Briefing Paper on the Convention-compatibility of new pre-trial defence disclosure regime

Lewis Kennedy, Advocate.

Defence Statements under section 70A of the Criminal Procedure (Scotland) Act 1995:

Introduction:

1. Defence statements are now a statutory requirement in respect of solemn cases commenced after 6 June 2011[1], under section 70A in the Criminal Procedure (Scotland) Act 1995 (as inserted by section 124 of the Criminal Justice and Licensing (Scotland) Act 2010).

2. It is a matter of some concern that these provisions constitute an erosion of the common law adversarial system. In recent years, there has been a perceptible movement away from the traditional adversarial model towards a more inquisitorial form of trial – with the judicial micro-management of cases dressed up with the antiseptic label of 'case management'. A culture has emerged subordinating procedure to substance. With this new regime, there is an increased risk that the judge might enter the arena too enthusiastically, acting as an advocate and second prosecutor – such that the impartial administration of justice might appear to be prejudiced. [2] [3]

3. In England, the correlating legislation could at least be said to have been directed towards assisting in the operation of a more sophisticated and regulated disclosure regime. Here, the equivalent legislation has no stated purpose. Certainly, there is no indication as to the rationale behind this

[1] By reference to the date of the first appearance on Petition

[2] See *A 'just' outcome: losing sight of the purpose of criminal procedure*, James Richardson, Q.C.

This is available at:

http://www.acclawyers.org/wp-content/uploads/2011/05/6-Richardson-A-Just-Outcome-2011-JCCL-105.pdf

[3] See *R v Malcolm* [2011] EWCA Crim 2069

legislation in the Explanatory Notes in the Criminal Justice and Licensing (Scotland) Act 2010.

4. This paper considers whether the requirement for an accused person to lodge a 'defence statement' is in breach of general fair hearing requirements (as guaranteed by Article 6(1), ECHR); the Convention right to 'equality of arms', in the regulation of respective disclosure requirements for the Crown and defence (under Article 6(1) and Article 6(3)(b)); the Convention right to a presumption of innocence, the right to silence and the privilege against self-incrimination (in terms of Article 6(2)); and the right to legal professional privilege in the conduct of an accused's defence at trial (under Article 6(3)(c)).

5. If so, it could be argued that these newly enacted provisions are *ultra vires* – in so far that this legislation has exceeded the legislative competence of the Scottish Parliament – thereby precipitating a 'Devolution Issue' Minute.

The information required:

6. Section 70A(9) provides as follows:-

'(9) In this section, "defence statement" means a statement setting out—

a. the nature of the accused's defence, including any particular defences on which the accused intends to rely,

b. any matters of fact on which the accused takes issue with the prosecution and the reason for doing so,

c. particulars of the matters of fact on which the accused intends to rely for the purposes of the accused's defence,

d. any point of law which the accused wishes to take and any authority on which the accused intends to rely for that purpose,

e. by reference to the accused's defence, the nature of any information that the accused requires the prosecutor to disclose, and

f. the reasons why the accused considers that disclosure by the prosecutor of any such information is necessary.'

7. It can be seen that there is an obligation upon the defence to include a considerable degree of information – in particular, any matters of fact

with which the accused takes issue in the prosecution case, and his reasons for doing so (paragraph (b)); and particulars of the matters of fact on which the accused intends to rely for the purposes of his defence (paragraph (c)).

8. Indeed, the defence must give notice of any issues, which may be in dispute – implying that the defence must subsequently obtain leave of the Court to argue issues, which have not previously been identified in the defence statement.

9. Depending on what is said in the defence statement, further disclosure of prosecution material, which is relevant to the stated defence, may be triggered.

10. The relevant form is prescribed by the Act of Adjournal (Criminal Procedure Rules Amendment No. 4) (Disclosure) 2011, which provides (7A.2.) that the 'defence statement' lodged under section 70A shall be in Form 7A.2-A. The form requires to be served upon the Crown and any co-accused.

