

Institution: University of Warwick
Unit of Assessment: School of Law
Title of case study: Improving the Quality of Criminal Defence Lawyering and the Protection of Accused Persons
<p>1. Summary of the impact: Professor Hodgson's empirical criminal justice research has resulted in the creation of new professional standards encouraging proactive defence lawyering and quality assessment requirements for the legal profession in England and Wales. A model of more effective defence rights, underpinned by empirical research in English, Welsh and French criminal justice, has also influenced recent developments in Scotland and in EU criminal justice; has been relied upon in extradition proceedings in the UK and Canada; and, through a study at the Criminal Cases Review Commission (CCRC), has improved legal representation of those seeking to have their cases reviewed for appeal, as well as the Commission's ability to work with defence lawyers.</p>
<p>2. Underpinning research: The impact is underpinned by a series of research studies that explored the provision of legal advice and other defence safeguards in Britain and Europe, as well as of convicted persons applying to the CCRC.</p> <p><i>Custodial Legal Advice</i> (3a: 1993) was carried out by University of Warwick researchers, Jacqueline Hodgson and Mike McConville, for the Royal Commission on Criminal Justice (RCCJ). It involved direct observation of the provision of legal advice to suspects in police custody by legal advisers in 26 firms and 3 agencies. It highlighted the deficiencies of the system then in operation: the absence of training and clear quality standards for police station advisers; the lack of professional regulation; and the widespread delegation of custodial legal advice work by solicitors to the least experienced member of the firm – resulting in suspects 'appearing' to benefit from legal assistance, but in fact receiving poor quality legal advice.</p> <p>The related, larger project, <i>Standing Accused</i> (3b: 1994), was the first of this size and nature. Carried out by Hodgson and McConville together with Warwick Senior Research Fellow, Lee Bridges, it involved direct observations of 48 firms and 3 agencies in England and Wales, over 198 researcher weeks. It demonstrated the limitations of the way in which custodial legal advice was provided in the context of the (inappropriately) non-adversarial culture of criminal defence work.</p> <p>Building on this tradition of empirical research, <i>French Criminal Justice</i> (3c: 2005) was a major empirical study by Hodgson of the investigation and prosecution of crime in France, consisting of 18 months of fieldwork and 20 interviews across six sites. It investigated the ways in which defence rights are protected through a procedural model centring on judicial supervision, in contrast to the adversarial and more lawyer-centred process in England and Wales. It showed how the close working relationships between police, prosecutors and judges, together with the dependence on mutual trust, mean that models of supervision often simply legitimate police accounts, and provide them with the credibility of appearing to be the product of a judicial investigation, with the gap between theory and practice again leaving the accused largely unprotected.</p> <p>Hodgson's subsequent Home Office commissioned study (<i>The Investigation and Prosecution of Terrorist Suspects in France</i> (3d: 2006)) found that this feature is most marked in terrorism investigations, where investigating judges work with intelligence officers, with the result that secret and untested intelligence appears as 'evidence' in the case file, with no opportunity for defence challenge. This later study was commissioned to inform government policy on the possible use of intercept material as evidence at trial, drawing on French experience.</p> <p>Building on her expertise in English and French criminal justice more generally, in 2007 she collaborated with academics and practitioners on <i>Suspects in Europe</i> (3e). This provided a 'law in action' account of criminal procedure in 8 countries, using a common scenario to illustrate how the criminal process plays out in practice.</p> <p>The empirical study <i>Impact of Legal Representation</i> (3f: 2009) was carried out by Hodgson with Warwick researcher Juliet Horne. Drawing on Hodgson's insights into criminal defence lawyering, together with her understanding of inquisitorial procedures as they operate in France and elsewhere, it demonstrated the potential impact of good quality legal representation of applicants to the CCRC, through an examination of applications and decisions, as well as interviews with lawyers and Commission staff. It challenged the assumption that as an inquisitorial procedure, CCRC investigations did not benefit from the assistance of lawyers representing the applicant. It demonstrated the ways that lawyers could assist both applicants and the Commission.</p> <p>A final project, <i>Inside Police Custody</i> (3g: 2013) was carried out with researchers from the UK,</p>

