



**Reforming Scots Criminal Law and Practice:
The Carloway Report**

Response to Consultation

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Introduction

1. JUSTICE is a British-based human rights and law reform organisation, whose mission is to advance justice, human rights and the rule of law. JUSTICE is regularly consulted upon the policy and human rights implications of, amongst other areas, policing, criminal law and criminal justice reform. It is the British section of the International Commission of Jurists. On Scottish matters it is assisted by its branch, JUSTICE Scotland.
2. The Consultation follows the work of Lord Carloway who reported in November 2011 following a year of enquiry with wide terms of reference concerning criminal procedure provided by the Scottish Government. Rather than use Lord Carloway's Report as the basis for more detailed enquiry into the areas he recommends for reform, the consultation paper makes clear that the Carloway recommendations as a package are to form the basis of extensive legislative reform, with only this public consultation to offer any further scrutiny:

It is my intention to present a Bill to Parliament based upon the recommendations in the Carloway Report but which is also informed by your responses to this consultation.¹

We repeat here the concerns we set out in our response to the Carloway Review:

In accordance with the terms of reference given to Lord Carloway, the Consultation Document was very extensive, and over 34 questions, considered whether changes are needed to the use of custody, evidence and appeals. The decision in *Cadder v HMA* which is the premise for this review does not require the majority of the changes that are under consideration. The case recognised a fundamental safeguard that was lacking from criminal procedure in Scotland – the right to legal advice and representation during police custody. Many of the questions raised would lead to substantial change to the criminal justice system. A fully independent commission of inquiry is necessary to consider each area proposed in the Carloway Review with a proper degree of scrutiny. It seems that this will not happen. Such a step is unprecedented in substantial law reform. As academics have observed², the last comparable review in terms of scale was carried out by the Thomson Committee.

3. The Thomson Committee comprised thirteen members, held 122 meetings, heard oral evidence from 52 witnesses of 17 interested bodies as well as individuals, visited penal institutions, spoke with prisoners and also with the Director of Public Prosecutions, New

¹ Kenny MacAskill MSP, cabinet Secretary for Justice, *Reforming Scots Criminal Law and Practice: The Carloway Report*; Scottish Government Consultation Paper, p 2

² J. Chalmers and F. Leverick, 'Substantial and Radical Change': A New Dawn for Scottish Criminal Procedure? (2012) 75(5) MLR 837-864, at 839.

Scotland Yard, Bow Street Magistrates Court, the Judicial Office of the House of Lords, the Central Criminal Court and the Royal Courts of Justice. It issued three reports in 1972, 1975 and 1977,³ the 1975 report leading to the Criminal Justice (Scotland) Act 1980 introduction of the detention period. While the Criminal Justice (Scotland) Bill was before the UK Parliament in 1980, the Royal Commission report on criminal procedure in England and Wales⁴ was nearing its completion. Over the course of three years the Commission received and considered some 447 written submissions, commissioned its own original research and carried out visits to, among others, every police force in England and Wales and to public prosecution departments in: Northern Ireland; Scotland; the Republic of Ireland; the Netherlands, Denmark and Sweden; the United States of America; Canada and Australia - and held twenty full or half day sessions to take oral evidence, covering a representative range of views. This was known to the Members of Parliament debating the Bill. The Secretary of State indicated that its recommendations would be examined in their context.⁵ Some concern was raised in both the Houses of Parliament that the Royal Commission had undertaken considerable research on matters directly relevant to the Scottish Bill, which were absent from the Thomson Committee.⁶

4. Despite this, the evidence obtained by the Royal Commission did not inform the decision to pass the 1980 Act, and its consolidating successor, the 1995 Act. If thirteen committee members taking extensive evidence were still able to reach a decision that ignored the wider evidence and concerns for safeguarding suspects' rights in relation to police detention, specifically in deciding that legal representation would not be necessary or appropriate at that stage, it must be questioned whether the conclusions of a single judge following a much more limited review are sufficient basis for wholesale reform of the criminal justice system.⁷

³ Thomson Committee, *Criminal Appeals in Scotland* (First Report) Cmnd 5038 (1972); *Criminal Procedure in Scotland* (Second Report) Cmnd 6218 (1975); *Criminal Appeals in Scotland* (Third Report) Cmnd 7005 (1977).

⁴ Royal Commission *The Investigation and Prosecution of Criminal Offences in England and Wales: The Law and Procedure* (Cmnd 8092-I 12/01/81))

⁵ HC Hansard: Deb 14 April 1980 vol 982 c815

⁶ Per Lord Gifford, Hansard HL Deb 15 January 1980 vol 404 c 65, and Mr David Steel, Hansard HC Deb 14 April 1980 vol 982 c851

⁷ A concern made all the more prominent by Lord Carloway's comparison of his exercise to that of the Thomson Committee, which he described as a moment of evolution in the criminal justice system 'when it has had to undergo substantial and radical change in order to meet the expectations and requirements of modern society,' *The Carloway Review; Report and Recommendations* (17 November 2011) (hereafter referred to as the Carloway Report), at para 4.0.1.

Arrest and Detention

1. **What are your views on the move to a power of arrest on ‘reasonable suspicion’ of having committed a crime, replacing the common law and statutory rules on arrest and detention?**
5. We agree that it is sensible to replace statutory detention under s14 Criminal Procedure (Scotland) Act 1995 and common law arrest with one uniform power of arrest. As Lord Carloway explains at paragraph 5.1.29 of the Carloway Report, the purpose of the distinct s14 detention period was rendered nugatory by the decision in *Cadder v HM Advocate* and the subsequent Criminal Procedure (Legal Assistance, Detention and Appeals) (Scotland) Act 2010. The distinct period was introduced in order to avoid the unlawful practice of arrest without warrant where there was no sufficiency of evidence to charge the suspect, in order to allow the police to further an investigation, but without affording the suspect their legal rights which would otherwise accrue upon arrest (most crucially the right to a lawyer).⁸ Since those legal rights have now been introduced to s14 detention, there remain only confusing anomalies between which power the police should exercise.
6. The police can arrest without warrant under a number of grounds carved out through the common law over the course of numerous factual scenarios. Lord Carloway sets the powers out at para 5.1.9 of the Review. Statutory powers of arrest also exist for various devolved and reserved offences. For both common law and statutory arrest, the ground of arrest is one of reasonable suspicion, belief or cause.⁹ The reasonable suspicion test therefore not only satisfies article 5 of the European Convention on Human Rights but has historically been an integral ground for arrest in Scots law and should remain the test applied.
7. Common law arrest however is only to be exercised where there is a sufficiency of evidence upon which to charge. JUSTICE is a partner in a project conducting research into the rights of suspects during police detention in four jurisdictions, one of which is Scotland¹⁰. Observational research over a period of three and two months respectively at two police stations in Strathclyde has revealed the disparity between the two methods by which a suspect can be

⁸ Expressly excluded by the Thomson Committee because it considered that the purpose of obtaining information from the suspect regarding the offence might be defeated by the participation of his solicitor, see para 7.16.

⁹ See *Peggie v Clark* (1868) 7 M 89, Lord Deas at p 93; Road Traffic Act 1988 ss 4, 6, 30, 103, 178; Criminal Law (Consolidation) (Scotland) Act 1995 ss 47 and 50; Firearms Act 1968 s50; Misuse of Drugs Act 1971 s24; Official Secrets Act 1911 s6; Protection of Animals (Scotland) Act 1912 s 11 and others set out in Renton & Brown, *Criminal Procedure*, 6th Ed (W. Green, 2011) R.41, para 7-09

¹⁰ *Suspects Rights in Police Detention*, a joint project between University of Maastricht, University of West England, University of Warwick, JUSTICE and OSJI, ongoing. The research is comparing police detention in England and Wales, Scotland, France and the Netherlands,

taken to a police station and detained. Section 14 detention is utilised to further police enquiries, often through interview of the suspect, whereas common law arrest appears sometimes to be employed to detain drunk and incapable persons so that they may sober up overnight in the police cells, or for a variety of other offences for which the outcome has already been determined as either caution, charge or report to the procurator fiscal's office for consideration of charge. In these instances, it has to be asked why a person needs to be arrested and conveyed to the police station at all.

8. In our view, not only should there be one power of arrest with all rights attributable to the suspect once exercised, but there must also be a requirement for the arrest to be necessary and in the interests of justice. Where there is a sufficiency of evidence, there should be no need to arrest the person at all, unless the person is committing, or is likely to commit, a further offence and the arrest is necessary to prevent crime. Absent such circumstances the officer should take the person's details in order to report them for consideration of charge or to offer them an undertaking to appear at court where there is a clear offence made out. If the accused fails to attend, it is a matter for the court to issue a warrant of arrest. Short of a sufficiency of evidence, holding a person in police custody upon a reasonable suspicion should be avoided unless an officer is furthering specific enquiries and needs the suspect to be in custody in order to do so (to conduct an interview, take samples or hold an identification parade). In cases where a person is not in this category, and possibly is only to be arrested due to being drunk and incapable, it is difficult to see what purpose the detention in police custody serves. We therefore agreed with Lord Carloway that a decision should be taken not only on arrest but on continuing detention at the police station. We also agree that where the offence is non-imprisonable the grounds for detention will be very hard to satisfy.
9. Whilst the *ground* for arrest is reasonable suspicion of an offence being committed, this is not the *purpose* of the arrest. It is not sufficient to arrest a suspect because of reasonable suspicion of committing an offence alone. The arrest must be necessary to achieve a specific purpose. Therefore the officers must satisfy themselves that it is necessary and proportionate not only, as Lord Carloway recommends, later on at the police station, but at the locus also. There will usually be no change in circumstances between the locus and the police station. Therefore if there is no necessary and proportionate reason to detain at the police station, there will have been no justifiable reason to arrest at the locus. The decision will however require review at the police station (see below).
10. Article 5(1)(c) of the European Convention on Human Rights (ECHR) provides three purposes to arrest:

(1) Everyone has the right to liberty and security of person. No one shall be deprived of his liberty save in the following cases and in accordance with a procedure prescribed by law:

(c) the lawful arrest or detention of a person effected for the purpose of *bringing him before the competent legal authority on reasonable suspicion of having committed an offence or when it is reasonably considered necessary to prevent his committing an offence or fleeing after having done so...*

(emphasis added)

The common law arrest, as indicated above, requires the interests of justice to be satisfied by the arrest as a result of a number of circumstances such as: prevention of crime; escape of the suspect; destruction of evidence. The purpose of the common law arrest continues to be to convey the suspect to court to appear before a judge and answer the charge (made at the point of arrest). Arrest at common law and under certain statutory powers also gives effect to the purposes of prevention of the committal of an offence or fleeing from the scene of a crime. Common law arrest should therefore comply with article 5, though we have concerns about whether these purposes are always satisfied in practice, as set out above.

11. Section 14 detention is currently 'for the purpose of facilitating the carrying out of investigations (a) into the offence; and (b) as to whether criminal proceedings should be instigated against the person. These are not reasons set out in article 5 ECHR. Nevertheless, in *Murray v UK* (1994) 19 EHRR 193 the European Court of Human Rights (ECtHR) expressly interpreted article 5(1)(c) to encompass police enquiries, including interrogation to be carried out during police detention, so long as they do not infringe the safeguards contained in the Convention:

55. With regard to the level of "suspicion", the Court would note firstly that, as was observed in its judgment in the case of *Brogan and Others*, "sub-paragraph (c) of Article 5 para. 1 (art. 5-1-c) does not presuppose that the [investigating authorities] should have obtained sufficient evidence to bring charges, either at the point of arrest or while [the arrested person is] in custody. Such evidence may have been unobtainable or, in view of the nature of the suspected offences, impossible to produce in court without endangering the lives of others" (loc. cit., p. 29, para. 53). *The object of questioning during detention under sub-paragraph (c) of Article 5 para. 1 (art. 5-1-c) is to further the criminal investigation by way of confirming or dispelling the concrete suspicion grounding the arrest. Thus, facts which raise a suspicion need not be of the same level as those necessary to justify a conviction or even the bringing of a charge, which comes at the next stage of the process of criminal investigation.*

(Emphasis added)

12. Section 24 of the Police and Criminal Evidence Act 1984 sets out a comprehensive set of powers concerning arrest in England and Wales which incorporate both the common law and s14 purposes Scots law currently recognises:

Arrest without warrant: constables

- (1) A constable may arrest without a warrant—
 - (a) anyone who is about to commit an offence;
 - (b) anyone who is in the act of committing an offence;
 - (c) anyone whom he has reasonable grounds for suspecting to be about to commit an offence;
 - (d) anyone whom he has reasonable grounds for suspecting to be committing an offence.
- (2) If a constable has reasonable grounds for suspecting that an offence has been committed, he may arrest without a warrant anyone whom he has reasonable grounds to suspect of being guilty of it.
- (3) If an offence has been committed, a constable may arrest without a warrant—
 - (a) anyone who is guilty of the offence;
 - (b) anyone whom he has reasonable grounds for suspecting to be guilty of it.
- (4) But the power of summary arrest conferred by subsection (1), (2) or (3) is exercisable only if the constable has reasonable grounds for believing that for any of the reasons mentioned in subsection (5) it is necessary to arrest the person in question.
- (5) The reasons are—
 - (a) to enable the name of the person in question to be ascertained (in the case where the constable does not know, and cannot readily ascertain, the person's name, or has reasonable grounds for doubting whether a name given by the person as his name is his real name);
 - (b) correspondingly as regards the person's address;
 - (c) to prevent the person in question—
 - (i) causing physical injury to himself or any other person;
 - (ii) suffering physical injury;
 - (iii) causing loss of or damage to property;
 - (iv) committing an offence against public decency (subject to subsection (6)); or
 - (v) causing an unlawful obstruction of the highway;
 - (d) to protect a child or other vulnerable person from the person in question;
 - (e) to allow the prompt and effective investigation of the offence or of the conduct of the person in question;

(f) to prevent any prosecution for the offence from being hindered by the disappearance of the person in question.

(6) Subsection (5)(c)(iv) applies only where members of the public going about their normal business cannot reasonably be expected to avoid the person in question.

13. Whilst we largely agreed with Lord Carloway about how arrest powers should be set out, we do not agree that the primary power of arrest should be specified solely as having the purpose of taking an accused to court. This would preclude the investigation stage from taking place since, where there is no sufficiency of evidence, there is no legal basis upon which to purport to arrest and convey an accused to court. The Scottish power of arrest should in our view encompass comprehensive reasons for arrest and we suggest therefore that statute should specify four separate provisions on:

- (1) The power of arrest to be exercisable upon similarly drafted grounds and purposes to those set out in s24 PACE;
- (2) Where the reasons for arrest cannot be satisfied because there is already a sufficiency of evidence to charge and none of the preventative measures apply, arrest will not be justified and the matter should be disposed of by report to the COPFS or seeking an undertaking to appear at court;
- (2) Where a person is charged with an offence the requirement that they should be taken before a court, or liberated (with or without an undertaking) to appear at court, in order to comply with article 5(1) ECHR;
- (3) Length and justification for detention prior to charge and being taken before the court in order to comply with article 5(3) ECHR.

14. We do not think that it is necessary to define 'arrest' for these purposes since this could construe the power too narrowly. For example, Lord Carloway has suggested at paragraph 5.1.30 that arrest 'be defined in terms of the initial deprivation of liberty. i.e. the restraining of the person and taking him/her to, or keeping him/her at, a police station.' We consider that this confuses arrest and subsequent detention. The power to arrest can be exercised without the suspect being conveyed to the police station at all. If the definition were as Lord Carloway proposes, the restriction of a person's liberty which did not involve police station detention would not be an arrest, and the restriction would not be subject to the proper exercise of police powers or convey rights upon the suspect. If a definition is to be adopted, we would suggest a wider description as acknowledged by the Supreme Court in the judgments of *Ambrose v Harris*, *HM Advocate v G* and *HM Advocate v M*.¹¹ when their Lordships concluded that the application of the right to legal advice depended on whether a suspect was in police custody at the time of questioning. Police custody requires a significant curtailment of freedom of

¹¹ 2011 SLT 1097; 2011 SCCR 651.

action.¹² Whilst their Lordships were not considering the definition of arrest in particular, in our view, arrest must be synonymous with police custody and also require a significant curtailment of freedom of action so that the person is no longer at liberty to leave. Whilst the moment when a person is entitled to legal advice prior to police questioning may occur earlier than arrest from the discussion in *Ambrose*,¹³ in order to ensure legal certainty, it would be prudent to adopt this definition over any other, should a definition be considered necessary. However, we consider statutory provisions that set out what the powers are under arrest are crucial. The requirement to convey to a police station once detained is already set out in section 14 and should remain.

2. What are your views on Lord Carloway's recommendations for the police no longer to be required to charge a suspect with a crime prior to reporting the case to the Procurator Fiscal?

15. The police may already report a case to the procurator fiscal, pursuant to s12 of the 1995. Where a decision is made to report a case for consideration of prosecution the police will usually liberate the suspect, with or without an undertaking. In a serious case where liberation would not be appropriate, and where there is doubt, a prosecutor should be consulted as to charge.¹⁴ Since the police are also required to take a suspect before a court competent to deal with the case on the next lawful day after being taken into custody, any potential delay which may ensue in waiting for a decision from a prosecutor as to charge will be subject to the scrutiny of the courts. Therefore, there is no change in law proposed here and we consider that the current approach to seeking the view of a prosecutor prior to charge where a case is not clear is prudent to avoid wrongful charge and prosecution. The concerns we have about the practical realities of the 'next lawful day' are considered below.

3. Do you agree that a suspect in a criminal investigation, who has not been detained or arrested, does not require any statutory rights similar to those conferred had that person been arrested and detained?

16. Lord Carloway considers that there is no distinct legal status for a 'suspect'. Lord Carloway has said that there ought not to be a statutory definition of suspect because if matters were formalised too early, a disproportionate and unnecessary burden would be placed on the police which would risk compromising investigations. Further, undue weight could be placed on the status to the suspect's detriment by the public and media as well as in subsequent

¹² Ibid, per Lord Hope, at [71].

¹³ 'The moment at which the individual is no longer a potential witness but has become a suspect provides as good a guide as any as to when he should be taken to have been charged', per Lord Hope at [63], though having been charged may not automatically render any questioning inadmissible after this stage either.

¹⁴ J. Mill, *The Scottish Police: Powers and Duties* (Edin, 1944), p69

proceedings. We agree that there is no need to define a suspect in a new statutory section. But it is not correct to say that there is not an already existing status of suspect.

17. Firstly, any person who is suspected of an offence has a general status of 'suspect' up until the point where they become an 'accused', be they arrested, detained, voluntarily attending or not. The moment a person is suspected of committing an offence, their right not to incriminate themselves must be properly respected.¹⁵ They should be cautioned and informed of the suspicion and general nature of the offence for which they are suspected:

[I]t is...well recognised that in order that his replies should be admissible in evidence, it is proper practice that any further questioning should be preceded by a caution in common form.¹⁶

18. Furthermore, article 6 ECHR is engaged when a person is 'charged', which can encompass a much wider set out circumstances than a decision to prosecute. In *Deweere v Belgium* the ECtHR held the test is whether the situation of the person has been substantially affected.¹⁷ In *Zaichenko v Russia*,¹⁸ the court concluded that a suspicion of theft arose when the appellant could not produce a receipt for a diesel purchase found in his car. Although he was not accused of an offence at that stage, his situation was substantially affected and, whilst proceedings were as yet too preliminary to require the assistance of legal advice, the Court considered that he should have been cautioned prior to asking any further questions:

The Court considers that being in a rather stressful situation and given the relatively quick sequence of the events, it was unlikely that the applicant could reasonably appreciate without a proper notice the consequences of his being questioned in proceedings which then formed basis (*sic*) for his prosecution for a criminal offence of theft. Consequently, the Court is not satisfied that the applicant validly waived the privilege against self-incrimination before or during the drawing of the inspection record.¹⁹

19. Section 13(1)(a) of the 1995 Act provides the power to question upon suspicion in order to identify a suspect and obtain an explanation for the circumstances giving rise to the suspicion.

¹⁵ *Ambrose*, *ibid*, per Lord Hope at [22]

¹⁶ *Tonge v HM Advocate*, 1982 JC 103, 147. However it was subsequently observed in *Pennycuik v Lees* 1992 SLT 763, 765H that 'There is no...rule of law which requires that a suspect must always be cautioned before any question can be put to him by the police or anyone else by whom the enquiries are being conducted. The question in each case is whether what was done was fair to the accused.'

¹⁷ (1980) 2 EHRR 439, at [46]

¹⁸ (App. No. 39660/02), 18th February 2010 (unreported).