11. The time limit for compliance is extremely short – the form must be lodged at least 14 days before the First Diet in Sheriff and Jury proceedings; and the Preliminary Hearing in High Court proceedings. [4]

12. Unsurprisingly, the provisions do not impose any corresponding obligation upon the Crown. It is not as if the prosecution is required to supply a 'case statement' – or if the Court has been empowered with a discretion to order production of a case statement' by the Crown. [5]

Sanctions for non-compliance:

13. On the basis of the English experience, it would appear that it is not open to the defence lawyer to advise his client not to file a 'defence statement'. [6]

[4] Section 70A(2)

[5] *R v Tibbs* [2000] 2 Cr. App. R. 309

[6] In *R v Essa* [2009] 5 Archbold News 2 CA, unreported, January 14, 2009, it was held that no lawyer should properly advise his client not to give a 'defence statement'.

In *R v G.R.* [2010] EWCA Crim 1928, unreported, July 28, 2010, it was held that it was not open to a lawyer to advise his client to disobey the statutory obligation to file a 'defence statement'.

14. However, though the statutory obligation is mandatory, there do not appear to be any identified sanctions for non-compliance in terms of the Scottish legislative scheme.

15. Nonetheless, the very real risk is that an accused might be left open to cross-examination, and adverse comment from the Crown; a co-accused's lawyer; and the trial Sheriff. [7]

16. It is not immediately apparent from the wording of the Scottish statute that the Court might draw adverse inferences from non-compliance – but equally, this prospect is not expressly excluded. It would appear that on the basis of the relevant English interpretative case law, whether or not adverse comment is permitted is a matter for the Court's discretion. [8]

17. Failure to comply could even be regarded as an obstruction of justice and/or a Contempt of Court. [9]

18. Meanwhile, an accused person could conceivably be prosecuted for making a false exculpatory 'defence statement'. As a condition of defending himself the accused risks a perjury prosecution.

Also, in *R v Rochford* [2010] it was held that the obligation to file a 'defence statement' is a statutory obligation upon the defendant and it is not open to a lawyer to advise his client to disobey the statutory obligation (paragraphs [22] and [25]).

However, if the defendant was going to make no positive case at all and not raise the issue of his possible location elsewhere, and if he was simply going to sit tight and ensure that the Crown proved its case, then, there would be no failure to comply with section 6A (of the Criminal Procedure and Investigations Act 1996 – the English legislative counterpart) (see paragraphs [16] and [24]). The judge was entitled to ask, insistently and trenchantly. He was not, however, entitled to require Counsel to reveal his instructions, if no positive case was going to be made (see paragraph [17]).

[7] *R v Tibbs* [2000]: ' ... in our view section 11 (of the Criminal Procedure and Investigations Act 1996 – the English legislative counterpart) does not disallow or require leave for cross-examination of an accused on differences between his defence at trial and his defence statement. The section precludes comment or invitation to the jury to draw an inference from the differences unless the court gives leave.'

[8] *Ibid*

[9] Though see *R v Rochford* [2010] EWCA Crim 1928, at paragraph [18], where it was held that it was not open to the Court to add an extra-statutory sanction of punishment for Contempt of Court.

19. It is a matter of particular concern that the defence lawyer even could be found in Contempt of Court if he has failed, without reasonable excuse, to comply with this mandatory requirement.

20. The 'errant' or non-compliant lawyer could also be the subject of a disciplinary complaint to his regulatory body. Or to the Scottish Legal Aid Board (with the implied threat of de-registration and an ensuing loss of livelihood). [10] It is not know whether it is seriously being suggested that the Court is not just to try a case, but is to discipline parties for the conduct of their cases.

Possible aggravating factor in sentence:

21. Perhaps more practically, it is likely that the failure of the accused (or of his lawyer acting on his instructions) to comply would be regarded as an aggravating factor in sentencing in the event of conviction.