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France and the Netherlands. Building further on *Suspects in Europe* and on Hodgson's empirical research in England and Wales and in France, which demonstrated the importance of legal and occupational cultures as factors limiting the effectiveness of defence rights in practice, this study adopted a similar qualitative methodology. Observations and interviews were carried out across four jurisdictions over a 14-month period. This project provided a detailed insight into suspects' rights and in particular, models of defence provision and the factors affecting the quality of advice received by suspects in different countries. Reinforcing the findings of Hodgson's earlier studies, the research demonstrated that training of police and lawyers, together with mechanisms to ensure the quality of defence advice, are essential across inquisitorial as well as adversarial procedural traditions, if suspects are to receive effective legal assistance. The findings interrogate how EU legislation can make suspects' rights to lawyers, interpreters and case information, more effective.

3. References to the research (indicative maximum of six references)

(a) McConville, M. and Hodgson J. (1993) *Custodial Legal Advice and The Right to Silence*, Royal Commission on Criminal Justice Study No. 16 (HMSO) [Funded by a grant of £40,000 from the RCCJ through a competitive tendering process, it remains the standard benchmark research on legal advice at the police station and the right to silence.]

(b) McConville, M., Hodgson, J., Bridges, L. and Pavlovic A. (1994) *Standing Accused: The Organisation and Practices of Criminal Defence Lawyers in Britain* (Clarendon Press) [Peer-reviewed monograph; funded by an ESRC grant of £150,000, this continues to be the seminal work in this area.]

(c) Hodgson, J. (2005) *French Criminal Justice* (Hart) [Peer-reviewed monograph; funded by a Leverhulme Trust grant of £37,000, this provides the only critical empirical socio-legal account of French criminal justice and was recognised as such even in France]

(d) Hodgson, J. (2006) *The Investigation and Prosecution of Terrorist Suspects in France*, http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1321868 [Commissioned and funded (£10,000) by the Home Office to inform government policy on the admission of intercept evidence in criminal trials.]

(e) Cape, E., Hodgson, J., Prakken, T. and Spronken, T. (2007) *Suspects in Europe* (Intersentia) [Funded by EU AGIS grant of €80,000, this is an important socio-legal account of comparative criminal justice]

(f) Hodgson, J. and Horne, J. (2009) *The Extent and Impact of Legal Representation on Applications to the Criminal Cases Review Commission*, <http://ssrn.com/abstract=1483721> [Funded (£7,000) and commissioned by the Legal Services Commission, this study was later replicated by the Scottish Criminal Cases Review Commission.]

(g) Blackstock, J., Cape, E., Hodgson J. and Spronken T. (2013) *Inside Police Custody: An Empirical Account of Suspects' Rights in Four Jurisdictions* (Intersentia) [Funded by a European Commission Action Grant of €330,000, this is the first comparative empirical study of suspects' rights across four jurisdictions and includes a Training Framework for police and lawyers]

4. Details of the impact: The research has had an impact on professional standards, guidelines and training; on access to justice (both in improvements to the quality of legal advice and in the provision of expert evidence in specific cases); and on policy both nationally and internationally.

Impact on professional standards, guidelines and training: *Custodial Legal Advice* (3a) and *Standing Accused* (3b) led to the transformation of professional standards, guidelines and training for criminal defence provision in England and Wales (5g). The empirical findings informed the recommendation of the 1993 Royal Commission (5a) that all those providing legal advice at police stations should be trained and accredited to avoid the poor quality of legal advice identified in the research. This proposition was adopted as policy by the Legal Aid Board (now the Legal Services Commission) and the Law Society, and a quality assessment programme for defence lawyers was rolled out nationally across England and Wales (the Criminal Litigation Accreditation Scheme Police Station Qualification). This accreditation scheme ensures that only those who are appropriately qualified in providing effective defence assistance at the police station are able to do so. The 10,000 individuals currently providing police station advice are all accredited under this scheme: moreover, since it requires them to undertake continuing professional development, it continues to have an impact on the training of those accredited before 2008, as well as those who have undertaken the programme after that date.

