear on their behalf in their absence and was so represented.

Section 150A of the Criminal Procedure (Scotland) Act 1995 makes it clear that the court is able to hear a case in the absence of an accused if "the citation of the accused has been effected or the accused has received other imitation of the diet and that it is in the interests of justice to proceed". Further, if there is a solicitor to act in the accused's interests then that solicitor may act in place of the accused however if there is no solicitor then the case may proceed if it is in the interests of justice to do so. Section 150A (8) also makes it clear that in certain cases he will not be allowed to represent himself (sexual offence/child witness/vulnerable adult). If the court proceeds without the presence of an accused person,

that person will not in his absence be subject to a sentence of imprisonment or detention(section 150A(10)).

As provided under Section 92 of the Criminal Procedure (Scotland) Act 1995 unless the specific circumstances mentioned above apply or unless the accused behaves in such a manner that he must be removed from the court then "no part of a trial shall take place without the presence of the accused" .

Taking national law into account, the Society is of the view that further detail is needed in the Commission's proposal on what the appropriate circumstances would be for a trial to take place without the presence of the accused or his solicitor in the interests of justice. We would suggest that this is limited to minor summary offences only such as motoring offences.

Right to a retrial (Article 9)

Article 9 provides that Member States must ensure that retrials are available where the suspects or accused persons were not present at the trial and the conditions of Article 8(2) and (3) were not met (referred to above). Therefore the right to a retrial is limited to the specific circumstances outlined.

In general, in Scotland, the prosecutor has limited means to request a retrial. Section 2 of the Double Jeopardy (Scotland) Act 2011 provides exceptions to the rule against double jeopardy. A retrial might be granted if (a) the acquittal of an original trial was tainted due to the commission of an offence against the course of justice during the original trial (e.g. giving of false evidence, interference with members of the jury); (b) an admission was made or became known after the acquittal of the original trial; or (c) new evidence arises that the accused committed the original offence or a relevant offence.

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