22. Notifying all elements of the offence as being in dispute would almost certainly be held against the accused. As would giving notice that all issues are in dispute, without identifying the particular issues in dispute. Or a failure to notify adequately the issues in dispute; or even by maintaining that some issues remains in dispute. Even the existence of a single outstanding disputed issue might subsequently test the patience of certain sentencers.

Article 6(1), ECHR:
Right to a fair trial:

23. It could be submitted that the requirement to lodge a defence statement is in breach of fair hearing requirements.

24. Hitherto, as a general principle, Defence Counsel who knew of facts which would assist his adversaries – the Crown and, in certain circumstances, the co-accused – was not under any positive duty to inform his adversaries, or the Court, of this, to the prejudice of his own client. He had no obligation to assist the prosecution, or other parties, or the Court, in ascertaining the truth, standing that it was, after all,

[10] Then again, it is not as if there is any provision in the current legal aid regulations allowing for Counsel to be paid a separate fee for this work. It is apprehended that the dubious principle of 'subsumption' will be invoked.

adversarial proceedings, which were involved. (This is not quite the same thing as deceiving the Court.) Instead, Counsel's duty to his client prevailed over his duty to the Court in this respect. [11]

25. Indeed, any such professional indiscretion might well have been deemed to amount to defective representation, or even professional misconduct.

26. It can be submitted that the defence lawyer should not have to provide a statement of the accused's position – particularly at the (pre-trial) stage of the case – since information of this nature is likely to be confidential; and to disclose it gives rise to a breach of legal professional privilege (see below). [12]

Burden of proof:

27. It still (just) remains the fundamental right of an accused to put the Crown case to the test.

28. This is a fundamental right in common law jurisprudence. Criminal trials in common law systems are supposed to be adversarial. This follows from a jurisprudential position, reflecting the accumulated wisdom of centuries, that the prosecution should bear the burden of proving an allegation of crime; that nobody should be forced to condemn himself out of his own mouth; and that the best way to test the truth of a proposition is by exposing it to an adversarial process in which the evidence to support it is subjected to cross-examination.

29. A system of pre-trial disclosure by the accused, which is supervised by the judge with sanctions in the form of adverse inferences for non-compliance is, of course, completely alien to an adversarial process where the accuser comes to court and makes his case, without help from the

[11] Thus, for example, an advocate would have no duty to bring a medical report in respect of his client to the court's or the other side's attention, which is adverse to his case. See *R v R* [1994] The Times, 2 February (CA) – privilege in blood sample taken from accused for DNA testing

[12] In the words of Lord Denning LJ in in *Tombling v Universal Bulb Co* [1951] 2 TLR 289 at 291:

> 'The duty of counsel to his client in a civil case – or in defending an accused person – is to make every honest endeavour to succeed. He must not, of course, knowingly mislead the court, either on the facts or on the law, but, short of that, he may put such matters in evidence or omit such others as in his discretion he thinks will be most to the advantage of his client.'

Court or the accused, with the accused having an opportunity to answer his case.

30. Indeed, the traditional approach in Scottish criminal procedure has been that a suspect was under no 'duty' to assist the police (or the prosecution); and committed no offence in refusing to do so. The prevailing principle has been that it is for the prosecution to prove guilt, unaided by the accused.

31. Generally this has meant that the defence has not had to divulge any details of the case on which they intend to rely; merely being reactive to the prosecution case, as and when it was presented.

32. Properly, it should not be for the accused to say what can or cannot be proved. It is for the Crown to identify what has to be proved and to set out to prove it – and for the Court (and Jury) to say whether the various elements that have to be proved have indeed been proved.

33. What if the accused denies identity? Does this mean that the prosecution are spared the necessity of proving that the offence actually occurred? If the accused was not there, how is he to know whether the offence took place as alleged? How can the accused make an admission about something, which is out with his immediate knowledge? The point is that there is a fundamental difference between a matter, which is not admitted (that any offence took place) – and a matter that is in dispute (that the accused was responsible for the alleged offence).

