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LCCSA RESPONSE TO CONSULTATION ON PACE CODES OF PRACTICE

The London Criminal Courts Solicitors' Association (LCCSA) represents the interests of specialist criminal lawyers in the London area. Founded in 1948, it now has around 620 members including lawyers in private practice, Crown prosecutors, freelance advocates and many honorary members who are circuit and district judges.

The objectives of the LCCSA are to encourage and maintain the highest standards of advocacy and practice in the criminal courts in and around London, to participate in discussions on developments in the criminal process, to represent and further the interest of the members on any matters which may affect solicitors who practice in the criminal courts and to improve, develop and maintain the education and knowledge of those actively concerned with the criminal courts including those who are in the course of their training.

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The LCCSA has grave concerns about the proposed changes to PACE Code E and F relating to recording interviews by body-worn cameras. We fear that budgetary and resource issues will mean that the ‘body worn camera ‘ interview away from the police station will become the norm. If this were to happen it would constitute a fundamental removal of fair trial rights which the state is legally obligated to promote and enforce and will undermine the rule of law.

It is surprising to say the least that these changes are even contemplated because interviewing those suspected of criminal offences in the way that the proposed changes caters for is so clearly unlawful.

Breach of Article 6 ECHR.

There is a long line of cases which establish the need for clear notification of the (separate) rights to silence and to legal assistance at the point of arrest, in such a way as to enable the suspect to understand them and exercise their rights. However, the case law does not relate to those only under arrest but applies also to those being questioned on suspicion of having committed a criminal offence whether under arrest or not.

Following the judgement in *Cadder –v- HMA*, UKSC [2010] 43, Scots Law recognised that a detained suspect must have the opportunity to consult a solicitor before being questioned in relation to a criminal allegation. It is unthinkable that the courts would determine that a person who answers questions under caution as a volunteer being interviewed away from the police station should have less protection than a person under arrest .

The UK Supreme Court reflected the decision of the European Court of Human Rights (ECtHR), which held in *Salduz v Turkey* (2009) 49 E.H.R.R. 19, and subsequently, that the case against an accused person can be irretrievably prejudiced if they do not have access to a lawyer. Enabling the police to conduct interviews as a matter of routine asway from the police station eliminates the lawyer from the process. As reflected in the ECtHR case law evidence acquired during interview can be pivotal to what follows in the criminal process. The case law acknowledges the truism that a person under suspicion being questioned by a trained police officer is particularly vulnerable given the stage of proceedings and complexity of the law. In most cases this vulnerability can only be mitigated by the assistance of a lawyer who can ensure that the fundamental right against self-incrimination is respected.

Breach of EU Directive

In addition the changes if enacted in the way envisaged would breach the key EU Directive 2012/13/EU on the Right to information in criminal proceedings which has already provoked changes to PACE to ensure that police practice is compliant. The Directive “applies from the time persons are made aware by the competent authorities of a Member State that they are suspected or accused of having committed a criminal offence”

The proposed changes appear to act in a parallel legal sphere in which this Directive and the UK's obligations to act in accordance with it do not apply.

In the leading case of *Saman v. Turkey* App. no 35292/05 (Judgment of 5 April 2011) the ECtHR commented on exactly the sort of situation which will be created by the seductive street interview mentality of waiving legal advice and protections in favour of "getting it over with" minus the delay and discomfort of going to a police station.

'Neither the letter nor the spirit of Article 6 prevents a person from waiving of his own free will, either expressly or tacitly, entitlement to the guarantees of a fair trial. However, if it is to be effective for Convention purposes, a waiver of the right must be established in an unequivocal manner and be attended by minimum safeguards (...) A waiver of the right, once invoked, must not only be voluntary, but must also constitute a knowing and intelligent relinquishment of a right. Before an accused can be said to have implicitly, through his conduct, waived an important right under Article 6, it must be shown that he could reasonably have foreseen what the consequences of his conduct would be (...).'

As Fair Trials International point out in their briefing on the Right to Information

"When procedural rights are not effectively conveyed to the suspect, the ECtHR finds that the waiver is not effective, as it considers that the decision to waive the right was not taken on a properly informed basis. Consequently, the reliance on statements obtained in that context then means prejudice is caused to the fairness of the proceedings as a whole. The court has pointed to various factors, both objective and subjective, relating to the notification of rights which affect the validity of a waiver of the right of access to lawyer and to counsel:

- The fact that rights were notified in a language other than the suspect's native language, without the assistance of an interpreter. *Saman v. Turkey*, cited above paragraph 35.
- The fact of the notification being given only orally in the form of a standard caution (which barely serves the purpose of acquainting the suspect with the content of the rights); *Panovits v. Cyprus*, cited above note 10, paragraph 74.
- The 'stressful situation' and 'quick sequence of the events' leading to questioning of the suspect; *Zaichenko v. Russia*, cited above note 10, paragraph 55.
- A 'certain confusion' in the mind of the suspect at the point of questioning; *Stojkovic v. France and Belgium*, cited above note 10, paragraph 53.
- The young age of the suspect; *Panovits v. Cyprus*, cited above note 10, paragraph 6726
- The suspect's level of literacy; *Case of Kaciu and Kotorri v. Albania*, Apps. nos. 33192/07 and 33194/07 (Judgment of 25 June 2013), para. 120.
- Familiarity with police encounters; *Pishchalnikov v. Russia*, cited above note 10, paragraph 80. and

- Drug dependency of the suspect. Case of Plonka v. Poland, App. no. 20310/02 (Judgment of 31 March 2009), para. 38.

It takes no great leap of the imagination that the scenario of the police interview on the street, in a police car, in the back of a shop will also adversely affect and discriminate against

- people from those communities who as the Government acknowledge (most recently in the response to the Lammy Review) are disproportionately approached by the police in the street
- people with communication difficulties
- people with mental health problems
- people with addictions
- young people
- people whose first language is not English

The changes appear to have been promoted by senior police officers as a cost saving exercise taking advantage of the improvement in body worn camera technology and the increasing digitisation of criminal justice system.

However, justice and the rule of law which underpins it should not be degraded because of a perceived financial benefit. The UK has for many years in concert with the Council of Europe been engaged in advocating for the rule of law derived from fair trial rights and ensuring that those rights and protections spread to other jurisdictions. These proposals represent a very shocking reversal of this tradition.

In addition the LCCSA is concerned about the weakened protections for vulnerable detainees contained in the draft Code C 1G . It presupposes a degree of foresight based on clinical awareness of how the circumstances of an investigation may affect an individual with mental health problems. Police officers do not possess this experience and these specialist skills.