¹⁹ At [55].

In our view, the second limb may give rise to a right to legal advice and certainly does give rise to a need to caution prior to answering questions. This power is exercised prior to detention yet s13(5) sets out the requirements upon the officer to inform the suspect of the reason for the suspicion, questioning and the consequences of failure to reply. Furthermore, searches and roadside breath tests occur prior to arrest and detention, which both require notification of the reasons for the search and the grounds for suspicion.

20. Finally, whilst volunteers are rare, there are circumstances where a suspect will assist with police enquiries without being formally arrested or detained. These suspects have the same right to be cautioned and informed of their right to legal assistance prior to being questioned or for other procedures such as an identity parade.
21. Therefore we think it is important not to restrict the status of a suspect by any new provisions that are drafted through conferring a particular status upon a detained or arrested person alone, but rather ensure that where police are given investigatory powers to exercise concerning suspects that these comply with the suspects' existing rights in Scots law and article 6 ECHR.
4. **What are your views on the recommendation that a suspect should be detained only if it is necessary and proportionate having regard to the nature and seriousness of the crime and the probable disposal if convicted?**
22. As indicated in question one above, we agree that a suspect should only be detained if it is necessary and proportionate in the interests of justice. However, at the point of arrest, whilst there may be a suspicion of a particular offence given the circumstances, it may be that further investigation is required in order to ascertain what the likely charge and disposal will be. This is why we would suggest an 'interests of justice' test, which should take into consideration the four conditions we set out above at paragraph 13, as well as the nature and seriousness of the alleged crime. It is why we also advocate a review of detention at reasonable periods to ensure it continues to be necessary and proportionate (see below).

Custody

5. Do you agree with Lord Carloway's recommendation that the maximum time a suspect can be held in detention (prior to charge or report to the Procurator Fiscal) should be 12 hours?

23. We observed in our evidence to the Justice Committee inquiry into the 2010 Act²⁰, that an extension of the maximum period of detention from six to twelve (and thereafter twenty four) hours should have been justified by empirical evidence to show that (a) solicitors are not able to attend within the six hour period and/or (b) police officers are hindered in completing their investigations by this period. The Lord Advocate's Interim Guidance had been in operation since July 2010. The Supreme Court indicated the date when it would give judgment. As such, it would have been possible to collect evidence of how the change brought about by the Guidance was affecting detention. If this related largely to geographical location and the problem of obtaining legal advice within the six hour period, we would expect this to be borne out by evidence, not hypotheses or conjecture. Furthermore, the amendment could have been drafted to reflect that particular concern. Since the amendment was a blanket extension, not limited to time awaiting legal advice, the provision is now being engaged for operational extensions of time rather than delay in legal consultation. Of most concern, whilst advice may have come from ACPOS²¹ that there was a need for an extension, this was not disclosed and the existence of such necessity was not accepted by defence lawyers. In the event, although our view is that personal consultation by a solicitor is essential in most cases, in practice most advice is being given by telephone and accordingly the need to continue with the revised periods does not arise in most cases. In our view the extension of time should never have passed.

24. Lord Carloway bases his recommendation upon evidence provided by ACPOS. The ACPOS evidence consists of statistics on periods of detention in police custody from November 2010 until August 2011. This is a very short period of time from which to draw a conclusion as to what length of detention is appropriate. Given that a further twelve months of statistical information must now be available this should be utilised to inform the decision about what period of detention is appropriate. At paragraph 5.2.22 Lord Carloway indicates that the ACPOS data reveals that, most commonly, the requests for extensions beyond twelve hours have stemmed from the complexity of the investigation, the existence of multiple suspects or witnesses, arranging samples and searches and also whether the suspect is fit for interview or

²⁰ JUSTICE, Written Evidence to the Justice Committee on the Criminal Procedure (Legal Assistance, Detention and Appeals) (Scotland) Act (March 2011). Copy available upon request.

²¹ It was asserted during debate that it was not possible, given the strictures the Government was operating under, to obtain evidence beyond advice, Scottish Parliament, Official Report, 27th October 2010, Richard Baker MSP, Col 29627.

needs the assistance of an appropriate adult or interpreter. Ninety three extensions beyond twelve hours appear to have been reported. Of these twelve were because of delay in access to a solicitor. It is not indicated how the other justifications contribute to the total of ninety three. There is also an absence of information as to why extension beyond six hours has been justified. Since Lord Carloway then goes on to recommend retaining twelve hours as a 'reasonable' period of detention,²² in our view this data cannot be considered statistically significant, nor, without further detail, can the figures themselves simply be relied upon to provide sufficient justification for maintaining a twelve hour period of detention.²³ If there are operational reasons to justify an extension, these must be revealed and scrutinised in order to consider whether better use of resources and efficiencies in the investigatory system could be made rather than simply resorting to lengthier detention of suspects. For example, officers must complete multiple reports by hand and often have to record interviews in their notebooks by hand. Despite the obvious opportunities for inaccuracies in reporting that this entails, the interview process could be much swifter if all interviews were tape recorded (as happens routinely in the most serious cases).²⁴

25. However, given that the recommendation is to combine the current common law arrest and s14 detention, it must be made clear that any detention period can only be authorised whilst there exists a justifiable reason to detain rather than charge. We therefore disagree with Lord Carloway that there is no rule requiring the police to charge once a sufficiency of evidence has been reached and that the time to charge should be at the discretion of the police. There can be no justification for detention within the 12 hour investigatory period once there is evidence upon which a charge could be laid. To suggest otherwise is contrary to the requirement that suspects must not be unnecessarily and disproportionately detained in custody.²⁵ It also ignores the caution of the Thomson Committee upon their creation of a period of detention: 'As soon as the purpose of the detention is served, the police will have a clear duty. They must either liberate the detainee or arrest him'.²⁶

²² At paragraph 5.2.34.

²³ The publicly available information from ACPOS, suggests that on average across Scotland, 83.5% of detentions are carried out within a six hour period; 15.7% within six to twelve hours and 0.8% over twelve hours. The report breaks this down by force area but does not give reasons for the extensions of time over six hours. It also does not indicate the period of time covered, but the maximum possible period is November 2010 until June 2011: ACPOS Solicitor Access Data Report (June 2011), available at <http://www.acpos.police.uk/Documents/News%20Releases/SolicitorAccessDataReport.pdf>

²⁴ This recommendation was made by the Thomson Committee at paragraph 7.21b but remarkably is still not operational across all police interviews. It is also a recommendation of the Committee for the Prevention of Torture (CPT), CPT Standards, (CPT/Inf/E (2002) 1 - Rev. 2011), available at <http://www.cpt.coe.int/en/docsstandards.htm>

²⁵ Pursuant to s17 Police (Scotland) Act 1967.

²⁶ Thomson Committee, paragraph 3.25.

26. In order to ensure that the detention is necessary from the outset, in our view, the custody officer must enquire not only as to the grounds for arrest, but also the *purpose* of the detention in the police station. The custody officer must inform the suspect of why they are satisfied that the purpose is justified. Again, the Thomson Committee recommended this process as part of the detention period,²⁷ yet our research in two police offices²⁸ did not observe any review of the actual detention by custody officers, nor the informing of suspects of reasons for their detention, in either common law or s14 detention cases. The only 'review' we have observed involves the arresting officer explaining to the custody officer the grounds for arrest or detention and the suspected offence that were given at the locus, which the suspect is informed of by listening to this conversation. A suspect is never formally informed of the reasons they are being kept in a police cell. In our view, statute must provide for this requirement in order to ensure that it is properly observed. The process and time should be recorded in a custody log so that the lawfulness of the detention can be verified.

6. What are your views on whether this 12 hour period could be extended in exceptional circumstances?

27. We certainly agree that a suspect should not be held in detention for longer than twelve hours. Whilst we do not see that a case has been made out for further extension on the current evidence, were such evidence to be made available that demonstrated a case with exceptional circumstances of particular complexity, the appropriate course would be to require in legislation that the suspect be taken before a sheriff who would review the case and decide whether an extension to the detention period can be justified as necessary and proportionate. This would give the police and suspect the opportunity to make representations about the proposed extension. It would also ensure that the decision is independent and impartial of the investigation and made by an appropriate arbiter.

7. What are your views on the need for the proposed 12 hour period of detention to be reviewed after 6 hours by a senior police officer?

28. We agree that detention which exceeds six hours should be subject to review by a senior police officer. This can be the custody sergeant since it is their role to oversee the custody area and they hold responsibility for the welfare of the detainees. A review at six hours will ensure that, if the maximum period of detention is to remain at twelve hours, the requirement to detain only when it is necessary and proportionate continues to remain justifiable throughout that period. By requiring the investigating officer to report to the custody officer as

²⁷ *Ibid.* paragraph 3.22.

²⁸ *Suspects Rights in Police Detention*, above.

to what they have been doing during the previous six hours and why any further period of detention is required, it will ensure that the detention remains justified.

29. However, we consider that further review is required after the decision to report or charge throughout the period of detention up until release. This is important to ensure the welfare of the detainee and the continuing requirement to detain. The reasons may alter from those given during the investigatory phase,²⁹ but the requirement to justify detention nevertheless remains, under s17 Police (Scotland) Act and under article 5(3) ECHR. Again, in our view this review should be conducted by the custody sergeant, take place every six hours and be recorded in the custody log to verify the lawfulness of the detention. It should be a formal review involving the investigating officer and be required by legislation.

30. Our observational research has revealed that suspects detained pending court who are held for lengthy periods of time spend all of that time in their cell. Where people are being detained for longer than twelve hours, in our view they must be given access to fresh air and exercise.³⁰

8. What do you consider the most effective way of ensuring that no person should be detained in custody beyond 36 hours before appearing before a Court, i.e. over the weekend period?

31. We are concerned by the length of time suspects are currently detained in custody. This is both in terms of welfare, as police cells are not designed for more than a few hours of detention, and lawfulness since it is not 'necessary' and therefore breaches article 5(3) ECHR because accused persons are not always promptly taken to court. Lord Carloway provides a 'snapshot' of the custody court which sat late on a Monday at paragraph 5.2.8 of the Report. This revealed that sixteen percent of appearances involved people who had been detained since the previous Thursday or Friday. A further twenty two percent had been waiting in police custody since Friday night or early Saturday morning. This last group alone had been held for more than sixty hours. Only twenty five percent of those in custody were committed to prison rather than released on bail. We repeat these figures because they reveal a concerning practice which must be reformed.

32. Our research in Strathclyde³¹ revealed a similar picture. Of the cases we observed, thirty six were custodies taken to court. Whilst sixty nine percent of accused were taken to court within

²⁹ For example, the suspect is unfit to be released through drink and may cause a danger to the public or himself; the crime is so serious that detention is necessary pending appearance at court.

³⁰ The CPT Standard in any event requires that a person detained in police custody longer than 24 hours should be offered outdoor exercise every day, at page 7, note 1 and in the Extract from the 12th General Report (CPT/Inf (2002) 15) at paragraph 47.

³¹ *Supra*.

twenty four hours, thirty percent therefore exceeded twenty four hours in police detention. Of these, nineteen percent were detained for over thirty six hours and fourteen percent over forty eight hours. Since the practice has emerged of dealing with custodies in the afternoon, it is likely that, once taken to court, these people had to wait in the court cells considerably longer to have their case heard.

33. The period of thirty six hours is suggested by Lord Carloway as the appropriate period of detention. We assume that this is reached by taking the twelve hour maximum investigatory period, should this be adopted, and thereafter affording a further period of twenty four hours of detention after charge. It is unclear why such a period would make any impact upon the current unsatisfactory situation as either the next court day will be before another twenty four hours have passed, or, if the person has been arrested on a Thursday or Friday, more than twenty four hours will pass before the next court day on a Monday.
34. In our view, there must be a requirement to hold Saturday custody courts³² in order to ensure that people are not unjustifiably detained for lengthy periods of time. There is no other way of reducing the period of detention that is viable. Moreover, custody cases should be prioritised and heard first on the court list, not last. In order to do so, we agree that efficiencies will have to be made in the report from the police to the procurator fiscal and in their preparation for court. We are surprised that a full morning is required prior to presentation of the overnight custody cases. Whilst we accept that holding Saturday courts will incur resources both in fees for court staff and lawyers, as well as additional time outside of their usual office hours, we do not consider that holding dedicated custody courts would take more than the Saturday morning. It would also not be necessary to open more than a few courts in each area, as appropriate to the volume of custody cases. We agree with Lord Carloway that this would avoid Monday courts sitting late into the evening which may well be preferable to many accused, court staff and lawyers. Justice is not served by courts having to sit late, administered by practitioners who are tired. The avoidance of personnel having to work on a Saturday cannot justify detaining people for forty eight hours longer. After all, many professions, including the police and hospitals, have to operate a twenty four hour, seven days a week service. Custody courts operate in England and Wales on Saturday mornings and the defence profession has produced a rota to ensure duty cover as well as employing agency solicitors or junior counsel to cover cases where nominated solicitors cannot attend in person. Because only the custody decision is taken at these hearings, this ensures that the issue of plea and process of the case is reserved until the next court day when the nominated solicitor and, where necessary, appropriate prosecutor and fuller details of the case, can be provided.

³² Additional sittings may be required where there are Monday and Tuesday bank holidays.

35. We consider that 'the next court day' should remain the appropriate test, coupled with the s17 requirement for detention to be necessary and six hourly reviews. If Saturday courts are introduced, periods of thirty six hours detention should become rare. Nevertheless we consider that thirty six hours should be the maximum period of total detention, from the point of arrest at the locus, through to appearance in court. It is not acceptable that, upon reaching court, suspects can be held all day without their detention being reviewed. This period should be included in statute to ensure detention periods do not creep over an acceptable limit as they have currently done. Where a person is detained for thirty six hours they must be released from custody otherwise further detention will be unlawful. This will ensure that custody cases are taken seriously and treated with appropriate urgency.
36. In our view, once detention passes twenty four hours, a further extension to thirty six hours should require authorisation by a superintendent, as in England and Wales under s42 of PACE, and the reasons for the continued detention should be recorded on the custody log. This will ensure a fresh and independent review so that the decision is accountable. Lord Carloway has reviewed other common law systems of detention. Thirty six hours, inclusive of investigative detention must be the maximum justifiable period of detention having regard to what other systems are able to achieve. Whilst the maximum lawful period supposed under article 5(3) ECHR is four days, this was in the context of holding suspected IRA members on suspicion of terrorism where the extension of detention concerned the investigatory period.³³ Furthermore, the UN Human Rights Committee has considered that, in order to comply with the requirement of promptness, delay in being taken before a court cannot exceed a few days.³⁴ Once a charge has been administered, there is no reason to detain other than in order to convey to court. The only justification for continued detention therefore would be that the court is not in session.

9. What are your views on the police having the ability to hold an accused for court and report a case to the procurator fiscal without first charging the suspect?

37. We repeat our answer to Question 2 above. However, where this route is taken, the same maximum period and reviews during detention will be necessary, with greater justification required in order to explain lengthy periods of detention. We accept that, in a complex case, the twelve hour investigatory period may pass without the police being able to make a decision on charge.

³³ *Brogan v UK* (1988) 11 EHRR 117.

³⁴ Human Rights Committee, General Comment 8, Article 9, (Sixteenth Session, 1982), Compilation of General Comments and General Recommendations Adopted by Human Rights Treaty Bodies, UN Doc. HRI/GEN/1/Rev. 1 at 8 (1994)

Liberation

10. Do you agree with Lord Carloway's recommendations that the police should be able to liberate a suspect from custody on condition, referred to as investigative liberation? What are the practical issues with this and what comments do you have about conditions and safeguards?

38. We welcome the recognition by Lord Carloway that the presumption should be in favour of liberation of suspects and that, where detention is no longer necessary and proportionate, they should be released. The right to liberty is a fundamental right protected by article 5 ECHR and research has confirmed that police detention is a particularly unpleasant deprivation of liberty.³⁵ Nevertheless, conditional liberation for up to 28 hours still places the suspect in a position of restricted liberty. The starting point in ensuring that such liberation does not lead to the commission of further offences is the Lord Advocate's Guidelines to Chief Constables on Liberation by the Police,³⁶ which set out when it is appropriate to allow liberation on an undertaking and what conditions may be appropriate, post charge.
39. However, given that Lord Carloway has recommended that the investigatory period of detention should be limited to 12 hours, it may be that there are few cases where liberation is viable because, in the majority of cases, the initial arrest will only be justifiable to question and/or take samples from the suspect. Equally the decision to impose conditions, which may be justifiable post charge where a sufficiency of evidence has been made out, may well not be possible (if there is a lack of information and thereby a lack of justification to detain) at that stage. The imposition of conditions upon liberation will have to be very carefully justified as a result, both in terms of the ongoing lines of enquiry and the conditions to be imposed, and recorded in the custody log. Any decision would have to be taken, in our view, by an inspector with the authority to justify the conditions imposed. In our view the conditional liberation should also be justified by the type of crime committed in order to show a correlation between the type of condition and the criminal activity.
40. We agree that a procedure should be legislated to allow the suspect to make representations concerning conditions imposed upon them. This should be possible initially at the police station prior to liberation, where the suspect must be entitled to legal assistance. This is the most efficient place to make representations prior to the imposition of the conditions so that

³⁵ See J. Chalmers and F. Leverick, 'Substantial and Radical Change': A New Dawn for Scottish Criminal Procedure? (2012) 75(5) MLR 837-864, at 844 citing research conducted in English police stations: A. Sanders et al. *Criminal Justice* (Oxford: OUP, 4th ed, 2010) 144; S Choongh, *Policing as Social Discipline* (Oxford: Clarendon Press, 1997) 97

³⁶ Available at <http://www.copfs.gov.uk/sites/default/files/Publications/Resource/Doc/13547/0000523.pdf>

any real impossibilities can be avoided. Suspects should not be set up to fail by conditions they are unable to meet, which can happen with geographical and non-contact conditions. In court these would be discussed prior to imposition and the same should happen at the police station. Thereafter, if changes occur which mean that the suspect would have difficulty meeting the conditions there should be the opportunity to appear before a sheriff and seek amendment to the conditions. Legal aid should be extended to cover this appearance.

41. Whilst it is helpful for the procurator fiscal to advise on whether liberation with conditions is appropriate pre- or post- charge, we do not consider that an actual power to bail the suspect should be given to the fiscal. This would blur the role of the fiscal with that of the police, which should remain independent bodies. The suspect is also within the control of the police, upon police arrest powers. Whilst we agree this would be a further means of securing release, it is difficult to see how a decision could be made by a fiscal rather than a police officer about release from police custody.
11. **Lord Carloway suggests that a limit of 28 days be set on the period that the police can liberate a suspect on investigative liberation. Do you think that 28 days is sufficient in all cases?**
42. We are unclear why a period of 28 days has been chosen. The Lord Advocate's Guidelines specify³⁷ that a post-charge liberation on an undertaking should be for an appearance at court no later than 28 days after liberation. This period is justified by the availability of court listings. The imposition of conditional undertakings pre-charge rests upon very different considerations. The duration should depend solely on the lines of enquiry that the investigating officer intends to pursue.
43. Evidence is needed from the police as to what enquiries would be conducted during a period of liberation and how long standard enquiries that they may pursue are likely to take, for example reviewing CCTV footage, waiting for sample analysis etc. It may be impossible to say how long these enquiries could take. There is also a risk that, given a period of 28 days, an enquiry could amply fill that time, either because other matters may take priority, or because other lines of enquiry may arise. The police must also provide information to demonstrate how, without this power, they are able to conduct enquiries and proffer charges at present. Chief Superintendent Main explained to the Justice Committee during evidence sessions on the Report that some investigations may take longer than 28 days:

The reality is that often telephone bills and evidence of internet use are not held in either Scotland or the United Kingdom. The jurisdictions in which such things are held

³⁷ At paragraph 4.

are often beyond Europe, which means that it is physically impossible to gather such evidence in 28 days.³⁸

This no doubt is correct. However, current investigations will require this material and be able to obtain it to support a prosecution. How is this currently possible without police bail? The likelihood is that in the vast majority of instances where police bail could be utilised, a search warrant is currently sought prior to arrest and forms the basis of the suspicion to arrest in the first place. Or, alternatively there is a sufficiency of evidence to charge, a person is charged and in the progression of the case, further evidence is obtained to bolster the prosecution. The opportunity to liberate upon conditions should not alter these current practices which ensure appropriate safeguards are in place so that a person is not unlawfully or unnecessarily detained, or has his movements restricted by conditions.

44. In our view, given the restrictions on the suspect's liberty and the fact the police currently have twelve hours in which to conduct enquiries (which they do not seem in almost a majority of cases to need to exceed)³⁹, seven days would seem to be a more appropriate maximum duration of any investigative liberation.