34. As such, there should be no requirement for an accused to advance a positive defence case and he should simply be entitled to call on the Crown 'to prove it' – that the prosecution is required to prove all elements of the offence – without him being obliged to assist the prosecution by volunteering information. [This is very much the equivalent of giving a 'no comment' interview.] [13] [14]

---

[13] See *R v Rochford* [2010] at paragraphs [16] and [17]; which was approved in *R v Malcolm* [2011] EWCA Crim 2069 at paragraph [74]

See *R v G.R.* [2010] – section 6A (of the Criminal Procedure and Investigations Act 1996 – the English counterpart) does not require a defendant to incriminate himself, merely to disclose what is to happen at trial. And where he intends to put forward no positive case as such, and not to take issue with any matters of fact advanced by the prosecution, the 'defence statement' must say that he does not admit the offence (or the relevant part of it); that he calls upon the prosecution to prove it; and that he advances no positive case. However, if the possibility is to be raised distinctly before the jury that the prosecution might be wrong as to a factual matter, that must be set out in the 'defence statement'.

Article 6(2), ECHR:
Right to silence and presumption of innocence:

35. It can be submitted that the requirement to lodge a defence statement is also in breach of the presumption of innocence, the accused's right to silence and privilege against self-incrimination, in terms of Article 6(2), ECHR. [15]

36. The requirement that the defence discloses its case to the prosecution undermines the whole notion of innocent until proven guilty and requires the defence to collaborate with the prosecution. This shifts the balance of power toward the prosecution.

37. The right to silence is a right to literal and continuous silence, prior to trial, and at trial. It is not merely about the right not to answer questions in interview; and not to give evidence at trial. Requiring of an accused person any form of statement prior to trial, or at trial, whether from his own lips, or through the medium of his lawyer, is an invasion of that right.

38. Indeed, there remains a right to silence to the extent that there even continues to be a post-conviction right to silence – for there might well be circumstances in which a convicted accused wishes to remain suitably circumspect at the sentencing phase – and on legal advice. [16]

---

[14] Megarry J.'s *dictum* in *John v Rees* [1970] Ch. 345 (High Court (Chancery Division)) constitutes a salutary reminder:

> 'As everybody who has anything to do with the law well knows, the path of the law is strewn with examples of open and shut cases, which, somehow, were not; of unanswerable charges which, in the event, were completely answered; of inexplicable conduct which was fully explained; of fixed and unalterable determinations that, by discussion, suffered a change.'

[15] *Cadder v HM Advocate*, 2010 UKSC 43; *Ambrose, G & M*, 2011 UKSC 43; *Murray v UK* (1996) 22 E.H.R.R. 29; *Saunders v UK* (1996) 23 E.H.R.R. 313 ; *Condron v UK* 2 May 2000, Application No. 35718/97; *Stott v Brown*, 2001 S.C.C.R. 62

[16] In the United States, there is recognition of a 'post-conviction right to silence' in certain circumstances – in so far that a convicted defendant might still be protected if their testimony might result in greater punishment still. See *State v. Tinkham*, 74 Wn. App. 102, 108, 871 P.2d 1127 (1994); *State v. Strauss*, 93 Wn. App. 691 (1999), where the court erred by using silence as partial basis to determine non-amenability to sexual deviancy treatment as supporting exceptional sentence.

Evidential status of 'defence statement':

39. The 'defence statement' effectively amounts to a signed proof of evidence – equating to a judicial admission.

40. There are potentially adverse consequences arising from an inaccurate or inadequate statement. There is a very real risk that an accused is needlessly boxed into what the Crown (or any other (potential) adversary) might regard as a prior inconsistent statement of his position.

41. The Crown, and a co-accused's lawyer, could cross-examine an accused, to his detriment, on any differences between the 'defence statement' (and any repeat 'defence statements') and his evidence at trial.

