

Institution: City University London
Unit of Assessment: 20 Law
Title of case study: National and international development and reform of the law of criminal evidence
<p>1. Summary of the impact</p> <p>Professor Adrian Keane's research relates to the law of criminal evidence, that body of law which regulates the means by which facts can be proved in criminal trials. His publications on the subject have effected change and benefited the awareness, capacity, performance and understanding of the subject on the part of:</p> <ul style="list-style-type: none"> (i) the judiciary in the UK and internationally, in reaching decisions at both first instance and at appellate level; and in giving directions to juries on evidential issues that are as clear and consistent as possible (ii) legal practitioners (iii) law academics and students (an impact that extends significantly beyond the submitting higher education institution) (iv) legislators in the People's Republic of China. <p>The most significant impact stems from participation in a project in Beijing that led directly to a revised Criminal Procedure Law that has improved the quality of the administration of Chinese criminal justice. Specifically, it has rendered criminal trials fairer to the accused and reduced the potential for miscarriages of justice, especially in relation to offences carrying the death penalty.</p>
<p>2. Underpinning research</p> <p>The research has been carried out by Professor Adrian Keane, employed by the Inns of Court School of Law (ICSL) from 1993-2001 and by City University London since 2001 (when the former was incorporated into the University). HEFCE has formally approved submission of impacts from ICSL research by City on the basis that ICSL is an absorbed unit.</p> <p>Professor Keane is the author of <i>The Modern Law of Evidence</i> (Oxford University Press) and a significant contributor to <i>Blackstone's Criminal Practice</i> (Oxford University Press), the first editions of which date back to 1985 and 1991 respectively. These have developed into highly authoritative works that engage with new and complex problems in fast-changing areas of the law, rigorously analyse legal doctrine, exemplify high standards of intellectual precision and contribute to development of the intellectual agenda in their field.</p> <p><i>The Modern Law of Evidence</i> provides comprehensive coverage of the theory behind the law of evidence as well as examining its practical application. It is regularly updated (now in its 9th edition) to reflect the latest case law, including decisions of the European Court of Human Rights, the Supreme Court and the Court of Appeal, and to analyse the implications of changes to legislation. It has been cited with approval and/or application by the Privy Council (<i>Lobban v The Queen</i> [1995] 1WLR 877 at 887); the House of Lords (<i>R v Randall</i> [2004] 1 WLR 56 at [20] - in which the House of Lords adopted and applied Professor Keane's definition of relevance, one of the most important concepts in the law of evidence - and <i>R v Hayter</i> [2005] 1 WLR 605 at [25]); the Supreme Court of Canada (<i>R v Noël</i> [2002] SCR 433 at [114]); the United Nations International Criminal Tribunal for Rwanda, in the first judgement by an international court for the crime of genocide (<i>The Prosecutor v Jean-Paul Akayesu</i> 1998 ICTR-96-4-T at 1.4); the Employment Appeal Tribunal (<i>Jones v London Borough of Havering</i> EAT/1099/01/ST at [25]); and numerous other appellate courts in a range of Commonwealth jurisdictions. It has also been cited by the Law Commission (Evidence in Criminal Proceedings: Hearsay and Related Topics, LC 245 at p121); the Scottish Law Commission (1995, Evidence: Report on Hearsay Evidence in Criminal Proceedings, Scot Law Com No 149 at pp15, 33 and 75); and the Irish Law Commission (Consultation Paper on Hearsay in Civil and Criminal Cases, LRC CP 60 – 2010 at fns 21 and 85).</p> <p><i>Blackstone's Criminal Practice</i> is one of the two 'bibles' relied upon by judges and practitioners in criminal courts and is found in reference libraries in the UK and worldwide. It provides extensive</p>

coverage of all aspects of criminal law and is used by the judiciary, criminal law practitioners, solicitors and barristers, the police, the Crown Prosecution Service, students on vocational law courses and academics. It is updated annually to reflect new legislation, case law and Practice Directions. It has been cited with approval by the Court of Appeal in *R v BA* [2012] EWCA Crim 1529 at [9] and by the High Court in *Hogan v Director of Public Prosecutions* [2007] EWHC 978 (Admin) at [25] (these citations relate to sections of *Blackstone's Criminal Practice* written by Professor Keane).

Although the first editions of these works predate 1993, the impact relates to content included in editions published since 1st January 1993.

3. References to the research

The Modern Law of Evidence, OUP, Oxford, 6th edn (2006) and 7th edn (2008), Adrian Keane.