12. Are there practical issues with the police advising the suspect of a time and place for a return to the police station, at the point investigative bail is granted?

45. No doubt the police inspector would fix a return according to the investigating officer's shift patterns, and would also take into consideration any difficulties the suspect may have with a proposed date and time of a return. We are not aware of other operational difficulties that may occur for the police.

³⁸ Justice Committee, Official Report, 4th Session (13th December 2011), col 662.

³⁹ Given that the evidence available suggests 0.8% of detentions extended past 12 hours, see ACPOS Report, above.

Legal Advice

13. What are your views on the recommendation for access to a lawyer to begin as soon as practicable after the detention of the arrested suspect, regardless of questioning?

- **What do you see as the purpose of access to a lawyer when questioning is not anticipated?**
- **What do you consider to be the best way of providing legal advice for suspects as soon as practicable after detention, whilst ensuring it is effective, practical and affordable?**

46. We welcome the acceptance of Lord Carloway that, over time, there has been a change in the investigation of crime in Scotland such that it is now routine for police officers to question suspects and their answers to be admissible at trial. This change in policing requires access to a lawyer in the same way as it is available at judicial examination and trial in order to preserve the privilege against self incrimination. As set out above, the UK Supreme Court in *Ambrose* has confirmed that the right to legal advice occurs from the moment a person's freedom of movement is curtailed, irrespective of whether they have been formally arrested and cautioned or not. The purpose of this, again, is to prevent questioning of the suspect at the locus where admissions may be relied on in court, without infringing the privilege against self incrimination which access to a lawyer helps to preserve. Equally, irrespective of the location, once a suspect's freedom of movement is curtailed, they are under pressure from the police and may not be able to consider their position as carefully as if they were in their own home.⁴⁰

47. Lord Carloway has considered the case of *Dayanan* to require access for the much wider purpose of preparing the defence from the outset of detention. We welcome this acknowledgement. There are many occasions where the assistance of a lawyer is needed during police detention irrespective of whether the person is being questioned. The purpose here is not to protect the privilege against self incrimination but simply to 'protect and advance the legal rights of their client'.⁴¹ There are many aspects to this: obtaining information about the purpose of the detention; ensuring the suspect's welfare is being maintained, particularly if they have any vulnerability which has not been identified or addressed; making representations concerning length of detention, bail, and charge, to ensure fairness in any procedures being conducted such as ID parades, samples taken and searches and to start preparation of the defence, such as ensuring evidence is secured and exploring an alibi to bring the case against the suspect to an end as soon as possible. All these aspects to the role

⁴⁰ See Lord Hope at [57] in *Ambrose*, *op. cit.*

⁴¹ This is the description of the role in PACE Code C, note 6D.

are recognised by the procedure in England and Wales and are expected to be conducted by police station representatives.⁴²

48. The development of the SLAB Advice Line, whilst ensuring there is advice available within a reasonable period of time, has focussed attention solely on the provision of advice concerning the police interview. We agree with Lord Carloway that the role is much wider than this.
49. In our view it is not possible to properly represent the interests of the suspect over the telephone even concerning the police interview. Furthermore, none of the other aspects of advice and representation can be properly explored over the telephone. Our research *Suspects Rights in Police Detention* involved interviewing lawyers in private practice, employment with the Public Defence Solicitor's Office or with the SLAB Advice Line. Whilst almost all solicitors interviewed agreed that they would almost always advise their client to remain silent because the police had not provided sufficient disclosure, there was a marked difference in attitude to attendance at the police station between the private solicitors who rarely went, other than for a serious matter or where they had concerns about the vulnerability of the client, and the employed solicitors who were often required to represent suspects at the police station and in interview. These solicitors were all concerned that representation in the interview is crucial because clients often were under pressure to answer as a result of the techniques used by the police (not usually amounting to oppression as such) or over the course of the interview may forget, or not even fully understand the advice. Once a question was answered, clients would often start to talk. All solicitors felt it necessary to intervene during the interview process which demonstrates that, without their presence, questions will be asked which the suspect may answer, despite earlier advice to the contrary.
50. Presence at the police station for some lawyers interviewed also meant better opportunity for obtaining disclosure about the circumstances of the offence. In one example what appeared to be a clear case of rape, with the police even catching the suspect in the act, turned out to involve the spiking of the suspect's drink by the female after taking him back to her flat following which he was not in control of his actions. By being present at the police station, the lawyer was able to obtain sufficient disclosure about what the police had found on arrival, to request the presence of a doctor to take a blood sample from the suspect and insist that the police search the flat for the substance. Had the solicitor not attended this defence may not have been raised in interview and this vital evidence may well have been lost to the investigation, the defence and any subsequent trial.

⁴² See for example, A. Edwards, *Advising a Suspect in the Police Station*, 7th Ed, (Sweet and Maxwell: 2009); E. Cape, *Defending Suspects at Police Stations*, 6th Ed. (LAG: 2011) and our guide JUSTICE, *Giving Legal Advice at Police Station: Practical Pointers* (November 2010)

51. Irrespective of whether there remain separate periods of s14 detention and common law arrest, our view is that there should be a right of access to a lawyer to assist with presence in the police station. Naturally it would not be appropriate in the majority of cases for a solicitor to arrive at the locus for the purposes of questioning there. The logistics of ensuring a properly recorded process takes places would be quite impossible. As such, the reality will be that the right to legal advice will only arise once the suspect has been taken to the police office. This will, of course, require the police to take the suspect to the police station as soon as possible and refrain from questioning the suspect until there.
52. Nor can a solicitor remain at the police office throughout the detention since this would largely involve filling the station with waiting solicitors. On arrival at the police office a solicitor's role will be to enquire as to the purpose of the detention, the evidence upon which it is based and to make any representations that can be made at that time whilst they are present. Following an interview it should be clear whether there is a sufficiency of evidence to charge or whether further enquiries are necessary. At this stage, the solicitor should be in a position to make representations about whether further detention is necessary and whether a client should be charged. In one example from our research, a solicitor was informed that it was necessary to make representations because the s14 detention period was about to expire. The police thought that they would just arrest the suspect and not charge them. The solicitor argued that there was not a sufficiency of evidence in order to change the suspect's status, nor could they hold the suspect as an arrested person simply to avoid the detention limitation period. This would not have been possible without the solicitor's presence.
53. If further enquiries are necessary, and the investigative period of detention has only been a short period of time, it may be necessary for the solicitor to return later in order to represent the client on the review of detention. Equally where samples, searches or ID parades are due to take place, the solicitor should return to be present at these. All these periods, once legal aid has been awarded for the initial attendance, should be covered by time recording. Police should communicate with the nominated or duty solicitor to ensure that they are given notice of the procedure and timeous requirement for their presence.

14. Do you foresee any difficulties with the recommendation that the standard caution prior to the interviewing of suspects outwith a police station includes information that they have a right to access a solicitor if they wish?

54. Once a suspect has been arrested or had his freedom of movement curtailed at the locus, he should be cautioned and advised of his right to legal advice prior to any questioning. There are clearly logistical difficulties in conducting a proper interview at the locus, irrespective of the presence of a solicitor, unless it is at the suspect's home or other private place where this can be arranged on a voluntary basis. Here, the interview should be by arrangement so that a

solicitor is able to attend. In our view, unless these conditions are in place, no questioning should be conducted outwith the police station. Any questioning once a suspicion has arisen could elicit an incriminatory response and should not be asked until arrival at the police office, under proper tape recorded interview conditions and with fully informed access to legal advice.

55. Where a sufficient suspicion has arisen to arrest the suspect, the current caution is in our view sufficient to protect the privilege against self incrimination so long as the police do not ask further questions concerning the alleged offence.

15. Lord Carloway recommends that it is for the accused to decide on the way legal advice is provided and whether their solicitor is present during a police interview. Do you agree with this approach?

56. We agree that it is for the suspect to decide whether they choose to have legal assistance at the police station, assuming a properly informed decision with the police giving them an accurate account of what is involved. This decision should only be taken once they have had the opportunity for initial telephone advice, where they can discuss the case with their solicitor and receive advice from the solicitor as to whether an attendance is necessary. It should certainly not be the case that the suspect is expected to choose as part of the booking in procedure whether they would like either a solicitor present or telephone advice. This would be far too difficult a decision without advice. It would also open up the opportunity for police officers to say that it would be much quicker to simply have telephone advice. Our interviews with lawyers in *Suspects in Police Detention* has demonstrated that clients are already advised that waiting for a lawyer can take a long time whereas they could be out of the cells very quickly if they just answered a few questions. This supports previous research where the same tactic has been demonstrated.⁴³

57. As we have indicated earlier however, in our view there are many roles for a solicitor at the police station which cannot be effectively carried out over the telephone and therefore in our view there ought not to be an option of whether advice is only provided by telephone, but rather the solicitor should always attend the police station where legal advice is requested.

16. It is recommended that the right to waive access to legal advice, and the expression and recording of this, should be set out in legislation – do you agree?

⁴³ L. Skinnis, *The Right to Legal Advice in the Police Station: Past, Present and Future*, [2011] Crim LR 19, at 34; Pleasance et al, *The Justice Lottery? Police Station Advice 25 Years on from PACE* [2011] Crim LR 1, pp 3-18

58. A statutory provision should set out the need to ensure that any waiver is fully informed. In *Pishchalnikov v Russia*⁴⁴ the Strasbourg court held that for a waiver to be effective it must be established in an unequivocal manner, made voluntarily and constitute a knowing and intelligent relinquishment of the right. Before an accused can be said to have waived this fundamental right under article 6, it must be shown that he could reasonably have foreseen what the consequences of his decision would be⁴⁵. The Court strongly indicated that these additional safeguards were necessary because, if an accused has no lawyer, he has less chance of being informed of his rights and, as a consequence, there is less chance that they will be respected.⁴⁶
59. Without a statutory provision, the parameters for the police are less clear. Guidance can be set out in a code of practice to build upon the provision for differing circumstances, for example, the provision must also recognise children and vulnerable adults as a group who will need particular assistance in order to decide whether to exercise their right of waiver.
60. Currently the mechanism through which legal advice is obtained is the Solicitor Access Recording Form (SARF). Whilst the SARF ensures that all police officers ask whether a suspect requires legal advice in the same way,⁴⁷ and whilst we understand it had to be drawn up under very speedy circumstances once the emergency legislation had been passed, we have strong reservations about whether suspects can fully follow what they are being asked. Lord Kerr considered the facts in *Birnie* and observed that the routine enquiry that must be followed by application of the booking in procedure and then SARF 'is hardly the most efficient way to examine whether a suspect has fully understood the importance of the right which is being relinquished.'⁴⁸ We agree with him that some procedure is required, but we also agree that the circumstances of the case, as those in *Birnie* where the 18 year old suspect was visibly upset in the face of a serious charge and made an admission after being told he would be detained all weekend, may call for inquiry by the police as to the suspect's understanding of the implications of the waiver.
61. Anyone faced with the SARF may become confused about what it actually means. Our research *Suspects Rights in Police Detention* observed how the SARF was administered over the course of three months in one police office and two months in another. Whilst practice was largely uniform, in most instances the suspect was visibly confused by the process and often asked what they should do. In response the police in both sites had developed a stock answer that they could not advise, but the suspect could change their mind at any time. In our view

⁴⁴ [2009] ECHR 7025/04 (First Section, 24 September 2009)

⁴⁵ *Ibid*, at [77]

⁴⁶ At [78].

⁴⁷ A requirement contained in the ACPOS Manual of Guidance on Solicitor Access, v. 1.2, (2011), at para 4.3.

⁴⁸ *Jude; Hodgson; Birnie v HM Advocate* [2011] UKSC 55, at [55]

this is inadequate since a suspect has not made any decision, never mind considering whether to change it. In a laudable effort to be comprehensive and not fall foul of the law, the SARF has unfortunately become very convoluted. Every police officer and lawyer interviewed for the project agreed that it is confusing, lengthy and in fact does not say what it means. This is exacerbated by the requirement on the police to precede the SARF procedure with the ordinary Prisoner Processing computerised booking in procedure, which already asks whether the suspects wishes to have intimation sent to a solicitor. Of most concern, the SARF in fact omits to mention anything about the right to representation at the police office and in interview, but focuses solely on the right to advice. Almost no one interviewed, police or lawyer, could explain what the third question actually meant,⁴⁹ and in the second site they were not asking it at all.

62. There were a few good examples of experienced officers faced with child suspects or worried first time attenders explaining the rights in an accessible and simple manner which could be followed. Some officers suggested that, with these types of suspect, they tried to guide the suspect towards seeking legal advice, though unfortunately this was never observed. Many officers had sensible suggestions about what actually needed to be asked of the suspect in order to exercise their right.
63. Based upon our observations, in our view the procedure is currently lengthy and confusing and, worse, fails to actually advise what the right is. Because there is no place to record the reason for waiver on the SARF, there is no assessment of whether the person has understood what their rights are. Recording the reason for waiver would be a sensible way of verifying that the suspect understands their rights. Whilst ACPOS gave evidence to the Justice Committee that it thought the guidance was sufficient and that the police are allowing suspects to make a more informed decision without recording the reasons,⁵⁰ this is not borne out from our research. In our view the obiter advice from Lord Hope in *B*⁵¹ that, to minimise the risk of misunderstanding, the police should follow para 6.5 of Code C of PACE, which requires explanation of the right and the recording of reasons where a suspect waives their right, should be followed. As Lord Hope explained in his judgment:

The giving of reasons may reveal that, although he has been given the standard caution and advice, the detainee has not fully understood what his rights are. It will provide an opportunity for any obvious misunderstandings to be corrected. Failure to

⁴⁹ The SARF states: The following question is to be read to the suspect in either of the following circumstances:

- Following the initial private consultation between the suspect and a solicitor, OR
- When the suspect has waived their right to an initial private consultation with a solicitor

“Do you want to have a private consultation with a solicitor at any other time during police questioning?”

⁵⁰ Col 663. We understand the ACPOS is currently updating the Solicitor Access Guidance.

⁵¹ *McGowan v B* [2011] UKSC 54

do that may be relevant to the question whether the waiver was 'knowing and intelligent' or 'voluntary, informed and unequivocal,' and thus to the question whether, in all the circumstances, the detainee was deprived of his right to a fair trial. Any reasons that are given should be recorded.⁵²

Lord Kerr in his minority judgment in *Jude et al*⁵³ made the case for this being a legal requirement on his reading of what the jurisprudence of the ECtHR indicated:

In saying that a means must exist for understanding why someone has declined to exercise his right to legal assistance before finding that there has been an effective waiver, I was merely reflecting what I understand to be the unmistakable effect of current Strasbourg jurisprudence. I was not constructing some unheralded, disquieting rule. This can be demonstrated by a few simple propositions:

(i) For a waiver to the right to legal assistance to be effective, there must be a knowing and intelligent decision to waive the right. I do not understand the majority in this case to suggest otherwise;

(ii) In a case where the effectiveness of the waiver is in dispute, it is for the prosecution to prove that it is effective. Again I do not believe that this is controversial;

(iii) It is well recognised that reasons other than those which would qualify as sufficient to support the conclusion that a knowing and intelligent decision has been made will frequently motivate a suspect to decline the right to legal assistance.

(iv) In order for the prosecution to show that such reasons do not obtain and that a knowing and intelligent decision has been made, it is necessary to have some insight into why the right has been declined.⁵⁴

64. Ensuring that a suspect is fully informed of the right and purpose of legal advice is a difficult role for the police to carry out. This is why the argument was raised in *Jude* that legal advice is necessary before a person is able to offer a fully informed waiver. Whilst there is no requirement in the ECtHR case law for this, the argument is an attractive one given that most people do not understand the significance of police detention and how a lawyer may provide them with assistance.⁵⁵

⁵² *Ibid* at [49].

⁵³ *Jude; Hodgson; Birnie v HM Advocate* [2011] UKSC 55

⁵⁴ *Ibid* at [60]

⁵⁵ This is clear from our *Suspects in Detention* research and also the number of requests for advice that SLAB has recorded: an average of 61 calls per day with only 12% attendances at the police station, SLAB, *Police station duty scheme update*, 10th September 2012, available at: http://www.slab.org.uk/news/articles/news_0002.html, compared with the number of offers of legal advice to suspects detained under s14 which is approximately 98.5 people per day: ACPOS Solicitor Access Data

65. The most effective way of affording the suspect some idea of the how important the right is, in our view would be by providing a written notice of rights. Currently some police offices have 'Notes for the Guidance of Accused Persons' which cover welfare, treatment and liberation as well as access to a lawyer. However this section states:

Communication with Law Agent:

If you so desire, intimation will be sent to your law agent, with whom you will be allowed a private interview prior to your appearance in Court.

If you wish to call witnesses for your defence in Court and have difficulty in arranging this, reasonable facilities for helping you will be given.

You are not obliged to make a statement in relation to the charge against you, but if you desire to do so you can inform the Officer on Duty. You are entitled to have the benefit of legal advice before such a statement is made and any such statement will be taken down and may be used in evidence.

The notice reflects the pre-*Cadder* position only and needs to be updated. Our research revealed that the notice is only positioned on the wall, in A4 size, in the custody area, it was rarely pointed out to a suspect (and this was only done after this was raised by our researchers to see whether the suspect could read it, which was difficult from where they were standing). Previously the notice had been given to suspects but there were incidents where it was eaten or flushed down the toilet, causing health and safety risks. Many suggestions were provided as to how it could be more prominently displayed. The notice needs updating to reflect the current right to legal advice and assistance.

66. This notice is in any event required by the EU Directive on the right to information in criminal proceedings⁵⁶ which must be implemented domestically by 2nd June 2014. However, the indicative model annexed to the Directive only requires the rights to be set out, not the reasons why they are important. In our view, a notice of rights is critical to ensure that the suspect understands why a lawyer can assist them. It is very important that the language is clear, accessible and easy to understand. The model letter should be used as a starting point but the notice needs to be drawn up in conjunction with the Law Society of Scotland to make sure it is seen as independent from the police and explains the right to a lawyer sufficiently clearly. The Notice of Rights and Entitlements which is available in England and Wales is a better starting point because it provides more detail in a clear written style.⁵⁷ The Scots version could still do more than say 'a solicitor can help advise you about the law' however.

Report, June 2011. The data was incomplete and over different periods which is why the figure can only be approximated, but it gives an indication of the take up rate.

⁵⁶ Directive 2012/13/EU, OJ L 142/1 (1.06.2012)

⁵⁷ Home Office, Legal Services Commission, Law Society, *Notice of Rights and Entitlements* (1.08.2011) available at:

67. The SARF can easily be amended to reflect what the law actually requires and this should be done as soon as possible, without the need for legislation. A letter of rights can also be drafted independently of legislation.
- 17. Do you agree with Lord Carloway's recommendation that the practice of only enrolled solicitors giving legal advice to suspects should continue?**
68. If there are sufficient numbers of solicitors available to ensure that every suspect who requires legal advice, including a personal attendance, receives it, we agree that only enrolled solicitors should give advice. The experience in England and Wales was that solicitors could not cover both court and police station duties and therefore were sending trainees and even office staff to the police station instead.⁵⁸ This was a worrying response to the right of access which led to a series of high-profile miscarriages of justice. However, it also led to the development of the Police Station Accreditation Scheme which is a rigorous training and assessment programme for anyone giving police station advice.⁵⁹
69. In Scotland, the duty plan services both the court and police station so that a solicitor on duty is supposed to be able to cover both. This is impossible unless those solicitors are simply providing five minute telephone advice during court recesses. Our research has indicated that this is often what solicitors are providing. The reason for this is that there is invariably little or no disclosure from the police in order to advise the suspect whether any defence should be put forward. As such, the client is advised to exercise their right to remain silent. However, from interviews with PDSO and SLAB lawyers who regularly attend the police station and are building up some experience of police techniques, it is often the case that the solicitor considers it necessary to intervene during the interview to protect their clients' rights, or remind them of advice given. Since only 12% of suspects are seeking a personal attendance it would seem that there is a problem with both the approach of solicitors to their role in the police station and their ability to carry out that role given their other work commitments and available funding.
70. We received concerning reports from SLAB and particularly PDSO lawyers that they were regularly having to attend stations during the night where no one else was available, having already worked a full day and then having to work the day after. Constantly being placed

http://www.homeoffice.gov.uk/publications/police/815449/notice-of-rights/NOTICES_OF_RIGHTS_ENTITLEMEN.pdf?view=Binary

⁵⁸ See McConville et al. *Standing Accused: the organisation and practices of criminal defence lawyers in Britain*, (Clarendon Press, Oxford: 1994)

⁵⁹ Information about the scheme is available here <http://www.sra.org.uk/solicitors/accreditation/police-station-representatives-accreditation.page>

under these sorts of working conditions can lead to traffic accidents and certainly poor advice and representation either in court or at the police station.