42. The prosecutor could tell the jury to draw adverse inferences from any differences between the accused's defence at trial and his 'defence statement', (presumably) after first having obtained the leave of the Court. [17]

43. Meanwhile, a co-accused's lawyer could tell the jury to draw adverse inferences from any differences between the accused's defence at trial and his 'defence statement', seemingly without first requiring to seek the leave of the Court.

44. Much could be made of what might be perceived to be gaps in the evidence in an overly concise and economical statement of an accused's position.

45. Further, this statutory imposition jeopardises the possibility of any subsequent plea adjustment by an accused – since he could be exposed to a further allegation of an offence against the course of justice), if he were to depart in any way from his original position, as ventilated in the 'defence statement'.

46. This new requirement simply makes no allowance for the occasionally fraught psychology of criminal defence litigation – where a defence solicitor has to gradually tease out an accused's explanation. The process of taking a client's statement of his position can be a progressive and

[17] See *R v Tibbs* [2000]

incremental one. A complex dynamic can also be involved in a multi-accused situation.

Privilege against self-incrimination:

47. The accused might not wish to make any admissions pre-trial – and for good reasons – which he should not be required to elaborate upon.

48. The accused, whose truthful answers might tend to incriminate himself faces a 'cruel trilemma': if he refuses to answer, he can be imprisoned for Contempt of Court; if he answers truthfully, he can facilitate his conviction of the substantive crime; and if he answers falsely, he can also be prosecuted and convicted of perjury. [18] This would effectively undercut the 'double jeopardy' guarantee (or what little is left of it).

49. It might be suggested that the accused is not being compelled to say anything incriminating. However, that approach is entirely disingenuous – in so far that compelling an accused person to identify that which is in dispute, inevitably and impliedly involves forcing him to admit that which is not in dispute. What of the accused who does not 'dispute' anything, but who does not admit anything, and who seeks merely to put the prosecution to proof? What is he to say in his defence statement? 'I dispute that I was the person who murdered the deceased' because he has no right to mislead the court. So he will be reduced to saying: 'I dispute that the prosecution have the evidence to prove that I am guilty of the murder with which I am charged.' Every judge will know instantly what such a statement means. And it will only take a jury a split-second to work out its implications.

50. The right to silence, the privilege against self-incrimination, and the burden of proof lying with the prosecution, are compromised by the fact that the Crown, co-accused and the Court might be entitled to draw adverse inferences from the failure to provide, or the lateness, of the defence statement.

51. Of course, the defence is already required to provide notice of any recognised special defences – and are perfectly content to do so, if

[18] See *Is there a Right to Remain Silent?* Alan M. Dershowitz, 2008, at page 166. The difference historically in continental systems has been that while the accused had no right to refuse to answer incriminating questions, if he answered falsely he did not expose himself to a further criminal prosecution. He must answer, but he is not expected to answer truthfully.

applicable. However, it can be submitted that special defences are in an entirely different category from 'ordinary' or conventional defences, because the Crown has, historically, been entitled to fair notice of special defences. [19] (That is precisely why they are called 'special' defences.) It is not as if the Crown has hitherto been entitled to notice of 'non-special' defences. [20]

52. It is far from desirable that defence lawyers should not be required to disclose the terms of any 'ordinary' defence in a 'defence statement', and, by that, reveal their whole trial strategy and tactics.

53. For perfectly proper tactical reasons, the defence might be reluctant to alert the Crown to a dispute about an essential Crown fact, which he believes the Crown, cannot prove. It is remarkable that in an adversarial system that the accused should be required to point out the defects in the prosecution case. Why exactly should the prosecution expect the failings in their preparation to be pointed out to them by the defence?

