



RESPONSE OF THE LAW REFORM COMMITTEE OF THE BAR COUNCIL AND THE CRIMINAL BAR ASSOCIATION TO THE CONSULTATION ON REVISIONS TO THE PACE 1984 CODE OF PRACTICE

1 The Law Reform Committee of the Bar Council and the Criminal Bar Association welcome the opportunity to respond to the Home Office consultation on revisions to the Police and Criminal Evidence Act 1984 Code of Practice.

Code A

2 We have no observations to make save that what should be paragraph 2.14B is numbered 2.15A

Code B

3 We have no observations to make.

Code D

D3.0

4 The second sentence of this new paragraph appears to assume that the suspect is the guilty party and that the issue is whether the eyewitness is able to select him or her. It also suggests that the purpose of a procedure is limited to obtaining evidence against a suspect whereas, the purpose is to assist in the investigation of the suspected offences in accordance with the investigators' duties under the CPIA Code and, as the case law has repeatedly stressed, it is also for the benefit of a suspect in seeking to establish his or her innocence.

5 For reasons explained below, this part is not and should not be disappplied in certain recognition cases. Accordingly, the distinction which the final sentence purports to make is not a valid one.

D1.2A, D3.28, and D3.34

6 We have significant concerns about the proposed amendments to D1.2A, D3.28, and D3.34. It appears to embrace 2 different situations:

- i. The showing of images (e.g. CCTV) in order to see whether the viewer recognizes and can identify an offender or suspected offender: 3.34(a), and
- ii. Seeing an individual in person at any location: 3.34(b).

In respect of both it is presupposed that the witness claims to know the person well.

7 We deal with 3.34 and the recording provisions of 3.35 and 3.36 first. It is understood that these amendments are designed to deal with the problems identified in *R v Smith*.¹ In that case the Court of Appeal was concerned with the lack of any contemporaneous record of the process by which a police officer made an identification and, accordingly, the lack of means by which the evidence could be tested (paragraphs 63-73). However, it is important to note that the complaint in that case was limited to the lack of record. No point was made regarding the arrangements for the procedure itself, hence the Court was not asked to consider that aspect of this type of identification.

8 In respect of other identification procedures, for example video identification and identification by photographs, Code D governs both:

- i. The conduct of the procedure itself, and
- ii. The recording of the procedure.

9 We consider proposed amendments to the present code address the second aspect of the lacuna, not the first. In our submission, the arrangements for the procedure are at least as, and probably more, important as the recording of it. In fact the proposed deletion of the second part of D3.28 removes what guidance as to procedural safeguards that currently exist. At present, for the showing of films or photographs, D3.28 requires the procedure to be carried out 'on an individual basis to avoid any possibility of collusion and, as far as possible, the showing shall follow the principles for video identification ...or identification by photographs...'

¹ [2009] 1 Cr App R 521, [2008] EWCA Crim 1342

10 The effect of the abandonment of this part of D3.28 is that there would be no provision at all for safeguards against mistaken identification which, in accordance with D1.2, are necessary. These include:

- i. Where a person is already a suspect, no disclosure to witnesses as to the identity of that person before the procedure.²
- ii. The avoidance of prompting.
- iii. Images to be shown on an individual basis to avoid the possibility of collusion or other contamination between witnesses.³
- iv. No communication between witnesses until the procedures are complete.
- v. No-one involved in investigation to participate in the procedure.

11 We recognize that these could only be guidelines. There will be cases in which the formality of a controlled and sanitized procedure may not be possible, for example where police officers are shown CCTV in the immediate aftermath of an incident while the CCTV is still in situ, when an identification takes place after arrest or charge so that the identity of the suspect is common knowledge, or where it may not be practicable for a large number of officers to view individually. Nevertheless, where achievable, these safeguards are important to promote as fair a procedure as possible. Adopting them is likely to render arguments concerning exclusion, exclusion itself, criticism by the defence and possible warnings to the jury by the judge less likely. However, as already stated, the amendments, far from reinforcing procedural safeguards, appear to be abandoning them.