Blackstone's Criminal Practice, OUP, Oxford, 17th edn (2006) 18th edn (2007) and 20th edn (2009), Adrian Keane and other co-authors, the contribution of Professor Keane being substantial.

The quality of *The Modern Law of Evidence* is evidenced by citations in numerous academic peer-reviewed publications, including, for example, the *Cardozo Law Review*, the *International Journal of Evidence and Proof*, the *Judicial Studies Institute Journal*, the *Modern Law Review* and the *Oxford University Commonwealth Law Journal*.

The quality of *Blackstone's Criminal Practice* is evidenced by its editing – the equivalent of peer review - by Professor David Ormerod, QC, Queen Mary, University of London, a highly distinguished academic who is General Editor of the *Criminal Law Review* and also a Law Commissioner, and Lord Justice Hooper. The contributions of Professor Keane have also been widely cited in academic peer-reviewed publications, including, for example, the *Cambridge Law Journal*, the *Criminal Law Review*, the *International Journal of Evidence and Proof* and the *Law and Practice of International Courts and Tribunals*.

4. Details of the impact

Continuing the historic impact of earlier editions of both *The Modern Law of Evidence* and *Blackstone's Criminal Practice*, the research in this case study has made a direct and material contribution to the awareness, capability, performance and understanding of members of the judiciary in reaching their decisions and in directing the jury. The extent of this impact can be gauged by the nature and variety of cases in which it has occurred. The impact in appellate decisions is of particular importance because when material is cited with approval, it becomes a part of the law and a binding precedent.

a) in the United Kingdom

Blackstone's Criminal Practice has been cited with approval and/or applied by judges in the UK in relation to:

- when it is appropriate to give the jury a 'Lucas' direction (a direction to the jury on lies told by the accused) in *R v Marsh* [2009] EWCA Crim 2696, an appeal against conviction of murder, Court of Appeal, Criminal Division at [66]
- what types of evidence may constitute 'supporting material' for the purposes of 'Makanjuola' warnings (a warning to the jury about acting on the evidence of impugned or unreliable witnesses) in *R v Brown* [2009] NICC 21, a murder trial in Northern Ireland at [104].

Blackstone's Criminal Practice has also had an impact on the way in which judges direct juries. Crown Court judges in England and Wales, in deciding how to direct the jury, make use of the *Bench Book* issued by the Judicial College, the body overseen by the Lord Chief Justice and with responsibility for the provision of training for judicial office-holders. The *Bench Book* contains 'model' directions to juries as well as advice on the law of criminal evidence and in both respects it expressly refers to and relies upon *Blackstone's Criminal Practice*. It does so on the subjects of circumstantial evidence, expert evidence, corroboration and the special need for caution, lies, and

conducting a view [1]. These references assist judges to ensure that juries are directed on these evidential issues as clearly and consistently as possible. They also benefit judges in their understanding of the law of evidence in these areas and therefore in their capability and performance.

Blackstone's Criminal Practice has also had an impact on educators and students that extends significantly beyond the submitting higher education institution, being among the practitioner works regarded by the Bar Standards Board as an authoritative and reliable source and therefore listed in its mandatory reading lists for 'Criminal Litigation, Evidence and Sentencing' specified for use by all Bar Professional Training Course providers [2].

b) internationally

The Modern Law of Evidence has been cited with approval and/or applied by judges overseas in relation to:

- the principle that adverse inferences can be drawn from failure to give evidence, in *Presho v Doohan* [2010] 1EHC 148, High Court, Ireland at [4]
- the way in which the judge should direct the jury about the dangers of visual identification evidence, in *Maitland Reckford v R* [2010] JMCA 40, Court of Appeal, Jamaica at [25], an appeal against conviction of murder, and *Raymond Hunter v R* [2011] JMCA Crim 20, Court of Appeal, Jamaica at [29].

The underpinning research of *The Modern Law of Evidence* and *Blackstone's Criminal Practice* has also changed and benefited the awareness, capacity, performance and understanding of those engaged in reforming the law of criminal evidence in China.

Professor Keane's international reputation as the author/co-author of these authoritative sources led to his selection by the Great Britain China Centre (a public body that promotes understanding between China and the UK), on behalf of the Foreign and Commonwealth Office (FCO), as the only non-Chinese scholar to participate in a project to be carried out by the Centre for Criminal Procedure Reform (CCPR), Renmin University, Beijing. Professor Keane's participation was funded by the FCO from its Human Rights and Democracy Fund.