54. These new provisions put the accused, who wishes to put the prosecution to the proof, in a particularly invidious position. The imposition of an obligation on the accused to explain why he is not guilty immediately eases the burden on the Crown. They will inevitably seek admissions of fact in relation to elements of the offence, which have not been flagged up as being in issue, thus sparing the Crown the necessity of obtaining evidence of matters that they might have difficulty proving, if required to do so.

---

[19] See *Lambie v HM Advocate*, 1973 J.C. 53, *per* Lord Justice General Emslie:

> 'The only purpose of the special defence is to give fair notice to the Crown ... '

Also, *HM Advocate v Hayes*, 1973 S.L.T. 202, *per* Lord Cameron:

> 'The purpose of a special defence in Scots law is to give to the prosecution proper notice of a particular line of defence which the defence of an accused person may take.'

[20] In *Williamson v HM Advocate*, 1980 J.C. 22, a special defence was lodged, but later withdrawn prior to the empanelling of the jury. It was held that the Crown was entitled to examine on the circumstances of the withdrawal of the special defence.

It is submitted that it is one thing to cross-examine on a defence, which is different from that set out in the notice of special defence, but quite another to cross-examine on inconsistencies in respect of what is at least a consistently stated special defence, as documented in different 'defence statements'.

55. In particular, the defence lawyer might not wish to disclose certain facts to his co-accused, which are to be relied upon in support of a possible 'Section 78' Notice, if deemed applicable. This is particularly so in what is a potentially 'cut-throat' defence situation – where an accused is contemplating formal incrimination of his co-accused. The co-accused's lawyer will apply rigorous forensic scrutiny to the accused's defence statement – making great play, not only about what is there, but what is not.

56. The co-accused's lawyer is not constrained from attacking any invocation of the right to silence by the accused; and he might invite the jury to draw adverse inferences from a 'defence statement' of the accused, which, in contrast, is couched in more minimalist terms. This could only be explained away as a difference in stylistic presentation up to a point.

57. A co-accused could always file a more detailed 'defence statement' than that of the accused at the mid-trial stage, and exploit any such discrepancy to his advantage – and to the obvious prejudice of the accused.

58. It might well be that there would have to be a separation of trials in such circumstances.

Disclosure and principle of 'equality of arms':
Article 6(1) and Article 6(3)(b), ECHR:

59. Invariably, full disclosure will not have been made by the Crown by the time an accused is required to lodge his 'defence statement'. The Crown might be expected to serve numerous (late) 'Section 67' Notices, up until the morning of trial.

60. It could be submitted that the absence of any correlating obligation on the Crown is hardly consistent with the Convention principle of 'equality of arms', in terms of Article 6(1), ECHR (which is very much central to the Convention's conception of a just and fair criminal process).

61. It does rather seem that the defence is expected to make full disclosure of its case – in the form of a full judicial admission – before the Crown has even made full disclosure of its case.

62. It is not immediately apparent why any distinction should be made between primary and secondary disclosure (which is supposed to be made

on the back of the defence statement). And if the defence wants disclosure of something from the Crown – or even third party disclosure – it hitherto had to ask the Crown, as a necessary preliminary to lodging a Petition for Commission and Diligence. Invariably, this would be a matter of averment as such in the Petition.

63. Properly, Counsel cannot, and should not draft a 'defence statement' without adequate instructions from the lay client. [21] Counsel should first consult with the client, and should never prepare such a document simply on the basis of papers.

64. The difficulty is that the accused might not be in a position to provide complete and adequate instructions, until such time as he has had full and proper disclosure of the Crown case against him.

65. It may be a somewhat old-fashioned or quaint point of view, but an accused person should be perfectly entitled to wait until such time as there has been full disclosure of the Crown case against him, before he is obliged to provide a full statement of his position to his legal representatives – though I doubt if there will be much judicial sympathy for this position.