12 D3.34(c) suggests that the record should be made where the witness claims to recognize an individual. We fail to understand how a claim of recognition can be made before the procedure has taken place. If it is the aim of the provision that the recording required by D3.35 is to be of application only when a positive recognition is made we suggest that the record may suffer possible inaccuracy by an ex post facto recording. More importantly, we submit that the record required by D3.35 should not be limited to the situation where the witness purports to recognize the defendant. A record should be made regardless of the outcome. In some circumstances, a possible recognition falling short of full identification or a failure to recognize may be of importance to either party at a later stage. Indeed *R v Smith* specifically refers to the need to record a non-identification or words of doubt expressed by the viewer (paragraph 68).

² See for example *In R v Swinscoe* [2005] EWCA Crim 916 where the police officer was told who the suspect was. The Court of Appeal upheld the judge's ruling that the evidence was properly admitted but remarked that it would have been more appropriate for the officer simply to have been asked whether or not he recognized the individual.

³ For example *R v Finley* [1993] Crim L R 50, a case concerning showing of photographs, in which 2 people were shown photographs at the same time and one must have overheard the other identify the defendant.

13 Both proposed new paragraphs 1.2A and 3.34(c) indicate that this part of the Code is concerned with recognition of someone who is 'well known' to the witness. We submit that 'known' is sufficient. It is the quality of the recognition that is important and not necessarily the extent of their acquaintance. Of course the latter may have a bearing on the former, but not necessarily. For example, a police officer may be able to state that he recognizes the defendant after being with him during the course of a short interview. He may make the recognition based in part upon a particular feature such as gait. In neither case could it be said that the defendant was well known.

D3.3A, D3.34 (b) and D3AA

14 With regard to D3.3A and D3.34 (b), we are unclear as to the situation envisaged by these provisions. It may be that it is intended to cover the type of identification carried out in *R v Popat*⁴ where the victim was taken to a place where it was believed that the offender might be observed, though as noted above, the phrase 'well known' would be inappropriate. If it is intended to cover the situation where a witness possesses some familiarity with a person believed to have committed an offence in respect of whom the police have insufficient information themselves to identify the suspect, it seems to us that the general principles of street identification should apply. The real difficulty is that, whether by design or not, D3AA would appear to suggest that it also covers the commonplace situation where a witness has identified a person s/he claims to know well and where the suspect counterclaims the contrary, thus the purpose of the exercise being to test whether the witness does indeed recognize the suspect. This situation is classically one where a video identification procedure is required under D3.12 to test the witness's ability to recognize. We therefore consider that D3AA is misleading and contradicts D3.12.

D3.35

15 As to the recording of the circumstances and conditions of the procedure under D3.35, we suggest the addition of the following requirements: A record of

- i. Whether the witness knew or was given information concerning the name / identity of any suspect.
- ii. What the witness has been told before the viewing about the offence, the person(s) depicted in the images/ offender and by whom.
- iii. Whether the viewing was alone or with others and if with others the reason for it.
- iv. The words of identification.

D3.2 (d)

⁴ [1998] 2 Cr App R 208.

16 We agree that the final sentence of D3.2 (d) should be deleted as it is unnecessary and potentially confusing. However we consider that the final part of the previous sentence 'for an other witnesses in relation to that individual' should be retained as it correctly states and emphasises the position under D3.12 in respect of a known witness.

D3.12

17 Finally, we are concerned about the drafting of the new first bullet point under D3.12, as an example of a procedure serving no useful purpose. We understand and agree with its intent. However, the provision assumes that in respect of a suspect who has admitted presence s/he will also have given an account of what took place. The second by no means follows from the first. There will be countless cases in which a defendant admits presence but gives no account at all. We therefore suggest it be altered to, 'Where the suspect admits presence and gives an account of what took place and the eyewitness does not see anything which contradicts that account.' We are not clear as to why the adjective 'readily' is necessary to describe the admission. We think that it is not, and may lead to confusion and unwanted argument over the application of the provision.

Conclusion

18 The Law Reform Committee and the Criminal Bar Association recognize the need for a substantial modification to Code D to deal with the increasingly common use of CCTV recognition. However, we do not think that the current amendments remedy the lacuna. In some respects the amendments are unclear and will lead to confusion and, far from providing for and reinforcing procedural safeguards for the conduct of such procedures, they actually abandon those that already exist. In our view the procedure for viewing of CCTV ought properly to be contained within a new separate Annex which both sets out the arrangements and appropriate safeguards for the procedure that should apply, where practicable, and provisions for the recording of the procedure.

On behalf of the LRC and CBA
Paul Bogan

2 November 2010