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Subsequent projects have incorporated training as an explicit element. The *Impact of Legal Representation* research (3f) underpinned training provided in 2013 to 32 lawyers to improve the quality of their work on CCRC applications. This was a collaboration between the CCRC and the Warwick authors: it has improved lawyers' ability to represent applicants effectively, and enhanced the CCRC's ability to work effectively with stakeholders. Feedback from the event showed that participants found it useful. A Commissioner commented that the training provided 'further knowledge of effective representation, will assist with screening and reviews and could help identify miscarriages of justice.' Feedback from lawyers indicated that as a result of the training they had a better understanding of the CCRC, and would be able to advise their clients more effectively. They noted that they were more likely to refer a case to the CCRC and more confident about their chances of success in doing so (5j). Similarly, the empirical findings from *Inside Police Custody* project (3g) underpinned a training syllabus that was piloted with 29 police officers and lawyers in the UK and the Netherlands in April 2013. The practical application of legal and professional responsibilities developed the practitioner skills necessary to deliver suspects' rights more effectively across EU jurisdictions and beyond. Participants reported that the training had a direct impact on their work, leading them to re-evaluate their approach to key practices in the delivery of suspects' rights.

Impact on access to justice: *Custodial Legal Advice* (3a) and *Standing Accused* (3b) have had a significant impact nationwide on the quality of legal advice available to those accused of crimes in England and Wales. The changes to training and accreditation led to the embedding of adversarial values into the police station training and accreditation scheme, which has been crucial to its success. Independent research, directly comparing the data from the 1993 study with advice provided several years later, concluded that the introduction of the accreditation scheme improved significantly the quality of legal advice in police stations (5b). Although the research began to have an impact prior to 2008, it continues to have a direct day-to-day impact in every police station across England and Wales. Its reach is therefore extremely substantial as it affects all suspects taken into custody who exercise their right to legal assistance: around 3.3 million of the 8.2 million suspects arrested since 2008 have received legal advice by an accredited adviser under this scheme. Its significance lies in the improved quality of legal advice received as a result of accreditation. Overall, it has had a real impact on access to justice.

Hodgson has also had an impact on access to justice in a number of significant cases. Based on her research, she has frequently been instructed as an expert witness on whether European extradition was for the lawful purpose of prosecution, or simply for investigation and questioning. [*McCormack v Tribunal de Grande Instance, Quimper, France* [2008] EWHC 1453 (Admin) (5d); *Tribunal de Grande Instance de Bourg en Bresse, France v Fatma Selcuck* (2010); *HM Advocate, representing Republic of France v Kelly* (2010)]. She testified at the hearing in *McCormack* and in *Kelly*, the appeal was abandoned as a direct result of the expert report provided. Her research also had an impact on the major Canadian extradition decision in *Diab*, in which she was required to assess whether, if extradited to France on terrorism charges, the accused would receive a fair trial [*Attorney General of Canada (The Republic of France) v Diab* 2011 ONSC 337]. Drawing on *French Criminal Justice* (3c) and *Terrorist Suspects* (3d), her assessment of the use of secret and un-sourced intelligence as evidence in any subsequent trial should *Diab* be extradited back to France was relied upon by *Diab*'s defence team. *Diab*'s lawyer noted that Hodgson's research had 'a considerable positive impact...on the quality of the defence afforded Dr *Diab* and on the protection of his legal and constitutional rights as a person sought by France in relation to a 1980 terrorist bombing in Paris' and 'led directly to the Attorney General for Canada disavowing any reliance whatsoever on the extensive intelligence set out in the French Record of the Case which sought to justify the French extradition request' (5h). While the judge felt legally mandated to extradite under the relevant treaty, the case is currently on appeal to the Canadian Supreme Court.

Impact on the implementation of policy in Scotland: The Criminal Procedure (Legal Assistance, Detention and Appeals) (Scotland) Act 2010 made new provision for the right of a detained suspect to access to a lawyer. Together with Jodie Blackstock from JUSTICE (5f), and drawing directly on the 1993 research (3a), Hodgson provided training to more than 60 Scottish lawyers in 2011, to alert lawyers to the crucial importance of their newly established role at the police station and the need for personal attendance rather than telephone advice. The findings from her research and the impact of the reforms on practice were distilled into a short guide for those attending (*Police Station Advice: Promoting Best Practice*).