66. This new mandatory requirement, involving as it does, short time limits for compliance – by which point it will have been extremely unlikely that the Crown will have provided full disclosure of its case – could conceivably result in a breach of an accused person's Convention right to adequate time and the facilities for the preparation of his defence – if the Crown and Court are insistent that a 'defence statement' must be lodged, while the Crown is yet to fully disclose its case (in terms of Article 6(3)(b), ECHR).

67. It is not as if it is being suggested that the Crown could be prohibited from introducing further evidence by way of 'Section 67' Notice, any time after the defence has lodged and intimated its 'defence statement'.

---

[21] See the Guidance, which has been prepared by the Professional Practice Committee of the English Bar Council.

This is available at:

http://www.barcouncil.org.uk/guidance/failuretodraftdefencestatementsandskeletonarguments/

http://www.barstandardsboard.org.uk/standardsandguidance/codeguidance/thepreparationofdefencecasestatements/

68. The requirement to file a defence statement does rather subvert expectations as to disclosure – in so far that the accused now has to explain precisely why he requires disclosure. It might have been thought that disclosure was the unassailable (Convention) right of an accused – and it is not immediately apparent why the Crown should first require sight of a focused defence statement, before it considers that its (continuing) obligation or duty of disclosure has necessarily been triggered. Surely the Crown should not be entitled to remain passive, and only reactive, until such time as prodded or provoked by the defence?

Article 6(3)(c), ECHR:
Legal Professional Privilege:

69. This requirement also compromises legal professional privilege, thereby subverting an accused's Convention right to legal representation (in terms of Article 6(1) and Article 6(3)(c), ECHR).

70. It should be trite to say it but communications between a client and his lawyer should be regarded as privileged. [22] Legal professional privilege protects communications between the lay client and the solicitor for the purpose of obtaining or giving legal advice.

71. Certainly, the implied threat of such sanctions as Contempt findings, or disciplinary complaints, will intimidate legal representatives; undermine legal professional privilege; create distrust between bench and bar; imperil the confidence that an accused person should have in his legal representative; create conflicts of interest; and thus potentially give rise to 'satellite litigation'.

72. The difficulty will be one of uncertainty as to whether the abuse of the system has been the fault of the accused, or of his Counsel, or Solicitor, or whatever combination of the above. Judges should be inhibited in their

[22] Any such discussions are deemed confidential, as a matter of public policy (as sacrosanct as the secrets divulged to the priest in confessional; or between journalist and source). This is one of the legal profession's fundamental articles of faith.

See *Renton and Brown* at paragraph 24-55; *HM Advocate v Parker*, 1944 J.C. 49; *Campbell and Fell v United Kingdom* A 80 (1984); *Goddi v Italy*, A 76.

Meanwhile, the European Court of Justice has held that legal professional privilege applies in EU law: *AM & S Europe Ltd v Commission of the European Communities* (1982) ECR 1575; 1983 QB 878.

inquiries by the existence of privilege for communications between Counsel and client. So sanctions might be impracticable to apply in practice.

73. In *R v Rochford* [2010] the English Court of Appeal quashed a finding of Contempt of Court of a defendant who had refused to confirm to the judge his whereabouts at the time of a motoring offence, because it had been impossible at the stage at which the finding had been made to establish whether the 'defence statement' had failed to comply with the relevant statutory requirements. It was conceivable that the defendant might make no positive case at all and not raise the issue of his possible location elsewhere, but merely put the Crown to proof of its case, in which event it would not be regarded that there had been no failure to comply.

74. In dealing with the impact of section 6A of the of the Criminal Procedure and Investigations Act 1996 on legal professional privilege, the Court held:

> '21 Do legal professional privilege and the defendant's privilege against self-incrimination survive section 6A? The answer to that is "Yes". What the defendant is required to disclose by section 6A is what is going to happen at the trial. He is not required to disclose his confidential discussions with his advocate, although of course they may bear on what is going to happen at the trial. Nor is he obliged to incriminate himself if he does not want to. Those are fundamental rights and they have certainly not been taken away by section 6A - see the reasoning in the slightly different context of the Criminal Procedure Rules in R (Kelly) v Warley Magistrates Court [2007] EWHC 1836 (Admin), [2008] 1 WLR 2001.'