71. As notification of rights improves, it can be assumed that more suspects will request representation, either by phone or in person. The profession must be able to offer the advice that is sought. This will require sufficient remuneration and solicitors available to cover the work.
72. Irrespective of volume, there is a concerning issue of quality. Police station advice is not subject to the scrutiny of the courts, and therefore the possibility of judicial oversight, other than occasionally in a trial or pre-trial admissibility hearing. A solicitor must understand the nature of their role and how to exercise it during police station advice. Our interviews with lawyers, particularly those employed by the PDSO or SLAB, have raised concerns about the lack of training concerning the police station, what judgements they should make and how to negotiate with the police. The environment can be very hostile since police officers are also not used to solicitors being present whilst they try to further their investigations. Lawyers have reported being threatened to be put out of interviews for intervening on behalf of their clients, and finding the police very obstructive to requests for information concerning the case. Currently there is no training available concerning this role through any possible provider⁶⁰. The Police Station Accreditation Scheme in England and Wales was developed because of the poor quality of advice. A similar response is necessary in Scotland to ensure that solicitors who have not had to attend the police station before are able to carry out their role appropriately. It will also require an appreciation of the value of advice for the suspect.⁶¹
73. We would also observe here that, contrary to Lord Carloway's conclusion, there is a right under article 6 ECHR for access to a solicitor of choice. The Convention states this explicitly in article 6(c):

To defend himself in person or through legal assistance of his own choosing or, if he has not sufficient means to pay for legal assistance, to be given it free when the interests of justice so require

*Croissant v Germany*⁶² merely clarifies the practical operation of the right:

⁶⁰ Which ideally ought to be the Law Society of Scotland but could be SLAB, the PDSO or a commercial training provider.

⁶¹ An observation made in *Standing Accused*, above, pp294-298 with respect to appropriate training and education some eighteen years ago.

⁶² (1993) 16 EHRR 135 at [29].

Nevertheless, and notwithstanding the importance of a relationship of confidence between lawyer and client, this right cannot be considered to be absolute. It is necessarily subject to certain limitations where free legal aid is concerned and also where, as in the present case, it is for the courts to decide whether the interests of justice require that the accused be defended by counsel appointed by them. When appointing defence counsel the national courts must certainly have regard to the defendant's wishes...However, they can override those wishes when there are relevant and sufficient grounds for holding that this is necessary in the interests of justice.

This therefore simply means, in Scots procedural terms, where the nominated solicitor is unavailable, the suspect should be offered advice from the duty solicitor or SLAB advice line solicitor. This system is operating satisfactorily as a mechanism of preserving choice (subject to our concerns set out above).

Questioning

18. Do you agree that the police should be allowed to question a suspect after charge?

74. Section 14(7)(a) of the 1995 Act currently allows police officers to put questions to suspects in relation to a suspected offence. In our view the parameters of this power are not sufficiently clear. In *Murray v UK* the ECtHR provided a definition of the purpose to questioning: to further the criminal investigation by way of confirming or dispelling the concrete suspicion grounding the arrest.⁶³ This has been expanded upon in the guidance available in England and Wales. Code C to the Police and Criminal Evidence Act 1984 paragraph 11.6 provides that the interview must cease when:
- (a) the officer in charge of the investigation is satisfied all questions they consider relevant to obtaining accurate and reliable information about the offence have been put to the suspect, this includes allowing the suspect an opportunity to give an innocent explanation and asking questions to test if the explanation is accurate and reliable, e.g. to clear up ambiguities or to clarify what the suspect said;
 - (b) the officer in charge of the investigation has taken account of any other available evidence; and
 - (c) the officer in charge of the investigation, or in the case of a detained suspect, the custody officer, reasonably believes there is sufficient evidence to provide a realistic prospect of conviction.
75. Guidance is also provided by the Criminal Procedure and Investigations Act 1996, Code of Practice paragraph 3.4 which states that an investigator must pursue all reasonable lines of enquiry whether these point towards or away from the suspect. What is reasonable will depend on the circumstances. Interviewers are advised to bear this in mind by Note 11B to PACE Code C.
76. In our view, statutory provisions or at least a code of practice would provide helpful parameters to the police and defence lawyers as to the remit of their powers in pre-charge questioning.
77. We question the value of post-charge questioning given the limited utility which the police in England and Wales appear to attach to it.⁶⁴ Furthermore, it is unclear why it would be necessary at all in Scotland. ACPOS statistics reveal that applications for extensions of s14

⁶³ *Supra*, para 55.

⁶⁴ See e.g. the evidence of then-Assistant Metropolitan Police Commissioner Peter Clarke to the House of Commons Home Affairs Committee, 21 March 2006, Q322: 'I think it must be the case that the percentage that would result in criminal charges as a result of post-charge questioning would be quite low. We are not against it but I think it would be quite low'.

detention have occurred in 0.8 percent of cases which demonstrates that almost all investigations can take place within the twelve hour legislated period. Indeed, Lord Carloway has recommended that twelve hours be the statutory norm as a result. Coupled with Lord Carloway's recommendation for a period of investigative liberation, many of the reasons the Report provides for having post-charge questioning⁶⁵ should be serviced by police bail *pre*-charge. For example, where someone is unfit for interview it is unlikely that they would be kept solidly in police detention for twelve hours without the possibility of interview throughout. In most instances, a person will sober up or become fit within the twelve hour period. If they do not, there may be no sufficiency of evidence upon which to charge at all. In which case, a decision will be needed to as to whether a charge can be laid, or whether an application to the court for a further period of detention is necessary. Or, indeed whether the person needs to be kept in police custody at all or could be released on police bail/investigative liberation. In our view post charge questioning will rarely be justified for this suggested category. Again, where a large volume of material must be reviewed which would involve considerable time, the police may initially seek a search warrant and may not even arrest the person prior to review of any material seized. Equally the police may wish to engage police bail or seek a further detention period from the court. Where this information demands an answer it may not be possible to charge until this has been put to the suspect; this is not a matter for post-charge questioning.

78. Nevertheless, there is already provision to question suspects after charge in certain limited circumstances in Scotland with respect to terrorism offences.⁶⁶ In England and Wales the power post charge is wider. Specifically, Code C paragraph 16.5 of the Police and Criminal Evidence Act 1984 permits questioning:

- to prevent or minimise harm or loss to some other person, or the public;
- to clear up an ambiguity in a previous answer or statement;
- in the interests of justice for the detainee to have put to them, and have an opportunity to comment on, information concerning the offence which has come to light since they were charged or informed they might be prosecuted.

79. Although there may be a principled case for these grounds for post-charge questioning, in our view it is important to retain a general prohibition on questioning suspects after charge for two reasons.

80. First, the key reason for prohibiting post-charge questioning by police is to prevent unfairness to, and indeed oppression of, suspects. Although *pre*-charge detention has historically been extremely limited, *post*-charge detention on remand awaiting trial can last much longer.

⁶⁵ At paragraph 6.2.47

⁶⁶ Counter Terrorism Act 2008

Unrestricted police questioning of a detained suspect for weeks or months on end is likely to be oppressive, no matter how mild the treatment of the detainee is in other respects.

81. Moreover, the fact that a suspect has already been charged with an offence when subject to police questioning has often been a decisive factor in judgments of the European Court of Human Rights determining whether such questioning breaches a suspect's privilege against self-incrimination.⁶⁷ In *Shannon v United Kingdom*, for instance, in which compulsory post-charge questioning was held to breach the suspect's right to silence, the Court noted that:⁶⁸

The applicant ... was not merely at risk of prosecution in respect of the crimes which were being examined by the investigators: he had already been charged with a crime arising out of the same raid. In these circumstances, attending the interview would have involved a very real likelihood of being required to give information on matters which could subsequently arise in the criminal proceedings for which the applicant had been charged.

82. The second key reason for restricting post-charge questioning is to ensure the proper supervision by the courts of the post-charge process. One of the fundamental features of the UK's adversarial system of justice is that the court acts as an arbiter between the prosecution and defence, and it is primarily the court that is responsible for ensuring the suspect's rights are respected. As Professor Clive Walker explained to the Joint Committee on Human Rights:⁶⁹

[A]fter charge, the suspect becomes subject to the control of the court and further actions in pursuance of the case should be authorised by the court. It is the court which takes charge of the suspect and not the police, and the police should not intervene without permission.

83. For these reasons, it is vitally important that any provision for expanding post-charge questioning be attended by a legal framework containing strict safeguards to prevent oppression of, and unfairness to, suspects. In particular, the Joint Committee on Human

⁶⁷ See e.g. *Saunders v United Kingdom* (1997) 23 EHRR 313 at para 68; *Weh v Austria* (2005) 40 EHRR 37 at paras 39-46; *Heaney and McGuinness v. Ireland* (2001) 33 EHRR 12 at para 40.

⁶⁸ (2006) 42 EHRR 31 at para 38.

⁶⁹ Memorandum from Professor Clive Walker, Centre for Criminal Justice Studies, School of Law, published in Joint Committee on Human Rights, *Counter-Terrorism Policy and Human Rights (Eighth Report): Counter-Terrorism Bill* (HL 50/HC 199: 7 February 2008), para 7.

Rights has recommended that any provision for broader post-charge questioning should include the following safeguards:⁷⁰

- a requirement that post-charge questioning be judicially authorised;
- the purpose of post-charge questioning be confined to questioning about new evidence which has come to light since the accused person was charged;
- the total period of post-charge questioning last for no more than 5 days in aggregate;
- post-charge questioning always take place in the presence of the defendant's lawyer;
- the judge who authorised post-charge questioning review the transcript of the questioning after it has taken place, to ensure that it remained within the permitted scope of questioning and was completed within the time allowed; and
- there should be no post-charge questioning after the beginning of the trial.

84. We agree with the safeguards recommended above by the Joint Committee. Indeed, we view them as the bare minimum required in any event, given the exceptionality of post-charge questioning. In most cases five days of post charge questioning in aggregate will be far too lengthy and amount to oppression in a Scottish context where investigative detention should last no more than twelve hours. We would go further and support Professor Walker's proposal for any post-charge questioning to be directly supervised by the court itself, along the lines of that provided under section 6 of the Explosive Substances Act 1883.⁷¹ We also consider that it is important to establish safeguards in primary legislation rather than leave such safeguards to be provided by way of codes of practice.

85. As such, we disagree with Lord Carloway's suggestion that post-charge questioning is acceptable with regard to the protection of article 5 and article 6 ECHR rights of suspects. Post charge questioning would not occur during police custody⁷² since the accused person will only be detained pending appearance at court, and the recommendation, with which we agree, is to make their appearance as speedy as possible. Article 5 ECHR is therefore engaged because detention at this point is to await trial, not for police investigation. Contrary to Lord Carloway's analysis of the *Cadder* reasoning, the question of post charge status of protection was not explored by the Court since the focus was on pre-charge questioning and the recognition of Strasbourg jurisprudence that protection should be extended to this stage. As set out above, the Convention seeks to protect accused persons at least as much as suspects. Police detention is justified in accordance with article 5(3) because investigative

⁷⁰ JCHR report, *ibid*, para 37. The Joint Committee also recommends that all questioning be DVD- or video-recorded.

⁷¹ Memorandum from Professor Clive Walker, n 69 above, paras 13-17.

⁷² See suggestion in Report at paragraph 6.2.52

enquiry is still being pursued; Either there is a sufficiency of evidence to charge or there is not. If therefore an occasion arises where the police or fiscal were to consider post-charge questioning would assist the investigation (and in our view, as the JCHR recommends this can only be where new evidence comes to light), an application must be made orally in court where the accused person has the opportunity to make representations against the request. If the court is satisfied that further questioning would assist the administration of justice, the questioning should take place in court, by the procurator fiscal and not by the police, and while represented by a solicitor. An electronic application without the means to make representations⁷³ would not satisfy the requirements of article 6 ECHR fairness, or article 5 ECHR liberty (since the accused person will need to be detained for the purposes of the questioning).

19. Do you agree that the procedure of Judicial Examination should be removed, whilst introducing provisions to allow the Crown to apply to the court to question a suspect after charge?

86. We agree with Lord Carloway that judicial examination has had little success in the way the Thomson Committee⁷⁴ intended and is used rarely. This may well be because at the stage of examination the accused is not provided with much disclosure of the case against him and, as in the current approach to police questioning, defence solicitors are advising their clients to remain silent until the full extent of the allegations and evidence against them are known.⁷⁵ Rather than be an opportunity to put forward a defence and allow the Crown to review the case against the accused, it could arguably have become simply a repeat of the police interview, putting the accused under further and unnecessary pressure.

87. As we set out above, should post charge questioning be deemed appropriate, in our view it should be conducted in court on application by the Crown rather than be contained within the purview of police powers. To this end, we see a continuing role for judicial examination, albeit amended and constrained.

20. Do you agree that the present common law rules of fairness concerning the admissibility of statements should be abolished in favour of the more general article 6 test?

⁷³ Suggested in the Report at paragraph 6.2.51. Contrary to Lord Carloway's opinion, we believe it is entirely in the interests of the accused person to have the opportunity to appear in Court on the application.

⁷⁴ *Criminal Procedure in Scotland (Second Report)* (1975, Cmnd. 6218), paras. 8.14 and 8.28.

⁷⁵ I. Macphail, 'Safeguards in the Criminal Justice System,' [1992] Crim LR Mar, 144, 146

88. The ECtHR has been reluctant to create an admissibility test with regard to evidence and has left this complex issue to the national courts to evaluate under national law.⁷⁶ Whilst in *Salduz* the court indicated that, where evidence obtained in the absence of access to a lawyer is relied on to prosecute an offence, this will irretrievably prejudice the fairness of the proceedings, the court did not provide general dicta on admissibility because the case concerned a conviction⁷⁷. It may be implicit in applying the ruling that failures to comply should result in exclusion of evidence rather than subsequent acquittal/quashing of convictions, but this is not expressly stated. Strasbourg deals with post-conviction applications where its findings relate to violations of the Convention rather than pre-trial decisions as to admissibility.
89. Equally, the Convention has been in force for some fifty years and has been directly applicable in domestic law since 1998. It would be surprising to suggest that judges ignore its applicability in domestic decisions given its lengthy presence in domestic law making.⁷⁸
90. Whilst Lord Carloway suggests that the distinction between a common law and article 6 ECHR test is one based upon a general assessment of fairness rather than societal norms, this view ignores the subsidiarity principle through which the Strasbourg court has regard to the moral and societal position in the member states before declaring an advancement of its jurisprudence or interpretation of the Convention. Where standards evolve across the contracting parties of the Council of Europe, so does the jurisprudence of the Court.
91. We would therefore favour a statutory test of admissibility similar to that found in sections 76 and 78 PACE, which reflect the requirement for fairness under article 6 ECHR but provide more detail about how this may operate in practice to satisfy a fairness requirement, and also when evidence may be excluded as a consequence. We agree that any such rule should be based upon an assessment of the balance of probabilities rather than beyond all reasonable doubt, unless the Crown seeks to disprove the accused person's application, which should be done on a standard of beyond reasonable doubt.

Pre interview briefings

92. Whilst we agree that a legislative footing for disclosure would create too rigid a rule as to the scope and application of such information, we nevertheless consider that much more guidance is necessary about when the police should disclose evidence. Since solicitors are now demanding information about the case from the investigating officer there needs to be

⁷⁶ *Teixeira de Castro v Portugal* (1998) 28 EHRR 101 at para 34; *Schenk v Switzerland*, App. no. 10862/84, (judgment 12th July 1988) (ECtHR); (1988) 13 EHRR 242 at para 46.

⁷⁷ See para 72 where the Court finds that restitution is the appropriate remedy, which in these circumstances is retrial.

⁷⁸ *Cadder* being a prime example of its application in both the High Court of Justiciary and the Supreme Court.

better indication of which cases this will be appropriate in. Our research *Suspects Rights in Police Detention* has revealed that most officers currently do not know when they should or should not be giving information to the defence solicitor. This is unfortunate since in many cases, an appropriate amount of disclosure would result in a candid interview which would help to progress the case, be it either towards a guilty plea or towards finding the correct perpetrator of the crime. This is a requirement of the Directive on the right to information which has just been agreed in the EU⁷⁹. Article 6(1) on the right to information about the accusation provides:

[I]nformation shall be provided promptly and in such detail as is necessary to safeguard the fairness of the proceedings and the effective exercise of the rights of the defence.

Article 7 on the right of access to the materials of the case provides:

1. Where a person is arrested and detained at any stage of the criminal proceedings, Member States shall ensure that documents related to the specific case in the possession of the competent authorities which are essential to challenging effectively, in accordance with national law, the lawfulness of the arrest or detention, are made available to arrested persons or to their lawyers.
2. Member States shall ensure that access is granted at least to all material evidence in the possession of the competent authorities, whether for or against suspects or accused persons, to those persons or their lawyers in order to safeguard the fairness of the proceedings and to prepare the defence.

In our view the current approach to disclosure at the police station is not sufficient to meet these requirements.

⁷⁹ See above.

Child Suspects

21. Do you agree with Lord Carloway's recommendation that, for the purposes of arrest, detention and questioning, a child should be defined as anyone under the age of 18 years?

93. Much comparative research is available on how to provide for children in the criminal justice system. There is insufficient time to set it out here, but it should be considered before any conclusions are drawn.⁸⁰ JUSTICE recently concluded a study with the Police Foundation on alternative criminal proceedings for children and young people.⁸¹ In it we reviewed sixteen forms of youth justice hearing, including the Children's Hearing in Scotland, and conclude that restorative youth conferencing is the most acceptable and effective response to children and young people who offend. The conferencing system has been in operation in Northern Ireland since 2003. It responds sensitively and appropriately to the needs of victims and communities in ways which are suitable for working with young offenders, helping them to understand the consequences of their behaviour and to make amends.
94. Article 1 of the UN Convention on the Rights of The Child 1989 defines a child as any person under the age of eighteen years. In Scotland, however, a child is defined differently, dependent upon which legislative provision is in issue. Under the Children (Scotland) Act 1995 a child is a person under the age of eighteen years,⁸² yet the 1995 Act states that a child is someone under the age of sixteen years for the purpose of a decision to prosecute⁸³ and the decision as to whether to permit access to their parent or guardian.⁸⁴ For certain offences, a child is defined as a person under the age of seventeen years.⁸⁵
95. A child alleged to have committed an offence is dealt with differently according to age. Eight to fifteen year olds are referred to the Children's Hearing, set up originally by Part 3 of the Social Work (Scotland) Act 1968, and now governed by chapter 3 of Part II of the Children Act. The Sheriff Court can refer sixteen and seventeen year olds to the Hearing, but they must first proceed through the court system.

⁸⁰ For a general overview of the law in other jurisdictions see Victorian Law Reform Commission, Supporting Young People in Police Interviews: Background Paper (2009) pp 18 to 24, available at: http://www.lawreform.vic.gov.au/wps/wcm/connect/justlib/Law+Reform/resources/f/e/fe8012804522519389f2a9e6d4b02f11/VLRC_SupportingYoungpPeopleinPoliceInterviews_BackgroundPaper.pdf

⁸¹ Independent Commission on Youth Crime and Anti-social Behaviour, JUSTICE, Police Foundation, *Time for a New Hearing*, (The Police Foundation, London: 2010).

⁸² Section 15.

