

Institution: University of Dundee		
Unit of Assessment: UoA 18 Law		
Title of case study: Reforming the Law and Practice of Eyewitness Identification Evidence in Criminal Cases		
Period when the underpinning research was undertaken: 2014-2015		
Details of staff conducting the underpinning research from the submitting unit:		
Name(s): Pamela Ferguson	Role(s) (e.g. job title): Professor of Scots Law	Period(s) employed by submitting HEI: 1989 to present
Period when the claimed impact occurred: From 2016 (when the Criminal Justice (Scotland) Act 2016 was enacted by the Scottish Parliament)		
Is this case study continued from a case study submitted in 2014? N		

1. Summary of the impact

Professor Ferguson's research on the problematic nature of eyewitness identification evidence - a major cause of miscarriages of justice - has shaped the law and practice of criminal procedure. Her recommendation that informal guidelines on police pre-trial identification processes be revised, and replaced with a statutory code of practice, resulted in the Scottish Parliament passing legislation which requires the Lord Advocate to issue such a Code. Despite the fact that the Code itself has yet to be finalised, the research has already impacted on police practice: Police Scotland have changed their identification procedures in line with recommendations made by Ferguson.

2. Underpinning research

Professor Ferguson's research expertise encompasses Scottish Criminal Law, Evidence, and Procedure. Unlike other jurisdictions, Scotland operates a corroboration rule in criminal trials, requiring two independent sources of evidence to establish that the accused committed the crime. This generally requires eyewitness testimony that the accused is the perpetrator. Pre-trial, the police invite witnesses to view suspects' photographs (usually on a computer), along with photographs of similar-looking individuals (referred to as "stand-ins"). Alternatively, suspects may be placed in a live line-up. Witnesses are asked whether they can identify the perpetrator from the group. Mistaken identification is a leading cause of miscarriages of justice, and it is essential that identification procedures are conducted in a way which minimises the risk of innocent people being wrongly convicted.

In 2011, Lord Carloway recommended that the corroboration requirement be abolished in Scottish criminal trials. This proved to be highly controversial, and in 2014 Lord Bonomy was asked by the Scottish Government to consider the implications of this abolition. His Lordship established a small (six member) 'Academic Expert Group' (AEG) to prepare a preliminary report. Due to Ferguson's recent work on corroboration [R1], Lord Bonomy invited her to serve on this AEG. The *Post-corroboration Safeguards Review: Report of the Academic Expert Group* (2014) is the fruit of this Group's work. Ferguson's chapter of the Report [R2], relating to eyewitness identification evidence, forms the basis of this impact case study. As a result of this work, Professor Ferguson was then invited by Lord Bonomy to serve on the *Post-corroboration Safeguards Reference Group*, itself [R3].

Ferguson's research drew attention to the problematic nature of current eye-witness identification practices in Scotland and offered potential reforms. One of her key recommendations was that the current, informal Guidelines issued to the Police by the Lord

Advocate should be replaced by a statutory Code of Practice. She further recommended that such a Code should include (among other things) that:

- There should be a minimum of eight stand-ins or images other than that of the suspect in an identification procedure.
- The officer in charge of the case should not be present.
- Stand-ins should resemble the verbal description given by the witness, rather than looking similar to the suspect.
- The entire procedure should be video recorded.
- Serious breaches of these requirements should result in the exclusion of the evidence.
- The police should employ cognitive interviewing techniques to enhance witness recall.

This research was considered by Lord Bonomy's Reference Group, and its impact is described further below. Its significance is also described in **R4** below.

3. References to the research

[R1] Davidson, F.P. and Ferguson, P.F. (2014) 'The corroboration requirement in Scottish criminal trials: should it be retained for some forms of problematic evidence?' *International Journal of Evidence and Proof* 18 (1) pp.1-27 DOI: [10.1350/ijep.2014.18.1.439](https://doi.org/10.1350/ijep.2014.18.1.439)

[R2] Ferguson, P.R., (2014) 'Eyewitness identification evidence', in Chalmers, J., Leverick, F. and Shaw, A., *Post-corroboration Safeguards Review: Report of the Academic Expert Group*, Chapter 5 (pp 44-66). Available online: <https://www.webarchive.org.uk/wayback/archive/3000/https://www.gov.scot/resource/0046/00460650.pdf> (Accessed 07 March 2021)

[R3] Lord Bonomy Reference Group (2015), *Post-corroboration Safeguards Review: report of the academic expert group*. Available online: <https://www.webarchive.org.uk/wayback/archive/3000/https://www.gov.scot/Resource/0047/00475400.pdf> (Accessed 16 March 2021)

[R4] Ferguson, P.R., (2018) 'Eyewitness identification evidence and its problems: recommendations for change', in Ferguson, P. R. and Duff, P. D. (eds). *Scottish Criminal Evidence Law: Current Developments and Future Trends*. Edinburgh: Edinburgh University Press. pp. 139-160.