The project related to coerced confessions and their exclusion, the use of 'concealed evidence' and the use of evidence obtained through special investigative measures such as tapping phones, using undercover police officers and entrapment. The aim of the project included the encouragement of a more uniform understanding among the Chinese judiciary of how the rules in these areas should be interpreted and implemented. The aim was also to draft proposals for the National People's Congress, for reform of the Criminal Procedure Law in order to enhance rectitude of decision-making and minimise the risk of miscarriages of justice and the negative international reputation that they engendered (famously, for example, in the case in which the 'victim' of a murder walked back into his village after the trial that had resulted in the conviction and execution of the accused). The project was led by Professor Chen Weidong, a legislation expert consultant with responsibility for advising the legislative affairs committee of the National People's Congress. Drawing materially and distinctly upon his own research in the relevant areas, Professor Keane made two trips to Beijing (in June and December 2011). He gave written and oral advice to Professor Weidong, to members of the CCPR (including specific advice on the report of its empirical research), and to a large number of senior judges from the Supreme People's Court and from the Intermediate People's Courts of various Provinces.

The project achieved a number of important outcomes: a comprehensive analysis of the problems relating to implementation of the relevant rules in the Chinese legal system; practical suggestions for judicial application in pilot courts and, most significantly, adoption by the National People's Congress of some of its most important recommendations for reform of the law. The amendments were included in the revised Criminal Procedure Law which was adopted in March 2012 and came into force on 1st January 2013.

The most important of the amendments make provision for:

- (i) the right to appoint a lawyer when first interrogated (Art 33)
- (ii) the duty to inform a suspect of that right (Art 34)
- (iii) no person to be forced to prove his own guilt (Art 50)
- (iv) in cases where there is no confession, facts to establish guilt to be proved beyond reasonable doubt (Art 53)
- (v) criminal prosecutions to be instigated where the collection of evidence involves the commission of a crime (Art 55)
- (vi) in cases where it is in dispute whether evidence was obtained illegally, the burden to be on the prosecution to prove that it was not so obtained (Art 57)
- (vii) where the court believes it to be necessary for a witness to appear before the court to testify, power to compel any such witness, except a spouse, parent or child of the accused (Arts 187 and 188).

These changes are modelled on the English law of evidence advocated by Professor Keane to members of the CCPR and others (detailed above). The changes, including in particular the adoption of such fundamental rights as the privilege against self-incrimination and the right of access to an independent lawyer before interrogation, amount to a major re-balancing of the Chinese criminal justice system in favour of the accused. The changes also strengthen the hand of the judiciary *vis-à-vis* the police authorities and the procurator's office: for the first time, a trial judge has the power to compel all but immediate family of the accused to give evidence, a power of special importance when the judge wants to go beyond the written statements of those who arrested and interrogated the accused. The changes will improve the quality of the administration of Chinese criminal justice by ensuring fairer criminal trials and reducing the potential for miscarriages of justice.

[In the case of all references in this section to co-authored research, the citations relate to material produced exclusively by Professor Keane.]

5. Sources to corroborate the impact

Most of the sources for impact details are set out in Section Four of this Impact Case Study.

1. *Judicial Studies Board Crown Court Bench Book: Directing the Jury* - accessible at http://www.judiciary.gov.uk/Resources/JCO/Documents/Training/benchbook_criminal_2010.pdf - references at pp 37, 154, 160, 249 and 386 respectively

2. Bar Professional Training Course, Course Specification Requirements and Guidance (August 2011), p 37, accessible at: http://www.barstandardsboard.org.uk/media/28049/bptc_final_pdf.pdf

The impact details made in this case study relating to Professor Keane's advisory work in China may be corroborated by:

- (i) Ms Xiaoping Zhang, Project Manager, The Great Britain China Centre (15 Belgrave Square, London SW 1X 8PS Tel 02072356696. Email Xiaoping.Zhang@gbcc.org.uk), who accompanied Professor Keane on his trips to Beijing; together with the following documents, all available on request;
- (ii) Ms Zhang's Project Report for the Foreign and Commonwealth Office;
- (iii) delegation lists (June and December 2011); and
- (iv) translations (by the Danish Institute for Human Rights) of (a) the Amendments to the Criminal Procedure Law of the People's Republic of China, March 14, 2012 and (b) the Criminal Procedure Law of the People's Republic of China, including the amendments, March 14, 2012.