⁸³ Section 42

⁸⁴ Section 15(4) and (7)

⁸⁵ Section 46(3) and (7)

96. Section 41A of the 1995 Act provides that a child under the age of 12 years cannot be prosecuted for an offence. The amendment to the Act is greatly welcomed as it removes children between the ages of 8 and 11 from the traditional criminal justice system.⁸⁶ However, section 41 remains, which provides that the age of criminal responsibility is 8 years, and referrals can still therefore be made to the Children's Hearing system, whose powers cover wider welfare related problems. In this way, it is helpful to identify concerns about children who are displaying offending behaviour, however there have been criticisms of the system.⁸⁷
97. Notwithstanding the raising of the age at which children can be prosecuted, the UN Committee on the Rights of the Child has recommended that the age of criminal responsibility should not be set too low bearing in mind the emotional, mental and intellectual maturity of children. The Committee recommends 12 years as the absolute lowest age and encourages state parties to increase the age to a higher level.⁸⁸ The US Supreme Court extensively reviewed culpability of children in the seminal case *Roper v Simmons* 543, U.S. 551 (2005) which concluded that it would be a violation of the Eighth and Fourteenth Amendments to the US Constitution to allow execution of juveniles (persons under the age of 18 years) due to their lack of maturity. The Court was influenced by the *amicus curiae* brief submitted by the American Medical Association et al.⁸⁹ which explained that 'perspective and temperance' are underdeveloped in children until late adolescence.⁹⁰ Thus, primitive emotions rule the child who functions more on impulse rather than on the basis of higher-level cognitive processes. Moreover, children have less experience of life than adults by which to make informed choices.
98. We agree with Lord Carloway that all persons under the age of eighteen should be considered children and the law should uniformly reflect this. We do not believe that the age of criminal responsibility should be set as low as eight years, nor the age from which prosecution can be brought as low as twelve years, given the immaturity of children at that age. However, the diversion to the Children's Hearing at least reflects that children ought not to be subjected to the harsh environment of the criminal justice system which is ill-equipped to reflect the essential difference in offending behaviour carried out by children. Prior to that, in our view no child should be treated as a 'suspect', but rather should be diverted from the traditional

⁸⁶ Which came into force on 28th March, by virtue of the Criminal Justice and Licensing (Scotland) Act 2010, and Commencement Order no. 8, 2011. For background and principles see Scottish Law Commission, Report on Age of Criminal Responsibility, Scot Law Com No. 185 (2002).

⁸⁷ *Time for a New Hearing*, *ibid*, annex A pp 76-85 and research referred to therein, most notably as to repeat offending following referral to the Hearing. The report and its annexes are available at: http://www.youthcrimecommission.org.uk/index.php?option=com_content&view=article&id=95&Itemid=90

⁸⁸ Committee on the Rights of the Child, CRC/C/GC/10, (Geneva: 25 April 2010), para 32. Para 33 recommends an age of 14 or 16.

⁸⁹ Brief is available at: <http://www.ama-assn.org/resources/doc/legal-issues/roper-v-simmons.pdf>

⁹⁰ *Id* p 7.

criminal justice system. The ECtHR highlighted the problem of treating children as criminally responsible in *T v UK; V v UK* 30 EHRR 121.⁹¹ In *Time for a New Hearing* JUSTICE set out the international human rights standards which should apply to children.⁹²

99. Whilst children between the ages of eight to fifteen are normally diverted to the Children's Hearing system, Part V of the 1995 Act provides for children to be kept in detention, which in police custody is defined as a 'place of safety' away from adult suspects and, following court appearance, in local authority care. Given that children under twelve cannot be prosecuted, it seems that children up to this age, should not be taken to the police station at all. For children between the ages of twelve and eighteen, detention ought only to be used as a last resort and for the shortest period possible.⁹³ ACPOS Guidance⁹⁴ provides that custody management regimes must identify where children will be detained. It does, however, state that lodging a child in a cell is acceptable providing the decision can be accounted for and shown to be proportionate to the circumstances. Whilst the guidance identifies the limited circumstances in which a child can be detained in a police office at all, it is concerning that detention in a *police cell* is considered acceptable in any circumstances. Our observations in *Suspects in Detention* saw few children in the police office, but those who were there were kept in exactly the same type of cell, adjacent to the adult cells. The environment is not one in which children should be detained, irrespective of whether they are unfit through drink or drugs or display some risk of harm. Alternative accommodation more suitable for children should be made available.

22. Do you agree that there should be a general statutory provision that in any decision regarding the arrest, detention, interview and charging of a child, the best interests of the child should be a primary consideration?

100. The UN Convention on the Rights of the Child is the most comprehensive treaty agreement recording children's rights and is the most widely ratified. In conjunction with its two Optional Protocols, it contains a comprehensive set of legally binding international standards for the promotion and protection of children's rights. Articles 3(1), 9, 12 and 18 all articulate the fundamental principle of the primacy of the rights of the child. The UN Committee on the Rights of the Child has also provided guidance on the interpretation of these rights. Every legislative, administrative and judicial body or institution is required to apply the primacy principle by systematically considering how children's rights and interests are, or will be,

⁹¹ See further J Fionda, *Devils and angels: youth policy and crime*, Hart Publishing, 2006, p138: *Children who commit very serious crimes lose the privilege of childhood and are assigned adult status, even though their physical (and possibly mental) capacity simply does not assimilate with that status.*

⁹² At page 30.

⁹³ Article 37 UNCRC

⁹⁴ ACPOS Custody Manual of Guidance (2010), part 14.

affected by their decisions and actions.⁹⁵ The CRC obliges States parties to ensure that those responsible for these actions hear the child: as stipulated in Article 12. The best interests of the child, established in consultation with the child, is not the only factor to be considered. It is, however, of crucial importance, as are the views of the child.⁹⁶

101. There are many sources of international law, in addition to the CRC, which support the primacy (or equivalent) of the child's best interests. See, for example, the second principle of the United Nations Declaration on the Rights of the Child 1959; Articles 5(b) and 16.1(d) of the Convention on the Elimination of All Forms of Discrimination against Women 1979; Articles 23-24 and General Comments 17 & 19 of the Human Rights Committee in relation to the International Covenant on Civil and Political Rights 1966. Of particular relevance to the European Arrest Warrant Framework Decision is the enshrining of the CRC in Article 24 of the Charter of Fundamental Rights⁹⁷:

...(1) Children shall have the right to such protection and care as is necessary for their well being. They may express their views freely. Such views shall be taken into consideration on matters which concern them in accordance with their age and maturity

2. In all actions relating to children, whether taken by public authorities or private institutions, the child's best interests must be a primary consideration.

3. Every child shall have the right to maintain on a regular basis a personal relationship and direct contact with both his or her parents, unless that is contrary to his or her interests...

The Court of Justice of the European Union ("CJEU") has affirmed the primacy of the rights of the child under Article 24 of the Charter.⁹⁸ When applying any EU law, a balanced and reasonable assessment of all the child's interests involved should be carried out, which must be based on objective considerations relating to the actual person of the child and his or her

⁹⁵ General Comment No. 5, *General measures of implementation of the Convention on the Rights of the Child*, CRC/GC/2003/5 (27 November 2003), at §12.

⁹⁶ General Comment No. 12, *The Right of the Child to be Heard*, CRC/C/GC/12 (20 July 2009), at §70.

⁹⁷ Article 6(1) of the Treaty on European Union recognises the Charter as having '*the same legal value as the Treaties*'. The Charter is thus primary law, capable of direct effect in same way as other Treaty provisions, within the scope of its operation. See further *NS v SSHD* (2011) (C-411/10), Dec 21, CJEU.

⁹⁸ See, for example, *Detiček v Sgueglia* (Case C-403/09 PPU) [2010] Fam 104, CJEU. The Court held that a measure which prevents the maintenance on a regular basis of a personal relationship and direct contact with both parents can be justified only by another interest of the child of such importance that it takes priority over the interest underlying that fundamental right

social environment.⁹⁹ Likewise, CJEU has held that Article 7 of the Charter (equivalent to Article 8 ECHR):

...must be read in a way which respects the obligation to take into consideration the child's best interests, recognised in article 24(2) of that Charter...¹⁰⁰

102. However, this does not mean that the best interests of the child are the only issue to consider. As Lord Hope held in *BH et al. v HM Advocate*, an extradition case considering the rights of the extraditees' children:

In *ZH*, para 44, I said that the starting point was to assess whether the children's best interests were outweighed by the strength of any other considerations. But I agree with Lord Judge that this does not require the decision-taker always to examine the interests of the children at the very beginning of the exercise: *R (HH and PH) v Deputy Prosecutor of the Italian Republic, Genoa* [2012] UKSC 25, para 124. It does not, as Mr Gill QC pointed out in his helpful note for the Coram Children's Legal Centre, impose a straitjacket. What it does do, by encouraging a temporal approach, of the kind described by Lady Hale in her judgment in that case at para 33, is ensure that the best interests principle will not be seen as having a reduced importance when there are other important compelling considerations which, on the particular facts of the case, must be respected. The place where the best interests and well-being of any children takes in the list of factors which the Strasbourg court set out in *AA v United Kingdom* (Application No 8000/08) (unreported) given 20 September 2011, para 56, supports this approach. As Lady Hale said in *ZH*, para 26, the strength of those other considerations may outweigh the best interests of the children, provided that those other considerations are not treated as inherently more significant than they are. So it is important to have a clear idea of their circumstances and of what is in their best interests before one asks oneself whether those interests are outweighed by the force of any other consideration.

103. Section 25 of the Children's Hearings (Scotland) Act 2011 states that 'the children's hearing, pre-hearing panel or court is to regard the need to safeguard and promote the welfare of the child throughout the child's childhood as the paramount consideration.' This requirement should also extend to the police office. However, adopting the 'best interests' test will ensure that the requirement is understood in line with the extensive jurisprudence interpreting this concept.

⁹⁹ Ibid, at §§ at 53 to 60.

¹⁰⁰ *Mc B v E* (Case C-400/10 PPU) [2011] Fam 364, CJEU, at §60.

104. The provision would ensure that there is an obligation upon police officers to consider whether the child ought to be arrested and detained at all, and, if so, how they will be housed, the length of their detention and treatment within the custody environment. It would also impose a requirement to ensure their views and concerns are addressed and that a responsible adult is obtained to support them. It would create a standard through which conduct could be held accountable.

23. Do you agree with the terms of the Report that the general role of the parent, carer or responsible person should be to provide any moral support and parental care and guidance to the child to promote the child's understanding of any communications between the child, the police and the solicitor?

105. We welcome Lord Carloway's observations and conclusions on the role of a responsible adult. For this reason we consider that it would be helpful to provide guidance on this role. This could be referred to, as Lord Carloway suggests, in the Letter of Rights. But since this document is for the suspect, it should explain how the responsible adult can help them. A separate document should then provide guidance on the role of a responsible adult to help parents and carers. In particular it should promote the benefit of legal advice and emphasise that the responsible adult cannot act as a replacement for a lawyer; their roles are very different. A statutory provision would create too rigid an obligation on a parent and an alternative social worker already has obligations to promote the child's welfare.

24. Do you have comments on the recommendation for children aged 16 or 17 years to be able to waive their right of access to a lawyer only with the agreement of a parent, carer or responsible person?

106. Whilst this may go some way to ensuring that child suspects exercise their right to legal assistance, we do not think it guards against the possibility that parents and guardians may consider legal advice to be unnecessary in their child's case. Some lawyers we interviewed during *Suspects Rights in Police Detention* observed that, even when they are there, the parent is advising the child to 'tell the truth' and 'get on with it' so that they can leave the police office and put the matter behind them. Some do not appreciate the consequences for a child of simply accepting the allegation, notwithstanding the advice offered by the lawyer.

107. We therefore think that in the case of all children it is important to at least require them to access legal advice, be it by telephone or in person (which is an assessment that the current duty plan allows for), to inform the decision as to whether they should then be represented by a lawyer during police detention. This would prevent the difficult scenario of the child refusing to cooperate with their solicitor who would then have no instructions to act upon, but guard against well intentioned but misinformed advice from a responsible adult.

25. Do you have comments on the recommendation for children aged 16 or 17 years to be able to waive their right of access to a parent, carer or responsible person, but that in such cases they must be provided with access to a lawyer.

108. We disagree with the suggestion that waiver should be possible. The police station is a daunting and intimidating place for most adults. This is magnified for children. Often children who are from difficult backgrounds will mask their fear and vulnerability. This does not mean they should be alone, irrespective of how many times they have been arrested previously. Whilst we appreciate Lord Carloway's concern that (a) some parents or guardians may not provide appropriate support and (b) waiting for an alternative person (or indeed the primary carer) may prolong detention, children should always have an independent, and ideally a familiar face, that they can trust with them.
109. Whilst suspected children in police detention are entitled to 'access' to a parent or guardian under the 1995 Act, it is not clear in the legislation what that access can do to assist the child. In particular, section 15(4)(a) provides that where there is reason to suspect that the parent has been involved in the alleged offence, they only 'may' rather than 'shall' be permitted access. There does not appear to be an option for an alternative responsible adult to be given access instead. This should be expressly stated as a requirement. Equally, there is no provision to allow responsible adults to accompany children into police interviews. In our view it is imperative that children are accompanied by a responsible adult as soon as possible during their detention period, both whilst waiting to be processed, and during interview.
110. However, we agree that if waiver were to be allowed in this situation, access to a lawyer would be essential.

26. What are your views on the recommendation that children under 16 should not be able to waive their rights to legal advice?

111. As we set out above, we consider that, whilst there is no international obligation to require children to always have access to legal advice, there should at least be initial advice provided to all children. Lord Carloway does not provide any evidence to support why sixteen is an appropriate age to be able to waive the right to legal advice, yet he acknowledges that international law recognises a child to be any person under eighteen years. This is not an arbitrary figure; it is based upon research concerning the stages of development that children attain and consensus that eighteen years is of sufficient maturity to be a responsible decision maker. Moreover, it is accepted that children develop at different paces and as such, one sixteen year old may not have the intellectual maturity of another. If mandatory advice is to be provided, it should be for all children, to the age of eighteen.

Vulnerable Suspects

27. Do you agree with Lord Carloway's recommendation that there should be a statutory definition of a 'vulnerable suspect'? Do you agree with the definition proposed by Lord Carloway?

112. We agree that there should be a statutory definition. Vulnerable suspects encompass a wide range of persons who are in need of support during police detention, with varying degrees of disability. ACPOS provides extensive guidance to custody suites on identifying vulnerabilities, particularly in relation to physical and mental impairments.¹⁰¹ However, this is not in the form of a code such as Code C of PACE, where obligations can clearly be made out which, if breached, could give rise to repercussions. In our view, it is necessary to take the main elements of this guidance and provide a code of binding duties.

113. A statutory definition would ensure that obligations are in place to assist those who may need it. We do not feel, however, that the definition should be limited to suspects but should apply to accused persons as well to ensure that the question of whether they are fit to plead and take part in the trial proceedings is subjected to the same requirement to provide assistance. The Mental Health (Care and Treatment) (Scotland) Act 2003 provides for disposal of proceedings against people who have a mental disorder, but those who simply need facilitation of communication (though of course some people will have so severe a disorder that they are unable to communicate at all, irrespective of whether they receive appropriate medication or facilitation) are not included.

114. Lord Carloway's definition follows the 2003 Act of mental health, personality disorder or learning difficulty. We consider that the definition should at least contain the following:

A suspected or accused person may be vulnerable where they appear unable to understand what is happening or to communicate a response as a result of (a) mental illness (b) personality disorder or (c) learning disability, however caused or manifested. This shall include, but not be limited to, people with acquired brain injury, autistic spectrum disorder and people suffering from dementia.

This is a simpler version of Lord Carloway's suggestion but draws further definition from the 2003 Act and Guidance on Appropriate Adult Service in Scotland.¹⁰²

¹⁰¹ ACPOS Custody Manual of Guidance, version 8 (2011/12)

¹⁰² Scottish Government (2007), available at <http://www.scotland.gov.uk/Resource/Doc/1099/0053903.pdf>

28. Do you agree with Lord Carloway's recommendation that the role of an Appropriate Adult should be defined in statute? Do you agree with the definition proposed by Lord Carloway?

115. We do agree that the role should be defined and that Lord Carloway's definition appears to encompass the role sufficiently, subject to our answer to question 30.

29. Do you agree with Lord Carloway's recommendation that statute should provide that a vulnerable suspect must be provided with the services of an Appropriate Adult as soon as practicable after detention and prior to questioning?

116. If a suspect appears to satisfy the definition for vulnerable person, they will require assistance throughout the detention and court process from an appropriate adult. This assistance should be provided as soon as possible and, dependant upon the level of their disability, the booking-in process should be delayed until the appropriate adult has arrived. It may be apparent to the arresting officer that the person has a vulnerability and they should call ahead to the police office for enquiries to be made for an appropriate adult to attend. As with children, adult cells may not be suitable for vulnerable suspects, particularly whilst waiting for the attendance of an appropriate adult. The suspect should not be asked whether he requires the assistance of a lawyer or be interviewed until the appropriate adult is in attendance. Nor should any comment made by the suspect be recorded and used in evidence until this time. All these considerations should in our view be set down in statute.

117. We do not agree, however, that a suspect should only be able to waive their right of access to a solicitor if the appropriate adult agrees. As Lord Carloway has indicated, the role of the appropriate adult is to facilitate and identify problems with communication between the suspect and the police, it is not to advise. There are of course varying levels of comprehension between vulnerable persons. Unlike a child who does not have the necessary maturity to consider whether to request legal advice, a person with some form of mental disorder may, once matters are explained through an appropriate adult, be able to fully exercise their right to choose. This should not be prevented. The assessment should be that set out by the ECtHR: a waiver must be knowing, intelligent and unequivocal. If it does not appear that this is the case, which should be possible to ascertain through the assistance of the appropriate adult, a solicitor should be appointed.

30. Do you agree with Lord Carloway's recommendation that statutory provision should be made to define the qualifications necessary to become an appropriate adult?

118. As with lawyers, interpreters, police officers and doctors, it is imperative that the role of appropriate adult require suitable qualifications so as to ensure that the person purporting to

hold office is capable of carrying out their service with a suspect to an appropriate level. Vulnerable suspects are in a particularly precarious position where the appropriate adult is incapable of offering them the requisite support because the suspect may not be able to communicate this to the police or their lawyer.

119. The necessary qualifications may vary according to the disorder that is being displayed. In order to draw up appropriate qualifications which will be practicable and ensure actual assistance is available swiftly for vulnerable suspects, as Lord Carloway has indicated, much more consultation is required. The Scottish Appropriate Adults Network, defence lawyers, the police and other organisations who are in contact with vulnerable persons should be consulted to ensure that all recommended statutory provisions reflect reality and do not exclude either vulnerable groups or appropriate professionals.

Corroboration

31. Lord Carloway concludes that the requirement for corroboration has no place in a modern legal system and should be abolished. Setting aside any question about whether this would require other changes to be made, do you agree with that conclusion?

120. Lord Carloway repeatedly opines that corroboration is an aged doctrine. The justification for its removal is said to be bolstered by several, at times unconnected, aspects of the operation of the doctrine in modern practice. The central aspect of corroboration to our law of criminal procedure appears in our view to have been overlooked or not given proper prominence.
121. Although Lord Carloway has met the terms of reference for the Review - negotiated between the Scottish Government and his Lordship - it is difficult to see the connection between the decision in *Cadder* (which was said to have prompted the Review) and the suggestion that the requirement of corroboration has had its day in the Scottish courts. Aside from the problematic linking of the issues of accessing legal advice prior to police interview and the evidential basis for meeting the standard of proof, there has been a distinct lack of criticism or unease expressed about the presence of this requirement in the Scottish criminal courts. It is difficult to point to a wave of academic criticism. Civic society has been muted in its criticism of the use of corroboration. Practitioners, up until the public linking of the *Cadder* judgement and the abolition of corroboration, did not, in the main, seek to criticise its use.
122. That lack of complaint falls to be contrasted with the many expressions of pride about the distinctive nature of this aspect of Scottish criminal law which was easy to contrast with the evidential basis employed in England and Wales leading to the high-profile overturning of convictions, with the assertion in Scotland that those cases would not have made it to the jury.
123. The requirement of corroboration is so deeply embedded in our law that the historical survey and search for its genesis and justification should not cloud its almost universal acceptance amongst those who practice in the criminal courts. That is quite separate and distinct however, from the question of whether it should continue to apply. In order to answer this question, a full review of the current law and the implications for its removal are necessary.

The purpose of corroboration

124. Many authoritative commentators have recalled the value of the corroboration rule. In the Stair Memorial Encyclopaedia title on Evidence¹⁰³, the author sets out the rationale of the requirement of corroboration:

¹⁰³ Reissue

125. The objective of the requirement of corroboration in criminal cases is to reduce the risk of the acceptance by the court or jury of untrue or unreliable testimony. The requirement is generally considered to be an invaluable safeguard against miscarriages of justice in criminal trials. The retention of the requirement in criminal cases, while unusual among advanced legal systems, is justifiable on the ground that in criminal proceedings it is necessary to minimise the risk of fallibility, both in the unsupported witness and in the court or jury which might find him to be credible and reliable.¹⁰⁴ The Thomson Committee recognised that:¹⁰⁵

The greatest safeguard against a miscarriage of justice is – and should continue to be – the rule of law that the crown must prove its case beyond reasonable doubt on corroborated evidence.¹⁰⁶

126. A year later the point was reiterated by the Report of the Working Group on Identification Procedure under Scottish Criminal Law:¹⁰⁷

We consider that the requirement of corroboration in effect places a higher onus on the prosecution in Scotland than exists in England, and that the requirement of corroboration substantially reduces the number of miscarriages of justice which could arise if only a single witness were required.