4. Details of the impact

The central recommendation made by Professor Ferguson was that the current, informal guidelines which the police use in their pre-trial identification procedures be revised, and that they be replaced by a statutory code of practice. The significance of Ferguson's contribution to work of the expert group, and its subsequent enactment has been acknowledged by Lord Bonomy, who describes the research as:

"pivotal in persuading the Reference Group ...that the proposed abolition [of the corroboration requirement] would increase the risk of miscarriage of justice through inaccurate identification in the absence of significant improvements to current pre-trial identification procedures." [E1]

A senior advocate, also a member of the Group, states:

“it was as a result of the extensive research carried out by Professor Ferguson into the problematic nature of eyewitness identification that the whole group had no hesitation in concluding that pre-trial identification procedures should be improved in the significant ways recommended by her.” [E2]

Lord Bonomy further notes that the Group were:

“unanimously of the view not only that improvements to current practice suggested by Professor Ferguson should be made, but also that the resultant procedural framework should be included in a statutory Code of Conduct which the Lord Advocate would be required to review regularly.” [E1]

The Bonomy Report (2015) accordingly recommended (at para 6.26): “that the Lord Advocate should be bound by statute to issue a Code for the conduct of identification procedures”. This led the Scottish Parliament to enact section 57 of the Criminal Justice (Scotland) Act 2016 Act, which provides that:

"The Lord Advocate must issue a code of practice on
(a) the questioning, and recording of questioning, of persons suspected of committing offences, and
(b) the conduct of identification procedures involving such persons." (See E4, below)

In line with Ferguson’s recommendation that serious breaches of the Code’s requirements should result in the exclusion of the evidence, section 57(7) requires courts to “take the code of practice into account when determining any question arising in the proceedings to which the code is relevant.”

This provision makes it far more likely that courts will reject evidence of pre-trial eyewitness identifications where the police have not followed proper procedures. This, in turn, reduces the likelihood of wrongful convictions based on mistaken eyewitness identification evidence. Further reflecting Ferguson’s research, the Bonomy Reference Group specifically recommended that there should be a minimum of eight stand-ins or images other than that of the suspect in any identification procedure, and that the entire procedure should be recorded by audio-visual means. The Bonomy Report recognised that the terms of the Code are ultimately a matter for the Lord Advocate, but added:

“it would be appropriate to have regard to the very detailed discussion of the provisions that may be incorporated into such a Code set out in Chapter 5 of the Report of the Academic Expert Group.”

In May 2017, Professor Ferguson met with a senior member of the Crown Office and Procurator Fiscal Service, at their request. The Senior Procurator Fiscal Depute in the Policy and Engagement Department, responsible for drafting the Code of Practice required by section 57, describes Ferguson’s input to these discussions as “invaluable” and having “formed the basis of many of the provisions that were ultimately incorporated into the draft Code” [E3]. As a result, the draft Code includes Ferguson’s recommendations regarding (i) the minimum number of “stand-ins”; (ii) the officer in charge of the investigation not being present during the identification procedure; (iii) the need for stand-ins to resemble the witness’s description, as opposed to resembling the suspect; and (iv) the use by police of cognitive interviewing techniques.

Ferguson’s recommendation that identification processes should be audio-visually recorded is not currently required by the draft Code, however, Police Scotland have indicated that they are willing to consider this as a potential safeguard in the future and intend to conduct a pilot project to assess its practicalities [E3].

Although the issuing of the final Code has been delayed (partly due to the current pandemic), Police Scotland have already implemented Ferguson's first two recommendations, listed above. According to the Senior Procurator Fiscal Depute: "This demonstrates an appreciation of the criticisms and concerns in relation to the existing processes, as highlighted by Professor Ferguson." The importance of implementing these recommendations even before the final version of the Code has been agreed is clear from their conclusion:

"In making these changes as soon as possible, a greater confidence can be placed on the accuracy of any identification and the possibility of mistaken identifications (and therefore unsafe convictions), has potentially been reduced."

The beneficiaries of these improved police practices are not only those who are wrongly accused of having committed a crime, and at risk of mistaken identification: society, as a whole, benefits from having an improved justice system.

5. Sources to corroborate the impact

[E1] Supporting statement from Lord Bonomy, Convenor of the Post-Corroboation Safeguards Reference Group.

[E2] Supporting statement from a senior advocate and member of the Post-Corroboation Safeguards Reference Group

[E3] Supporting statement from the Senior Procurator Fiscal Depute: Policy and Engagement Department Crown Office and Procurator Fiscal Service.

[E4] Criminal Justice (Scotland) Act 2016, s 57. Available at <https://www.legislation.gov.uk/asp/2016/1/section/57/enacted> (Accessed 16 March 2021)