75. It can be countered that this distinction is wholly artificial – the point is that the accused could still incriminate himself, not so much by what he does say, but by what he does not. [23]

76. It should be noted that the complainant would not necessarily have immunity from suit if he were to make an unwarranted complaint to the professional bodies of the Solicitor or Counsel concerned. It is a moot point whether the content of any such correspondence remains privilege – being potentially regarded as defamatory. It could still be argued that the account of the court proceedings concerned is not considered fair and accurate, such that it falls within the ambit of qualified privilege.

[23] See paragraph [48], above

Failure to preserve record for appeal:

77. Further, by failing to state any objection or point of law in the 'defence statement', it is also apprehended that the Crown might subsequently invoke waiver or acquiescence as a preliminary defence to any post-conviction appeal.

***Ultra vires* legislation of the Scottish Parliament:**

78. An Act of the Scottish Parliament is not law so far as any provision of the Act is outside its legislative competence. [24] A provision is outside that competence if incompatible with any of the Convention rights. The question of whether an Act of the Scottish Parliament is within its legislative competence is a 'Devolution Issue'.

79. The Sheriff Court may refer any devolution issue which arises in criminal proceedings before it to the High Court of Justiciary. [25]

Appropriate procedure:

80. It is understood that Sheriff Swanson has recently referred a 'Devolution Issue' Minute to the Appeal Court (in the pending Glasgow Sheriff Court case of *HM Advocate v James Barclay and William Bain*), as has Temporary Judge Rae (in the pending Paisley High Court case of *HM Advocate v MacLean*) — where the defence had challenged the new statutory requirement to lodge a 'defence statement' as being *ultra vires* of the legislative competence of the Scottish Parliament.

81. Recent experience suggests that the Crown might be indifferent to the defence taking up an entrenched position, pending the outcome of the forthcoming remit – and that they will be perfectly content to give an undertaking to that effect.

82. However, though the Crown might well make a concession that there is no requirement for the defence to file a 'defence statement' in the

[24] Scotland Act 1998, section 29(1) and 29(2)(d)

[25] Scotland Act 1998, Schedule 6, Part II, Paragraph (9)

particular circumstances of a given case, that type of concession is hardly determinative of matters. The difficulty is that if the 'defence statement' were not lodged, then the Crown might not consider that it has a correlating (legal) duty of disclosure – that it is not bound by the new statutory disclosure regime – particularly since it should be remembered that the common law disclosure rules have now been abolished (perhaps in a calculated snub by the Scottish Government and Parliament to the Supreme Court).

83. Further, the difficulty is that any such Crown undertaking will not necessarily be binding on the Court – who may insist that defence disclosure is now essential to the proper discharge of its increasingly important case management duties. Equally, it has no bearing on how a co-accused conducts his defence.

Conclusion:

84. There will be cases where a suitably focused 'defence statement' can assist the defence – in alerting the prosecution to the importance of making very particular investigations, with a view to obtaining very specific disclosure. [26] After all, the police and the prosecution have hardly been culturally motivated to investigate exculpatory defences – and now there is a framework for them to do so. However, it might have been thought disclosure could otherwise be sufficiently focused by any Petition for Commission and Diligence – which the defence might still be expected to pursue, quite independently of the new statutory disclosure regime. Nonetheless, there will be difficult marginal situations, where defence disclosure will not exactly serve the defence's purposes, particularly in multi-accused situations. [27] However, it might be thought that the best way for the prosecution to flush out the defence case is surely to prepare its case properly.

Lewis Kennedy, Advocate
Advocates Library,
Parliament House,
Edinburgh.

[26] See *OB v The Crown* [2009] EWCA Crim 2291

[27] *R v Rochford* [2010] at paragraph [26]

1 December 2011