...For our part, we are firmly of the opinion that the existence of the requirement of corroboration in Scotland is a valuable, though by no means infallible, safeguard which does not seriously inhibit the effective administration of justice.¹⁰⁸

127. In 2002, the previous administration balked at the idea of abolishing corroboration in the face of many difficult examples of its application:

...[W]e do not believe that doing away with the need for corroboration is the answer. The dangers of potential miscarriages of justice are too great.¹⁰⁹

128. Lord Hope of Craighead, the respected Deputy President of the Supreme Court and former Lord Justice General, looked very carefully at the question of corroboration in a lecture given

¹⁰⁴ para.292 (references omitted)

¹⁰⁵ Cmnd. 7005 (1977)

¹⁰⁶ para. 1.09

¹⁰⁷ Cmnd. 7096 (1978)

¹⁰⁸ para. 205

¹⁰⁹ *Vital Voices: Helping Vulnerable Witnesses Give Evidence* (2002)

at the University of Edinburgh on 12th June 2009 in honour of Sir Gerald Gordon¹¹⁰. He concluded that the law of corroboration 'is as settled as any aspect of our criminal law can be.' Yet he critically evaluated the rule, from both a historical and comparative perspective and concluded that it was 'something of real value and importance which, I suggest, we must without any shadow of doubt hang on to.'¹¹¹

129. That said, and as the successive Royal Commissions have pointed out, it is equally unacceptable for access to justice to be denied for victims of crime, as Lord Carloway identified in his Review. The true test for our parliamentarians is to ascertain whether there is a proper basis presented for change now to such a deeply entrenched aspect of Scottish criminal law of evidence.

The Configuration and Balancing of Interest

130. Although the Review expressly disavows any intention of reconfiguring the present equilibrium in the criminal justice system, it may be said that what is proposed, especially with a lack of any concrete proposal on what should replace the present state of the law, will undoubtedly recalibrate where the present system presently stands. The various different and, at times, competing, interests have not yet been the subject, in the current round of debates at least, of detailed consideration. It might be said that, in the current review and consultation, they have barely been identified. In the previous thematic reviews – and there have been many (academic and otherwise) - this has featured as an important introduction.

131. In England & Wales, the (Phillips) Royal Commission on Criminal Procedure in 1981,¹¹² search for that balance between various interests was an unenviable, though significant, one:

What is clear is that in speaking of a balance between the interests of the community and the rights of the individual issues are being formulated which should be the concern not only of lawyers or police officers but of every citizen.

132. Our concern is to ensure that in the search for new rules of evidence there are not caught a number of unsound, unsafe and unjust convictions as occurred in England and Wales. There must be a thorough exposition of the purposes and consequences of such change. The Review has not produced sufficient evidence to justify this alone.

¹¹⁰ 'Corroboration and Distress: Some Crumbs from under the Master's Table', published in *Essays in Criminal Law in Honour of Sir Gerald Gordon*, (Edinburgh University Press, 2010)

¹¹¹ Sentiments opined by Lord Justice Clerk Aitchison in *Morton v HM Advocate* 1938 J.C. 50 at p 55; Lord Morris in *DPP v Hester* [1973] AC 296 at 315 and Lord Rodger in *Smith v Lees Smith v Lees* 1997 JC 73 at 76F.

¹¹² Royal Commission on Criminal Procedure, Cmnd 8092 (1981), at para 1.12

133. The Scottish Courts have jealously guarded the right of an accused to a fair trial. This is not an international import.¹¹³ Nor is it a private or individual right.¹¹⁴ It is a societal interest capable of being objectively justified as a positive aspect of any system based upon the rule of law. It's constituent elements are several and intertwined. These include the Courts' attitude to the admission or exclusion of certain types of evidence. The importance given to a suspect's right to silence is also viewed as a hallmark of a mature, balanced system of the prosecution of crime, reinforcing, as it does, the requirement that a citizen ought not to be under any duty to contribute to the prosecution against himself. At its root however, in any fair system of the prosecution of crime are the entrenched and linked aspects of the presumption of innocence (the right to silence being an aspect of this), the onus, or burden, of proof and the standard of proof. It is of some moment that these individual and basic aspects of Scottish criminal procedure are to be found elsewhere in Europe. Together they sound a basic and far-reaching truth in the prosecution of crime. No-one need contribute to the case against themselves; The State must prove its allegation of guilt. The burden of so doing in the course of a criminal trial never moves. The standard of proof – now just about universally acknowledged as 'proof beyond reasonable doubt' – speaks to another globally accepted truth. Before convicting someone, with all the sanctions that go with that – punitive, societal and wider – we must be certain, or as certain as we can be, of guilt. It is well documented that the system is fallible; protagonists and arbiters can fall victim to seeing patterns in behaviours where none exist; of jumping to conclusions sometimes based upon inexact presumptions, and, at worst, prejudice. To avoid such influences in the context of so serious an exertion of state authority, the imposition of some rigour – of some objectivity - is necessary.

The Law on Corroboration

134. It is one thing to suggest corroboration does not address the real issue, namely the quality and safeguarding of the quality of evidence, but another to suggest that the rule of corroboration itself somehow distorts the system into disregarding quality. On one view, it is not the existence of the rule of corroboration that has caused a failure to address quality control. Rather, it has been used as an excuse to avoid introducing additional or further reforms to increase the quality of evidence and the fairness of the trial – a clear example being the rejection of safeguards over identification evidence.¹¹⁵
135. It is interesting to note that the principle of corroboration has detained many criminal lawyers and judges. That is not to say that it is a difficult concept to grasp. It may be difficult in the particular circumstances of some problematic cases to say whether some aspect of evidence is truly corroborative of what has been spoken to by another witness. It does not mean that the

¹¹³ *Robertson & Gough v HM Advocate* 2008 J.C. 146

¹¹⁴ *Smith Petr.* 1998 SCCR 672

¹¹⁵ Report of the Working Group on Identification Procedure under Scottish Criminal Law. Cmnd. 7096 1978, paras. 1.03, 2.14 & 6.02

law of corroboration has lost its usefulness. In many aspects of law, arguments rage about foundational concepts. Even eminent jurists disagree – sometimes vehemently - about what many of us would regard as basic concepts of law. Under the law of delict for example, there are many submissions made before judges, and then decisions about, issues such as foreseeability, causation and the like. Failure to enter into such a debate will render a legal system, or aspects within a legal system, stultified.

136. Nevertheless, whether evidence may constitute corroboration has generally been held to be a matter of common sense. As Lord Reid has observed:

There is nothing technical in the idea of corroboration. When in the ordinary affairs of life one is doubtful whether or not to believe a particular statement one naturally looks to see whether it fits in with other statements or circumstances relating to the particular matter; the better it fits in, the more one is inclined to believe it. The doubted statement is corroborated to a greater or lesser extent by the other statements or circumstances with which it fits in.¹¹⁶

Similarly, the Lord Chancellor (Lord Mackay of Clashfern) has said:

Although there is a difference between the law of Scotland, which requires corroboration generally in criminal cases, and the law of England, which does not, the principles which determine whether one piece of evidence can corroborate another are the same as those which determine whether evidence in relation to one offence is admissible in respect of another.¹¹⁷

Another Lord Chancellor, Lord Hailsham of St Marylebone, observed:

The word 'corroboration' by itself means no more than evidence tending to confirm other evidence. In my opinion, evidence which is (a) admissible and (b) relevant to the evidence requiring corroboration, and, if believed, confirming it in the relevant particulars, is capable of being corroboration of that evidence and, when believed, is in fact such corroboration...Corroborative evidence in our law must be evidence which can be used to test the truth or falsity of the accounts of material matters *ie* those which constitute *facta probanda*.¹¹⁸

137. The Lord Justice General (Lord Rodger) draws much of this together in *Smith v Lees*¹¹⁹:

¹¹⁶ *DPP v Kilbourne* [1973] AC 729 at 750

¹¹⁷ *DPP v P* [1991] 2 AC 447 at 461

¹¹⁸ *DPP v Kilbourne* [1973] AC 729

¹¹⁹ 1997 JC 73, 1997 SCCR 139

The institutional writers recognise that the direct testimony of one witness can be corroborated by evidence of facts and circumstances: Hume, *Commentaries*, ii, p 384; Burnett, *Treatise*, Chapter XX and Alison, *Practice*, p 551. Where facts and circumstances are used in this way to corroborate the evidence of an eyewitness, their function is to 'support' or 'confirm' the evidence of the eyewitness: Hume, *Commentaries*, ii, p 384 and Burnett, *Treatise*, p 518. But the older authorities do not spell out what kinds of circumstances are necessary or sufficient to supply the required support or confirmation of the eyewitness's evidence. This appears to be because the questions of the weight of the evidence and its technical sufficiency are rather run together. As Burnett, *Treatise*, p 519 puts it: 'What those circumstances are which ought to confirm and render complete the *semplena probatio* of one witness, it is impossible to determine by any rule—as the result depends upon the nature and quality of each circumstance, and their joint effect when combined; and also on the view taken of them by those who are to judge of the case. This only may be noticed, that the circumstances founded on must be *extrinsic* of the witness.'

138. It is important to remember that only essential facts – that the crime was committed and that the accused was responsible – require to be proved by corroborated evidence. It is not the case that the minutiae of each case requires two independent witnesses.¹²⁰ Like *Smith v Lees*, *Fox v HM Advocate*¹²¹ is a modern exposition of the law of corroboration. It provided an opportunity for the High Court to look, once again, at the historical basis for this doctrine and its modern, practical application in difficult cases before the Courts. In this case as in *Smith*, the High Court did not detect any real injustice, or difficulty in defining what this concept consists of and what its application meant to real cases. If it had, such a view would have been given clear expression and parliament alerted to an area in need of attention. The case also gives a rare example of the High Court explaining its view as to how corroboration operates in practice. Lord Justice General Rodger observes:

...[T]he starting point is that the jury have accepted the evidence of the direct witness as credible and reliable. The law requires that, even when they have reached that stage, they must still find confirmation of the direct evidence from other independent direct or circumstantial evidence. Unless they find that confirmation, the jury must acquit the accused even though they may be completely convinced by the direct evidence of the single witness.

¹²⁰ *Lockwood v Walker* 1910 JC 3, per Lord Justice-Clerk MacDonald at p 5.

¹²¹ 1998 SCCR 115

139. As such, the law admits that, practically, members of a jury are likely to be impressed by individual testimony, and what it seeks to do, by way of ensuring that the correct or accurate account is capable of being relied upon, is to demand that some form of supporting or concurring material is available: to then hold that *legal proof* is made out because the jury is not proceeding solely on that uncorroborated account. To do so is implicitly hazardous as the institutional writers opine.

Shift Or Weakening Of The Rule Of Corroboration

140. The Review suggests that, in relatively recent times, there has been a departure from or weakening of the application of the rules of corroboration. This has been suggested as some reworking of the original doctrine and evidence of its rigid application being unworkable. Professor Duff describes the evolution as 'interpretations, refinements, exceptions, loopholes and pure "fiddles"'.¹²²

Gillespie v MacMillan

141. In reviewing *Gillespie v MacMillan*, the Review suggests that this is an example of the original principle of corroboration being undermined and as a reflection of judicial thinking at the time. It is also said to be an indication of how corroboration gets in the way of justice. Thus, evidence should be left to juries. Given the prominence accorded to the decision it is important to note that it is not free from difficulty and controversy, notwithstanding the eminence of the judicial figures involved. The decision was widely criticised at the time and subsequently.¹²³ *Gillespie* is and has always been, out of step with the established view and jurisprudence on corroboration. The Review suggests, however that this case is evidence that Scots law remains 'thirled to the requirement of corroboration in its Romano-Canonical sense'.¹²⁴
142. For the Review, the evolution of the doctrine, and its continued development, has deprived it of its previous justification – even questioning whether that ever existed. The case of *Gillespie* is the prime example and justification (for the Review) of both. In its Full Bench decision in *Smith v Lees* the court sidestepped having to reconsider *Gillespie*.¹²⁵

¹²² Duff, "The requirement for corroboration in Scottish criminal cases: one argument against retention" (2012) Crim LR 513

¹²³ Anon. 1958 SLT (News) 137; Wilson, *The Logic of Corroboration* (1960) 76 Sc Law Rev 101 contrasting the "old" preferred theory with the "new" *Gillespie* theory founded on *Lees v Macdonald* (1893) 3 White 468

¹²⁴ 7.1.21

¹²⁵ per Lord McCluskey

At the other end of the range there is *Gillespie v. Macmillan* where, in my view, expediency masqueraded as pragmatism; the opinions paid lip service to the principles expressed by Hume and applied in *Morton*, but then proceeded to sidestep them on the basis that: 'law is a practical affair and has to approach its problems in a mundane common-sense way ... The analytical approach to the problem is over subtle and over-simplifies the problem'. To that *dictum*, fortunately, the Lord Justice-Clerk (Lord Thomson) added: 'The problems arising are so various and so different that each has to be solved on its own merits in a practical way, and the decision in one case rarely throws much light on the solution of another.' The comfort I consider I can take from that is that it was being acknowledged that *Gillespie v. MacMillan* would not have to be treated as a governing authority in relation to different types of case outside the field of road traffic law; the Lord Justice-Clerk was building in a ground of distinction. I consider that it would be extremely unfortunate if we were driven by a decision like that in *Gillespie v. Macmillan* to conclude that in this field Scots law had abandoned principle altogether. I do not consider that we need reach such a conclusion.

...In my opinion, the considerations which have come into play...in relation to cases such as *Gillespie v Macmillan*, are so special that it is legitimate to regard those cases as not affording much assistance in the type of case we now have under consideration, a case in which the essence of the matter is the sufficiency of the available evidence to provide legal corroboration of the credible eyewitness, the alleged victim herself.

143. As the law has developed it has become pragmatic and its response to particular issues has been nuanced. For example, in the question of the intention of a suspect found in possession of a knife under the Prevention of Crime Act 1953, the single testimony of the suspect as to his intention was held to be sufficient.¹²⁶ Lord Hope of Craighead has discussed how, in the times of Alison, highway robbery, committed in the dark and secluded loci, was such a serious problem that the law moved to adapt to this scourge.¹²⁷ In this context, for the Review, the flexible development of the rule demonstrates the impossibility of the practical application of the original principle.¹²⁸
144. This assumes a relationship between the requirement of corroboration and securing convictions. The evidence in sexual offence cases suggests that convictions are not readily made without supporting evidence. We also know that, in sexual offences, the absence of the

¹²⁶ *Normand v Matthews* 1993 SCCR 856

¹²⁷ *Corroboration and Distress: Some Crumbs from under the Master's Table*, published in *Essays in Criminal Law in Honour of Sir Gerald Gordon*, Edinburgh University Press, 2010 at p.24

¹²⁸ at 7.2.10

requirement in England has not returned significantly increased conviction rates.¹²⁹ The Review at another point,¹³⁰ seems relaxed that conviction rates will be unaffected by the change. Most importantly, it is repeatedly suggested that the rule requires technical and complex directions to be given which are liable to be beyond the ken of the jury. We question what is technical about telling a jury: (1) that they cannot rely on the evidence of witness A alone; (2) that they should look for evidence which confirms and supports the direct evidence (3) that pieces of evidence B and C are capable of providing the necessary support and, as in every case, must ask themselves whether they are satisfied beyond a reasonable doubt of guilt? Compared to some of the directions called for in other areas of the law of evidence, it seems relatively straightforward. If the rule is difficult at all, it is surely difficult for the judge, rather than the jury, where identification of what is corroborative may not be straightforward.

145. The problem may well be one of legal proof. What precisely does a jury need before it can be satisfied beyond reasonable doubt? Scots criminal lawyers have always understood that question with reference to the corroboration requirement. The infinite number of variable cases where the difficulties about the requirement are not present, but still there is a detailed direction required on the evidence, provide examples of problems of proof for a jury.

Moorov

146. The review suggests the doctrine is another area of concern at paragraph 7.2.46. The complexity here is surely related to the use of similar fact evidence / identification of a course of conduct, not the rule of corroboration. In this way, the argument over the gaps in time, and what amounts to similar conduct, can be difficult. This has been regarded as a response to the difficulties of proof in a case involving the commission of a criminal course of conduct. This is not a particular response to the difficulties faced by corroboration. Juries are directed in such cases that there must be a unity of purpose, linking the commission of the crimes to one person. That is a useful application of common sense rather than, as suggested, a difficulty thrown up by the corroboration requirement. Similar fact evidence is a concept applied in England and Wales absent a corroboration requirement. In its absence, the jury will have to be satisfied upon similar matters – a unified course of conduct and to the necessary standard of proof. In such a case, the prosecutor will rely upon corroboration and the similarities between accounts, as strengthening the case against the accused. The defence would, or could, presumably challenge the conduct as being similar and in any way supportive of each other. The difficulty encountered in such cases will remain: they are both difficult to prosecute or preside over. Clear guidance will require to be given on the disputed issues. The removal of the requirement of corroboration will not render trials quick affairs, free of complexity and

¹²⁹ Speech by Keir Starmer QC, Director of Public Prosecutions, 23rd July 2012, available at http://www.cps.gov.uk/news/articles/prosecuting_violence_against_women_and_girls_-_improving_culture_confidence_and_convictions/

¹³⁰ 7.2.41

challenging, disputed questions of fact. Not every drawback in the prosecution of crime can be laid at the door of corroboration, and its removal will not lead to a perfected system of prosecution of crime

Distress

147. At paragraph 7.2.45 the Review identifies distress as a particular issue. The law was made relatively clear in the full bench decision in *Smith v Lees*. There, Lord Rodger said this:

Evidence of distress can therefore corroborate a complainer's evidence that she did not consent to the accused's conduct and that he used force to overcome her will. But the Solicitor General seeks to take it further and to use the evidence of distress, not simply to corroborate the complainer's evidence that something distressing occurred, but to corroborate her evidence as to what exactly the appellant did. In my view that is not a legitimate use of the evidence of distress. The simple fact is that in itself the evidence of distress cannot tell the jury or sheriff more than that something distressing occurred.¹³¹

Lord Sutherland agreed:

The difficulty with distress is that on its own it gives no indication of what has been its cause other than that some event of an unspecified but distressing nature has occurred. It is indicative of a state of mind but it is not in any way indicative of the nature of the act which has caused that state of mind. In my opinion, therefore, the value of distress on its own as corroborative evidence should be limited to situations where it is necessary to establish the state of mind of the witness.¹³²

148. This is another difficult area where the law has not departed from reason or common sense. The jury may receive a direction to this effect as confirming their shared experience. What is important however, is that these cases will still come before the court to be adjudicated upon. They do so now – even when corroboration is required and is available. What the jury make of distress and what they are directed to make of it, will remain a live issue which is not diminished by the proposed changes. It is difficult to see how it can be used a reason to justify the removal of the corroboration rule.

Confessions

149. Confessions provide a good example of when corroboration can provide a safeguard. It is well established that such evidence is often unreliable. Scottish criminal law's proud boast that no

¹³¹ *Smith v Lees* 1997 JC 73 at 80H-81A

¹³² *Smith v Lees* 1997 JC 73 at 112C-D

man could be convicted upon the uncorroborated account from his own mouth will ring hollow in the event that the requirement of corroboration is abolished. The number of high profile overturned convictions in England and Wales which, at the time of trial relied solely upon purported confessions of accused persons, is sufficient to point up the hazards of the introduction of this provision into the law of Scotland.

150. The case of *Ward*¹³³ is an interesting and tragic illustration of an accused person falsely confessing to involvement in a serious crime. Upon conviction there was no challenge by way of appeal. Subsequent expert testimony showed that the accused suffered from a personality disorder which rendered her susceptible to claims of responsibility for crimes which she had not committed. In parallel, there was concerning partisanship on the part of forensic scientists. On the face of it, this fabricated confession appeared compelling. In this field – extra judicial statements or confessions to police officers – the importance of the requirement for corroboration is thrown into sharp focus. Absent that check upon the truthfulness of the account given to police officers – some confirming or concurring evidence implicating the accused – it is highly likely that miscarriages of justice will increase. That is not to say that the police will be more prone to fabricate confessions but, rather, simply having met – perhaps exceeded – the legal requirement of sufficiency, the impetus to look further for an independent check may not be present. Lord Bingham of Cornhill ¹³⁴ offers an old, cynical view of such evidence pointing up the need to pause for thought:

I would add that for my part I always suspect these confessions, which are supposed to be the offspring of penitence and remorse, which nevertheless are repudiated by the prisoner at the trial. It is remarkable that it is of very rare occurrence for evidence of a confession to be given when proof of the prisoner's guilt is otherwise clear and satisfactory; but, when it is not clear and satisfactory, the prisoner is not unfrequently alleged to have been seized with the desire borne of penitence and remorse to supplement it with a confession; - a desire which vanishes as soon as he appears in a court of justice.¹³⁵

Abolition of Corroboration in Civil Evidence

151. In civil litigation the onus is on the pursuer to establish that it is more likely than not that what he or she says occurred actually did happen. The requirement that that be proved by corroborative evidence was viewed as anachronistic, having regard to what was at stake between the parties. Mainly, though not exclusively, what is before the court in civil litigation is an argument about sums of money. There is a stark difference between what is at stake in

¹³³ *R v Ward* (1996) Cr. App. R.1

¹³⁴ "Justice and Injustice" – the Sir Dorabji Tata Memorial Lecture 5th January 1999 in *The Business of Judging, Selected Essays and Speeches*

¹³⁵ *R v Thompson* [1893] 2 QB 12 at 18 per Cave J

civil and criminal trials. The requirement of a fair trial is not simply safeguarding the rights of accused persons or suspects, but also societal confidence in the criminal justice system. What is at stake in transferring the uncorroborated testimony of one witness into a court finding, is a criminal conviction and the deprivation of liberty. That recognition forms a basis of many differences between civil and criminal litigation.