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Subsequently, in 2012, Lord Carloway's Review of new arrangements allowing lawyers into the police station in Scotland, drew on this briefing and *Custodial Legal Advice* (3a) to highlight the importance of training in ensuring high quality provision of advice, as well as the importance of retaining the right to silence (5c). It noted that in order for the right of access to a solicitor to be effective, those advising clients 'must have adequate training' and noted the 'need to guard against complacency in this area' in the light of the research findings from England and Wales (para 6.1.35). It specifically recommended that 'University Law Schools and the Law Society should be encouraged to formulate guidance for solicitors in advising clients in a police station'.

The *Impact of Legal Representation* research (3f) has also had an impact on the Scottish Criminal Cases Review Commission, stimulating it to carry out its own assessment of the impact of legal representation, explicitly mirroring the study carried out by Hodgson.

Impact on the development of EU policy: Hodgson's research on both English and French criminal justice has provided evidence to inform the development of EU policy. Drawing on *Custodial Legal Advice* (3a) and *Standing Accused* (3b), as well as the findings from *Inside Police Custody*, all of which reinforce the importance of training in order to achieve effective custodial legal advice, she has advised those preparing the impact study for the EU legal aid directive on how to embed adversarial and competent legal assistance within the administration of legal aid (5i). With Blackstock, she also organised and delivered a policy briefing to some 30 lawyers and EU officials in Brussels in 2012 (5f); feedback from the event demonstrated that this successfully raised awareness of the importance of linking legal aid funding to mechanisms to ensure the quality of legal advice to suspects in police custody throughout the EU. Her French criminal justice research 'is used widely within the Commission's Directorate-General for Justice', being 'read and consulted by those advising Ministers of Justice throughout the EU [...] and by practitioners and students... who all have a role to play in the wider public debate about the need for harmonised standards of rights in criminal trials throughout the EU' (Morgan, European Commission (5e)).

5. Sources to corroborate the impact (indicative maximum of 10 references)

(a) Royal Commission on Criminal Justice, *Report* (1993) Cm 2263 (HMSO) [cites the research and its importance for training and accreditation, pp 37-9]

(b) Bridges, L. and Choong, S. (1998) *Improving Police Station Legal Advice: The impact of the accreditation scheme for police station legal advisers*. Research Study No. 31. London: The Law Society. [This independent study verified the improvements to quality that occurred as a result of the accreditation scheme that was put in place following the 1993 RCCJ research]

(c) The Carloway Review (2012) <http://www.scotland.gov.uk/About/CarlowayReview/Contents> [This Review cites 3a pp160-161]

(d) *McCormack v Tribunal de Grande Instance, Quimper, France* [2008] EWHC 1453 (Admin) (also cited in *Balzas Asztalos v The Szekszard City Court, Hungary* [2010] EWHC 237 (Admin)) [This case references Professor Hodgson's expert evidence]

(e) Principal Administrator and former Procedural Rights Team Leader to the European Commission [can confirm the impact of French Criminal Justice research in informing debate]

(f) Director of Criminal and EU Justice Policy, JUSTICE [can confirm Hodgson's involvement in the 2011 training event and 2012 EU briefing, and the impact of her research]

(g) Immediate past chairman, Law Society's Criminal law Committee [can confirm impact on professional standards, guidelines and training in the context of criminal defence lawyering]

(h) Lawyer representing Hassan Diab in *Attorney General of Canada (The Republic of France) v Diab* 2011 ONSC 337 [can confirm impact of French research and that on terrorism investigations]

(i) Centre for Strategy and Evaluation Services [conducted EU impact assessment for legal aid directive; attended policy briefing. Can confirm impact of Hodgson's research on legal aid impact study]

(j) Feedback forms from 2013 CCRC training event [on file: demonstrates that participants found the event useful and informative]