152. The requirement of corroboration in civil cases was abolished, in line with the Law Commission's recommendations, by the Civil Evidence (Scotland) Act 1988. One of the main reasons for removal was that the requirement sits somewhat uneasily with the concept of proof on a balance of probabilities – so, for example, it was suggested that, where civil proof required to be beyond a reasonable doubt, there was a case for retaining corroboration.¹³⁶
153. It is clear that the Review favours the general approach taken by the Scottish Law Commission and seeks to apply it to criminal cases. The picture painted in the Review is that an attempt was made to abolish the requirement of corroboration in personal injury litigation but, due to the resistance of judges, this was only partially successful. The Review opines that, in 1988, the abolition was extended – this time with a measure of success not hitherto enjoyed - to all civil cases.¹³⁷ This, however, only tells part of the picture.
154. By virtue of section 9 of the Law Reform (Miscellaneous Provisions) (Scotland) Act 1968, the requirement of corroborative evidence in personal injury cases was abolished. In the first cases that came before the Inner House of the Court of Session, the opportunity was taken to restate the importance of corroboration being led, if available. In *Morrison v J Kelly & Sons*¹³⁸ Lord Clyde said,

Section 9(2) of the 1968 Act does not eliminate corroboration altogether. On the contrary, corroborative evidence still constitutes a valuable check on the accuracy of a witness's evidence. There may be cases where owing to the nature of the circumstances corroboration is unobtainable. Such a case may be an appropriate subject for the application of the subsection. But, where corroboration or contradiction of the pursuer's account of the matter is available, a Court would obviously be very slow indeed to proceed upon the pursuer's evidence alone. The test under the subsection is a relatively high one. The Court must be "satisfied that [the] fact has been established." How could the Court be satisfied if corroborative evidence was available but without any explanation not produced?

¹³⁶ See SLC 2.13; 2.8 (also injustice to parties).

¹³⁷ Para.7.2.52

¹³⁸ 1970 SC 65.

155. *McGowan v Lord Advocate*¹³⁹ dealt with the question of conflicts in evidence where only the pursuer had been led, and a body of evidence contradicting that account was before the court. The uncorroborated evidence was insufficient to support a verdict in favour of the pursuer. *McLaren v Caldwell's Paper Mill Company*¹⁴⁰ dealt with the power of an appeal court to intervene where a pursuer was uncorroborated. In discussing the extension of that provision to the remainder of civil litigation, Parliament was reassured that, all that was being done, was an extension of the present state of the law as it then was. In the course of the passage of the Civil Evidence (Scotland) Bill 1988 there was much discussion about further extension of the relaxation of the requirement for corroboration. One practitioner member underlined to the House the fundamental importance of retaining the corroboration rule in criminal proceedings.¹⁴¹
156. No further revolution was sought or expected when the Civil Evidence (Scotland) Act 1988 was passed. Precisely where this brought the state of the law was reasonably clear. It had extended the provision of the 1968 Act, section 9(2) but not altered it. Accordingly, the only change which was carried in force by the Civil Evidence (Scotland) Act 1988, was the extension of the principle that corroboration was not technically required. Precisely what that meant for the civil law and for the conduct of civil litigation was to be discovered in the authorities which decided the import of section 9 of the Law Reform (Miscellaneous Provisions) (Scotland) Act 1968. In *Mackay v Yarrow Shipbuilders Ltd*¹⁴² Lord Osborne regarded the operation of section 9 of the Act of 1968 as equally application to the application of section 1(1) of the Act of 1988.
157. The matter was reviewed in some considerable detail in *L v L*.¹⁴³ In that case, concerning a mother seeking custody of her two children, an allegation of abuse was made against the man with whom the mother resided. In that case the Inner House expressly disavowed any review of the previous cases about section 9 and the ruling in *McLaren*.¹⁴⁴ In the case of *Rae v Chief Constable Strathclyde Police*,¹⁴⁵ having heard submissions about the import of *L v L*, Lord Marnoch took the view that this was really an application of common sense:

[T]he weight to be attached to evidence is, in my opinion, a different matter and where, without any attempt at explanation, someone who, on the face of matters, is a crucial witness is not led to substantiate a party's position that, in my opinion, is

¹³⁹ 1972 SC 68.

¹⁴⁰ 1973 SLT 158.

¹⁴¹ House of Commons Deb 16 May 1988 vol 133 cc 758-759

¹⁴² (OH.) 4th July 1991, unreported.

¹⁴³ 1998 SLT 672

¹⁴⁴ at 676 per Lord Rodger.

¹⁴⁵ 1998 Rep LR 63.

clearly a situation in which the court may be disinclined to give maximum weight to the uncorroborated testimony. This, it seems to me, is no more nor less than an application of common sense, one clear example being where an accused person pleading alibi fails, without explanation, to lead in evidence the person or persons in whose company he claims to have been at the time the crime was committed: *Gall v HM Advocate* 1993 GWD 37-2378. It is also the reason why 'soul and conscience' medical certificates and/or certificates of execution of citation are, on occasion, produced to the court.

158. The civil cases indicate that if corroboration is abolished also in the field of criminal procedure, where there is a matter of the application of common sense then the search for corroborated evidence to support an individual's testimony will continue. One would expect in the conduct of, for example, summary trials, judges will continue to look for corroborated evidence and may test the strength and quality of the evidence led before them having regard to that matter. It seems likely that a direction along similar lines as that of the pronouncements of Lord Kissen be required to be given to the jury, which suggests in the context of legal certainty that there is little point in abolishing by statute a common law rule which will continue to flourish for the protection of fairness.

Miscarriages of Justice

159. The Review considers a converse concept of miscarriage of justice which it finds has two aspects: (i) Guilty people go free; (ii) there is a denial of access to justice by the victims who are barred, by the operation of a rule imposing an artificial, aged and volumic assessment of the evidence in their case, from having their day in court and from having a jury rule upon the evidence in their case.
160. The Review's approach to this topic – to suggest that there is a dual aspect of miscarriages of justice – is not new. Such a concept is well understood. The Royal Commissions looked at these matters to discuss the competing pressures on any criminal justice system.¹⁴⁶ It is natural, however, that miscarriages of justice have been understood traditionally to involve those cases where an innocent person has been convicted.¹⁴⁷ This is because those high profile cases attract the public attention and opprobrium, and for good reason. The conviction

¹⁴⁶Runciman Royal Commission on Criminal Justice, Introduction, para.9; Phillips Royal Commission on Criminal Procedure para.6.9

¹⁴⁷ Bingham, *The English Criminal Trial: The Credits and Debits* in "The Business of Judging, Selected Essays and Speeches": "I suppose a purist might argue that a miscarriage of justice occurs as much when a guilty man is acquitted as when an innocent man is convicted. It is not, however, the acquittal of the guilty which on the whole gives rise to public disquiet, and the occasional acquittal of the guilty defendants is, I think, generally accepted as the price which has to be paid for the observance of the beneficial principle that the defendant shall enjoy the benefit of any doubt (p.259)

of the innocent and all that ensues, is a tragedy of the first order. For the convicted person, it represents a stain on their reputation and character. It carries with it a societal stigma. There may well be a stiff judicial sanction imposed, including imprisonment. For serious crimes, that period of imprisonment may well be lengthy. Given that JUSTICE was set up to highlight miscarriages of justice we cannot but comment upon the brief and summary coverage of this topic in the Review.¹⁴⁸ The Review seems to proceed on the assumption that the absence of evidence about the contribution of corroboration to reduction of miscarriages of justice, means that corroboration does not reduce the incidence of miscarriages of justice.

161. However, because of the prohibition upon enquiry into the deliberations of jurors,¹⁴⁹ it is difficult to find out much about the process of fact finding by the jury. It is difficult, too, to ascertain the true extent of miscarriages of justice. Miscarriages of justice do, however, occur. The precise effect of removing the important safeguard of corroboration upon the number of miscarriages of justice is simply not known. It is important, however, to recognise that, with no real discussion of what should stand in the stead of the corroboration safeguard, the number of miscarriages in this sense, will not reduce.

162. In a paper entitled *The New Miscarriages of Justice*, Hammond J, of the New Zealand Court of Appeal essayed a variety of factors which influence traditionally understood miscarriages of justice. They form the relevant backdrop for the discussion of this issue. For Hammond J it is a live, current and real issue for the criminal process. Given that this issue is not covered to any extent in the Review and Consultation, we hope we will be forgiven for repeating the factors in full which, in the opinion of Hammond J, contribute to justice miscarrying:

(a) There is an ever-present danger of falsification of evidence. For instance there may be informers (who may also be co-accused) who may well have self-serving reasons for exaggerating the role of the particular accused. Regrettably the police are sometimes in a position to manipulate evidence, for example by "verballing" the accused. That is, it is possible to invent damning statements, or passages within them, although that danger has been much lessened by the use of modern technology, such as video interviews. That this occurs in a "noble cause" (as in the case of the Birmingham Six and the Tottenham Three cases in England) makes them no more excusable. Police may also suffer from what has been called "tunnel vision" – bringing narrow mindedness, based on a personal sense of justice, to any particular case. Then too the abolition, by legislatures (as occurred in New Zealand) of the requirement for corroboration in sexual offences, which by their very nature usually occur in private, "broadened" justice for victims (usually women), but left an accused at greater risk from false claims.

¹⁴⁸ Carloway Report, 7.2.56.

¹⁴⁹ The Contempt of Court Act 1981.

(b) Police or lay witnesses may prove to be unreliable when attempting to identify an offender. This is especially so in fleeting or difficult conditions, or in a situation of stress.

(c) There may be unreliable confessions as a result of police pressure or the mental instability of the accused.

(d) The evidential value of expert testimony has been over-estimated in some instances, where subsequent investigation has found that the tests being used were inherently unreliable, or that the scientists conducting them carried them out poorly.

(e) There can be non-disclosure of relevant evidence by the police or prosecution, to the defence. At the outset, the investigation of a case is by and large reliant on the police. It is the police who speak to possible witnesses and arrange for forensic testing. The difficulty for the defence is that routinely it begins its task late, and it has neither the financial resources to undertake such work, nor the opportunities in terms of access to check the police investigation. Unfortunately, there have been instances which demonstrate that the police, forensic scientists and prosecution cannot always be relied upon fairly to pass on evidence which might be helpful to the accused, despite there being no other agency which might bring it to light.

(f) The conduct of a trial may itself produce miscarriages of justice. For instance, the Court in the Birmingham Six case exhibited an unfortunate propensity to favour the prosecution evidence, rather than act as an impartial umpire. And there may be a failure to appreciate defence submissions, either in law or fact, which then gives rise to unfairness in rulings or directions to the jury.

(g) Defence lawyers are sometimes not beyond reproach. They may not always be as competent or assertive as they should be. Institutionally, legal aid funding is given a much smaller proportion of public funds than is made available to police and prosecution work.

(h) Defendants can sometimes be portrayed in a prejudicial way. This is particularly noticeable in the common-law world in the so-called "terrorist" cases, although it is also true of particularly heinous crimes, such as bizarre serial killings. There may be a pejorative labelling of the accused, very heavy-handed and obvious security arrangements, and quarantined appearances in the dock, leaving the media with a heavy influence in such cases.

(i) Then there are a subset of problems associated with appeals. Appellants may have exhausted the patience of counsel, or their funds, so that there is a lack of access to lawyers and limited legal aid funding. The strength of such claims of a miscarriage often then have to

depend on extra-legal campaigns. The case may or may not be taken up by the media.

(j) Then there is the problem of how intermediate appellate courts approach their tasks. Courts of appeal are solely creatures of statute. They have to interpret their own appeal provisions. If there are inappropriately narrow restrictions to the basis of an appeal, then the possibilities of a miscarriage increase.

(k) Finally, there are some very difficult problems thrown up by the advent of human rights legislation, and Bills of Rights. The very difficult question here is whether, in terms of those instruments, a safe conviction is entirely contingent upon a fair trial.

163. The effect of any alteration of the balance between the various actors and interests in the criminal process, upon the numbers of those who suffer at the hands of our criminal justice system by way of wrongful conviction, ought to be a reason to pause. For the English, when they sought to review the operation of their criminal system, a careful, well researched, foundation was the starting point.¹⁵⁰
164. The Review did commission research to ascertain how many cases would be able to proceed to Court, absent the requirement of corroboration. On one view, such an exercise was unnecessary. Taking away a requirement for two independent sources of evidence – an assessment of the numerical contributions to a case – will always result in more cases being marked to proceed. It is axiomatic. Certain criticisms have already been levelled at the conduct of the research,¹⁵¹ in relation to its participants and methodology. We do not think that it features large in the reasoning or work of the Review but the central aspect of the research carried out is the test said to be applied by the researchers to determine whether cases would be marked to proceed to court. We detect an absence of any real discussion in the Review about the test, if any, which should replace corroboration.¹⁵² The focus, it is argued, should the rule requiring corroboration be ended, will be upon quality. The test that the Review asked researchers to adopt was whether there was a reasonable prospect of conviction.¹⁵³ The question of a realistic or reasonable prospect of conviction is one not entirely alien to prosecutors in Scotland. It is, however, applied by them in an entirely different context from the similar test applied by prosecutors in England and Wales. In Scotland, this hitherto has been invoked by the prosecutor “only in cases in which there are insurmountable weaknesses,”¹⁵⁴ as a basis for instructing no proceedings in a particular case. Questions of

¹⁵⁰ See the work undertaken by both Royal Commissions in England & Wales

¹⁵¹ “*Substantial and radical change*”: a new dawn for Scottish criminal procedure. 2012 MLR 837 Chalmers & Leverick.

¹⁵² Para. 7.3.5

¹⁵³ Carloway Report, 7.2.32.

¹⁵⁴ *Review of the Investigation and Prosecution of Sexual Offences in Scotland*, COPFS, June 2006 at para.9.52

credibility and reliability for prosecutors have been pointed out in a recent report as 'properly for a jury to determine and it is not for the prosecutor to usurp the function of the Court by judging the facts of the case.'¹⁵⁵

165. The test applied by the researchers – if it be the same one that they as prosecutors in Scotland would be used to applying - is one which has developed hand-in-hand and, one could say, as a direct result of the operation of corroboration in Scotland. It cannot easily be separated from the requirement therefore. If the Review research applied the test as understood in England and Wales, different considerations apply. The Code for Crown Prosecutors details the manner in which they approach the question of reasonable prospect of conviction¹⁵⁶. It is directly linked to the question in that jurisdiction of sufficiency: Is there enough evidence against the defendant?¹⁵⁷
166. At the time of the (Phillips) Royal Commission, the then Director of Public Prosecution provided a note to the Royal Commission, which was reproduced in the Annexe¹⁵⁸, outlining the basis of decision making in the prosecution of crime and the factors which influence it. The prosecutor used the realistic prospect of conviction test at that time as a synonym for sufficiency of evidence to justify proceedings. It seems that the prosecutor asked him or herself: Whether ... it seems rather more likely that there will be a conviction than an acquittal. For the DPP that involved the prosecutor asking him or herself a series of questions which, it was said, involved a close analysis of the case as a whole, 'particularly in borderline cases, the prosecutor must always delve beneath the surface of the statements.' The list of factors or questions to be asked were said to be along the following lines,
1. Does it appear that the witness is exaggerating, or that his memory is faulty, or that he is hostile to the accused, or is otherwise unreliable?
 2. Has he a motive for telling 'less than the whole truth?'
 3. Has he previous convictions, or are there other matters which might properly be put to him by the defence to attack his credibility?
 4. What sort of impression is he likely to make as a witness? How is he likely to stand up to cross-examination? Does he suffer from any physical or mental disability?
 5. If there is conflict between eye-witnesses, does it go beyond what one would expect and hence materially weaken the case?
 6. If there is a lack of conflict between eye-witnesses, is there anything which causes suspicion that a false story may have been concocted?

¹⁵⁵ *Op. cit.* para. 9.51

¹⁵⁶ Most recent version, February 2010, available at <http://www.cps.gov.uk/publications/docs/code2010english.pdf>

¹⁵⁷ See Annex on England and Wales where the full test is set out

¹⁵⁸ Annexe 25

7. Are all the necessary witnesses available to give evidence, including any who may be abroad?
8. If identity is likely to be an issue, how cogent and reliable is the evidence of those who purport to identify the accused?
9. If the case depends in part on confessions by the accused, are there any grounds for fearing that the evidence may not be admitted or that they are of doubtful reliability having regard to the age and intelligence of the accused?
10. Are the facts of the case such that the jury is likely to be sympathetic to the accused?

167. The application of that test for England and Wales was clearly influenced at the time of the Royal Commission by the experience of what would happen to such cases in court. In fact, in concluding upon the question of sufficiency, the DPP stated,

[The prosecutor] must also draw, so far as is possible, on his own experience how evidence of the type under consideration is likely to “stand up” in Court and commend itself to a jury before reaching a conclusion as to the likelihood of the conviction.

168. In the Scottish context since it is not yet known what factors will influence the court in deciding to convict in single testimony cases or how prosecutors will apply their mind to this issue, it is difficult to see how the review on that standard was carried out. The conclusion of the research conducted for the Review in our view therefore holds little weight.

Other jurisdictions

169. In a brief comparative survey, the Report focuses on the issue of corroboration warnings in the law of England, Australia and Canada and correctly notes the abolition of formal requirements for such warnings in those common law jurisdictions.¹⁵⁹ However, the Report ignores how the corroboration requirements operates in practice in those systems through corroboration warnings and other safeguards that serve to ensure a fair trial. We have set out in detail in the Annex how these systems operate. Much has been made in particular of those types of offences where often there is only the victim and the perpetrator involved, such as domestic violence or sexual offences. It is particularly important to observe that in these cases, corroboration is actively sought in case building by the CPS,¹⁶⁰ and corroboration warnings are necessary in all three jurisdictions.

¹⁵⁹ Carloway Report, 7.2.24

¹⁶⁰ See Domestic Violence Legal Guidance, available at http://www.cps.gov.uk/legal/d_to_g/domestic_violence_aide-memoire/ and Sexual Offences Act 2003 Legal Guidance, available at http://www.cps.gov.uk/legal/s_to_u/sexual_offences_act/#Charging_practice_2, under heading ‘evidential considerations.’

170. It is generally possible to observe that in the absence of a formal requirement for corroboration, judges in Australian and Canada, continue to value corroborative or confirmatory evidence when faced with potentially unreliable evidence. When freed from a rule requiring the giving of warnings to certain classes of witnesses, they mandate the giving of such warnings when the circumstances demand it. The abolition of rules of corroboration seems not to have lessened judicial enthusiasm for either corroboration or rules. A similar process can be noted in Scotland where the abolition of corroboration in civil proceedings has not prevented judges seeking corroboration where they deem it ought to be available. In considering the possible implications for Scotland it can be seen that, whilst the response to potentially unreliable evidence varied across the jurisdictions, a common feature was increased judicial intervention in the role of the jury in adjudicating on the evidence.
171. The case has not in our view been made out for abolition of the corroboration rule by the Review. In any event, it is impossible to divorce the question of abolition of corroboration from the changes that would require to be made to ensure safeguards remained in place to preserve the fairness of the proceedings.

32. If the requirement for corroboration is removed, do you think additional changes should be made to the criminal justice system?

172. The additional changes which would be required were corroboration to be abolished are many and varied. The abolition of corroboration would represent a significant recalibration of the present system of criminal justice in Scotland. What is left in the wake of abolition may well not be fit for purpose. Many consultees have already raised the prospect of challenges. In our view, the shaping of a modern criminal justice system ought, in Scotland, in the 21st century, to be capable of meeting the minimum standards laid down by the Convention jurisprudence. That will involve a serious appraisal of where the criminal justice system is left in the wake of abolition.

Effect of Abolition on Investigation & Prosecution

173. As the Review acknowledges, because corroboration is a legal requirement, it has an effect from the outset of, and throughout, the investigation and prosecution of crime. In this way, police investigation is directed towards finding corroborative evidence. Whilst both the police and prosecution will, in theory, always aim to present the best case to a jury, over time and under pressure – including financial¹⁶¹, time constraints and media pressure – in the absence of any legal requirements - poor quality and unsupported evidence, may be relied upon. There is a potential disincentive under pressure to do more than is necessary – to investigate other sources of evidence which are not needed.

¹⁶¹ Creation of Single national force under Police and Fire (Scotland) Reform Act 2012

174. The Report suggests that in any event, even without the rule, it “will not be enough for the police to find *some* evidence”¹⁶² and that they will need to find sufficient evidence to persuade a trier of fact. The requirement of corroboration is designed to secure better than ‘some’ evidence but the Review suggests that it may be enough to find and prosecute on ‘some’ evidence. Indeed, the Review argues that if the rule is abolished, the trial judge ought not to be given a power to intervene, either at the ‘no case to answer’ stage or on a reasonableness submission, ‘It should be enough, therefore, that there has been some testimony that (i) the crime charged has been committed; and (ii) the accused was the perpetrator.’¹⁶³
175. The Review essays, in some considerable detail, how the quantitative, capacious analysis is brought to bear upon every aspect of the criminal justice process and the various stakeholders in the system. The requirement of corroboration dictates the course of a police enquiry, e.g. what further work, if any, has to be done on the case and the question of whether a report will be submitted to the Procurator Fiscal. At the time of reception of a report by the prosecutor, that requirement will dictate whether any further work – investigative or otherwise - will be instructed. At the case marking stage it is to the fore. In advance of the trial, it will dictate the advice to be tendered by defence solicitors at a police station, and, in preparing for trial, to accused persons. In the course of the trial it may well dictate, in some cases, how a trial is conducted and defended. It will influence and inform legal debates at trial around sufficiency and certainly submissions, if appropriate.
176. The Review asserts that the police will continue to ingather as much evidence as available – as if the requirement were still in existence; and that there will be no consequential effect in the volume of cases reported, prosecuted and ultimately of persons convicted. This is not based upon any evidence and in our view is a dangerous conclusion to reach.

Investigation of crime

177. The requirement for corroboration provides some certainty that the police gather what, to their minds, is sufficient evidence and provides a reason for them to continue to work to investigate but also informs their decision on taking a case any further. If no corroborated evidence is available, the case need not be processed further. In advising the complainer of that fact the explanation of the law of corroboration whilst not being palatable, is comprehensible and capable of being communicated. No report is required to be submitted to the Procurator Fiscal though procedures and protocols were adopted to deal with the detected high rates of attrition for sexual crimes.¹⁶⁴

¹⁶² At para 7.2.41

¹⁶³ Carloway Report para.7.3.19

¹⁶⁴ Summary Case Preparation Thematic Report, Inspectorate of Prosecution in Scotland, August 2012

178. In the absence of corroboration, crimes will need to be investigated with a completely new approach. That will be influenced by the new regime of proof adopted by the criminal courts in light of abolition. What that will be, and how it will operate in practice, and the consequence for police conduct in individual criminal investigations, is not known. The lack of any concrete guidance will be problematic. Aside from being unfair to individual officers to be left to exercise their discretion, the matter of the detection and investigation of crime cannot be left in a vacuum to develop from one case to the next. The absence of consistency of approach has left many victims, in the past, at the whim of the exercise of the subjective decision making of officers who may view particular types of crime as being in need of prioritising over others. The need to look at the overall requirement for evidence, and what the courts will expect, must be well understood by officers and nationwide training of police officers will be required to ensure a uniform approach to decision making which is accountable and transparent.

Prosecution

179. Upon abolition it can be expected that a greatly increased number of reports will be received by local prosecutors and by Crown Office. A new test, if any, to be applied by the prosecutor, in determining which cases will now be proceeded with and be marked, or recommended, for prosecution will require to be formulated. The previous test, although blunt, was attractive in that it was easily understood and easily communicated.¹⁶⁵ The decision making is going to be far more difficult if a test, such as a realistic prospect of conviction, is introduced. There will have to be analysis of what factors will influence the decision.
180. The manner in which the question of realistic prospect of conviction is applied at present can be gleaned from a consideration of the *Review of the Investigation and Prosecution of Sexual Offences in Scotland* carried out by Crown Office in June 2006:

The Quality Threshold

9.49 The range of issues about credibility and reliability which can arise in any case is wide. In determining the appropriate standard of evidence we consider that there is a need to achieve an appropriate balance between prosecuting difficult cases, notwithstanding evidential difficulties, while identifying at an early stage cases in which the standard of evidence is such that there is no realistic prospect of a conviction.

Importantly, though, even in the age of the requirement of corroboration being at the root of decision-making, difficult decisions were called for at every stage. The problem of facing up to any evidential difficulties was uncovered even in those cases where a sufficiency existed:

¹⁶⁵ This appears to be recognised at para.9.36 of the Report.

9.50 In the case analysis we found examples of cases which had proceeded to trial, notwithstanding the existence of significant problems with the quality of the evidence. We considered that in some cases the decision to prosecute had simply had the effect of deferring the failure of the case to a later stage. Where a case will inevitably result in an acquittal, the merit of proceeding with a criminal trial must be questioned. The work of this Review has left no doubt that the impact of criminal proceedings on the victim cannot be overestimated and we consider that there are strong public interest reasons for ensuring that victims are not required to give evidence and be cross examined in the context of a trial which has no realistic prospect of conviction. While some victims have expressed the view that the opportunity to give evidence in the context of a trial is in itself important, regardless of the outcome, not all victims record such sentiments. In any case it is a characteristic of prosecution in the public interest that the interests of the individual do not inevitably align with the interests of the wider public. A desire to afford the victim an opportunity to give evidence against the accused in court is not a sufficient basis to justify criminal proceedings in the public interest and would be an improper basis on which to prosecute, if it were assessed that there was no reasonable prospect of conviction.

The current approach to a 'realistic prospect of conviction' test is one that would not see many cases fail in advance of the trial:

9.51 In many cases, however, there will be finer questions of credibility and reliability. These are properly for a jury to determine and it is not for the prosecutor to usurp the function of the court by judging the facts of the case. In this regard it is imperative that prosecutors do not recommend or instruct no proceedings because the credibility or reliability of the victim is likely to be challenged in the course of the trial.

9.52 We considered that the "no realistic prospect of a conviction" test provides an appropriate safeguard which has served to ensure that the decision to take no proceedings is made only in cases in which there are insurmountable weaknesses. In the absence of this test we considered that it would be open to prosecutors to recommend or instruct no proceedings in cases in which the evidence was weak but where there was still the prospect of conviction.

181. These conclusions were reached in the context of a corroboration requirement. In single witness cases the question of the prospects of convictions will similarly require to be raised and answered based solely on quality alone. Even for very experienced prosecutors, the question of whether to prosecute already raises difficult and formidable challenges. On the one hand it has been recognised that, to proceed to court in cases which will not succeed, is

'deferring the failure of the case to a later stage.'¹⁶⁶ On the other, as presently advised, the test is such that 'the decision to take no proceedings is made only in cases in which there are insurmountable weaknesses.' Leaving aside further considerations as to how these issues will be grappled with by prosecutors, it is clear that these difficult issues will be faced in a greater number of cases in the future if corroboration is abolished and, one would expect, sensitive cases including sexual offences will be made more complex. That will call for a greater demand upon the resources of already stretched prosecutors.¹⁶⁷

Victims' rights

182. The other potentially significant competition for the resources of the prosecutor will be the ever strengthening of the hand of the victim. The European Union has adopted a Directive¹⁶⁸ which will give to victims the right to participate in decisions regarding prosecution. This includes the right to be fully advised of the reasons for decisions taken in connection with the prosecution of crime.¹⁶⁹ In the absence of any requirement for corroboration to be applied, an increasing number of victims will see the removal of this barrier as increasing the prospect for access to justice. For them it may mean that any barrier imposed artificially or otherwise by the prosecutor is likely to come under considerable scrutiny.

The Trial

183. The test at trial is proof beyond a reasonable doubt. The standard of proof alone provides no proper objective indication of the quality of evidence that will be required in law to convict. Deferral of the question – the weighing of the evidence – to the members of the jury provides no indication about what the law will regard as satisfactory evidence. In the absence of any indication by the presiding judge which would assist the members of the jury, we have serious concerns that their decision making will be arbitrary – based upon considerations other than being satisfied of the *facta probanda*, with no content to the standard of proof. Like cases will not be treated alike. With no structure to the jury's deliberations, and little interruption by the trial judge on evidential rulings - they may well return verdicts based upon what has previously been regarded as legally incompetent evidence. This will have implications for discerning the minimum standards of fairness and meeting the requirements of article 6 ECHR and the grounds for appeal when a wrongful conviction has occurred.
184. In the view of JUSTICE Scotland we are unable to detect even the most elementary research to ascertain how the various mechanisms would apply to safeguard the fairness of the trial. We have endeavoured in our response to point out the importance of the fairness of the trial,

¹⁶⁶ para. 9.50

¹⁶⁷ Summary Case Preparation Thematic Report, Inspectorate of Prosecution in Scotland, August 2012.

¹⁶⁸ Directive 2011/0129, establishing minimum standards on the rights, support and protection of victims of crime, adopted 8th October 2012 (Council, 14725/12).

¹⁶⁹ Article 6

not merely to an accused person but the public confidence in our system of criminal justice. The various factors that can be enunciated, some of which have direct application in Scotland, are good starting points but the manner in which they coalesce is important and is an area for urgent further research.

185. It is a matter of some surprise and concern that the Scottish Government should call upon consultees to produce evidence to support their position in relation to proposed changes. It appears to us that those who bring forth such a profound change to our law of evidence and procedure ought to be reassuring legislators that what is proposed to replace it will instil within the public at large a measure of confidence that the guilty will be convicted and the innocent acquitted. The alteration to the size of a jury majority is one suggested factor for comment. This alone, in isolation, is incapable of being judged as sufficient or not. The proper, thoroughly researched definition of what will constitute sufficient evidence before a jury can convict would be a good starting point. A clear definition of how a jury will be directed by a presiding judge in relation to their treatment of evidence, rather than it being left to the development of common law would, in our opinion, be a minimum. Certainty is important. As we have tried to illustrate, a lack of certainty is likely to lead to the deferral of important decisions from and after the commencement of the investigation of a crime right through to the end of a trial process. That is likely to lead to considerable volumes of business at each part of the criminal justice system – in the reporting and processing of crime to the police; in the submissions of reports thereon from the police to the Procurator Fiscal and the marking of cases to proceed to court. All of these channels need considerable training and clarity about what test would need to be applied to the new environment. No proper assessment has been made as to the effect of any new definition on the practical operation of the system absent the requirement of corroboration and significantly in our view, upon the volume of business through these various parts of the criminal justice system. Clearly defined, evidence based research is required to know the effect of the proposed changes.

Other criminal evidence issues

33. Do you agree that the test for sufficiency of evidence at trial and on appeal should remain as it is now? If not what do you believe should change?

186. According to what is proposed, the trial judge will have no role in determining upon the question of sufficiency or on reasonableness. That omission is so profound as to call into question the safeguard against arbitrariness in the jury's decision making. If the test of sufficiency is to remain, it cannot do so without accompanying rules allow judges to exclude evidence.
187. The Review adopts the approach of the Scottish Law Commission in relation to guiding principles about admissibility of evidence in court proceedings. As much as possible, it is said, the law of evidence should be simplified and, further, the presumption must be in favour of admissibility, for all relevant information to go before the jury. In another place, the Review makes mention of the law being a "practical affair" and that the judge is somehow akin to a games master with the lawyers pressing complex contentions.¹⁷⁰
188. It is important to remember that our criminal law of procedure and evidence is not an end in itself for lawyers and judges. The purpose of the rules on admissibility and on the overall context for the jury's deliberations - is to ensure safeguards are in place to justify the trial of an individual at the hands of society. It is a basic requirement of the rule of law that a person charged with a criminal offence should receive a fair trial.¹⁷¹ Lord Bingham states the obvious in saying 'Over the centuries a framework of rules has grown up, developing over time to protect the fairness of the trial.'¹⁷²
189. Lord Bingham goes on to notice certain given foundational aspects to this: that this process must take place before an independent and impartial tribunal; it should be conducted in public; that fairness means fairness to both sides; and that fairness is a constantly evolving concept. The developing rules of procedure that safeguard a fair trial for an accused person form the framework of our criminal law of evidence and procedure. Hitherto, corroboration has featured as a central plank of that structure in Scotland.

¹⁷⁰ Carloway Report, 7.1.21.

¹⁷¹ *R v Horseferry Road Magistrates' Court, ex p. Bennett* [1994] 1 AC 42 at 68, it is "axiomatic that a person charged with having committed a criminal offence should receive a fair trial and that, if he cannot be tried fairly for that offence he should not be tried for it at all"; *Brown v Stott* [2003] 1 AC 681 at 719, the right to a fair trial is "fundamental and absolute."

¹⁷² Bingham, *The Rule of Law* (2010) at 96.

190. There are types of evidence which the law has regarded as unreliable, and for policy reasons, the law has stated that the courts must not acquiesce in, in particular unlawful conduct by law enforcement and other officials in the investigation of crime. Thus, certain exclusionary rules have developed – some of principle and some of expediency. Some rules are held to steadfastly and some admit exceptions. The presiding judge does not operate and apply these rules in a vacuum. They do so according to the circumstances of the case.
191. In the context of setting out a framework as to how the jury should assess and weigh the evidence, the presiding judge is not set an impossible task. It is an important and complex task to ensure that the jury places the proper weight on the evidence before it. The judge holds a critical role in directing the approach to that evidence. The framework exists to provide fairness to the accused, the victim and the relevance of all evidence in the trial. The aim of simplifying evidential rules is laudable. In the abstract, however, it will achieve little. Absent rules of evidence, how is the jury to apply the standard of proof? What assistance are they to be given in that task? In assessing whether such a system will meet the minimum requirements of the rule of law and of fairness, it is necessary to know that a jury will approach their task appropriately and returned its verdict in accordance with law. This is particularly significant when what is proposed is the removal of the test which has been, until now, well understood by Scottish criminal lawyers. Following conviction, how is an appeal court to test the arguments on the new qualitative assessment?
192. On the question of the charge to the jury and the demarcation of the tasks between judge and jury Lord Devlin observed:
- [T]he object of the process is to produce a directed verdict if ‘direction’ be given its double meaning of guidance as well as of commandment. The jury is not allowed to search for a verdict outside the circumference delineated by the judge; and within the circumference its search is directed by the judge in that he marks out the paths that can be taken through the facts, leaving to the jury the final choice of route and destination.¹⁷³
193. The law regarding improperly obtained evidence in Scotland was laid down in *Lawrie v Muir*.¹⁷⁴ The proposition taken from that, and the exposition in that case about how a trial court should deal with evidence obtained in breach of lawful requirements, has been repeated in jurisdictions furth of Scotland.¹⁷⁵ Many suggested changes, however, to providing important safeguards in difficult cases such as eyewitness identification, were thought unnecessary in

¹⁷³ Devlin, *Trial by Jury* (1966).

¹⁷⁴ 1950 J.C. 19; 1950 S.L.T. 37

¹⁷⁵ For Example, *Kuruma v The Queen* [1955] AC 197; *King v The Queen* [1969] 1 A.C. 304

Scotland because of the importance attached to corroboration.¹⁷⁶ This framework, coupled with rules about what evidence may or may not be led in front of the jury, is not imposed with a view to creating confusion or to keeping from the jury evidence which may well be germane to the issue before them. Rather, these procedural rules are designed to secure the rule of law and the protection of certain minimum rights within the trial process.

194. At present, there is much to be proud of and much sound justification for thinking that any challenge to the fairness of Scots trials will be easily withstood in Strasbourg. Absent the requirement of corroboration it may be difficult to explain, with conviction, the safeguards which remain to safeguard the overall fairness of the trial process. Furthermore, the prospect of allowing all evidence to be left to the jury to weigh without rulings from the judge on exclusion has already been visited in Scotland. Whilst such a view held sway for some time until the latter part of last century, it was overturned as representing an abdication to the jury of a judicial function. The five-bench decision of *Thompson v Crowe*¹⁷⁷ looked at the division between judge and jury in decisions on admissibility. Lord Justice General (Rodger) looked at the historic treatment of this division under the Scottish law of criminal procedure and, more importantly, for our purposes, the rationale behind this.
195. In *Thompson v Crowe* a convicted person challenged, on appeal, the system of dealing with an improperly obtained statement. The appellant argued that the absence of a *voire dire* procedure to enable him to argue before the judge that a certain line of evidence ought not to be led before the jury was incompatible with his right to a fair trial. This pre-dated the incorporation into the law of Scotland of any aspect of Convention rights. Accordingly, the matter was resolved upon a consideration of domestic law. Prior to the decision in that case, questions of admissibility were, in the main, left to juries to determine. This followed upon the decision of Lord Justice-Clerk Wheatley in the case of *Balloch v H.M. Advocate*.¹⁷⁸

...[A] judge who has heard the evidence regarding the manner in which a challenged statement was made will normally be justified in withholding the evidence from the jury only if he is satisfied on the undisputed relevant evidence that no reasonable jury could hold that the statement had been voluntarily made and had not been extracted by unfair and improper means.

By analysing the historical antecedents of a procedure for resolving admissibility issues, Lord Justice General Rodger was able to show that this method of settling such questions was historically within the sole province of the presiding judge. By way of illustration, Lord Rodger

¹⁷⁶ Report of the Working Group on Identification Procedure under Scottish Criminal Law Cmnd. 7096 1978.

¹⁷⁷ 2000 J.C. 173; 1999 S.L.T. 1434; 1999 S.C.C.R. 1003

¹⁷⁸ 1977 JC 23.

mentioned the ruling of the Lord Justice-Clerk Hope in the case of *H.M. Advocate v Madeleine Smith*,¹⁷⁹ 'Evidence ought not to be admitted at all unless it is *legally* competent and admissible evidence.'

196. A trial within a trial procedure was adopted in the case of *Chalmers v H.M. Advocate*.¹⁸⁰ Of that case, and the procedure commended for resolving questions of admissibility, Lord Rodger said this:

... the respective roles of the judge and jury were not in substance changed....it had always been for the judge to determine the admissibility of the evidence of the statement and for the jury to determine the weight which they should give to it. Similarly the circumstances surrounding the statement had always been relevant both to the matter of admissibility and to the matter of weight.

197. The case of *Balloch* and the *dicta* of Lord Justice-Clerk Wheatley ruled that such a procedure was unnecessary. This was the subject of a detailed critique by Lord Rodger. He determined that it was 'fundamentally unsound':

What the judge is being asked to decide is whether evidence of a statement by the accused is admissible – in other words whether evidence of that statement can be led before the jury. It is a logical impossibility to answer that question by first leading the evidence and then directing the jury as to the basis upon which they should either disregard it or take it into account. It follows that by definition the question of admissibility is one for the judge rather than for the jury...

For Lord Rodger the approach enshrined in *Balloch* could readily lead to injustice. What was countenanced in that decision was that, even if the judge reached the view that a statement had been extracted by improper means, it had to be left to the jury to consider admissibility if there was a basis that a reasonable jury could hold that the statement was fairly obtained. Lord Rodger said of this procedure:

This approach greatly diminishes the power of the judge to ensure that the accused has a fair trial.

...Not only does such a system make it harder to do justice in an individual case, but it also means that the courts cannot develop meaningful rules for having the issue

¹⁷⁹ (1857) 2 Irv 641.

¹⁸⁰ 1954 J.C. 66; 1954 S.L.T. 177

determined consistently – making it at best difficult for them to fulfil a basic requirement of justice that like cases should be treated alike.

Obligation upon the jury

198. There may be superficial attraction in saying that all relevant evidence is to be placed before the jury and it is for them to assess and weigh. However that is a difficult obligation for the jury to discharge. In order to avoid burdening the jury with long submissions on what they should make of certain types of evidence, it has been the function of the judge to rule upon admissibility. The rules applied by the presiding judge are designed to ensure that the accused has a fair trial and that prejudicial evidence, which has little or no bearing upon the issue in the trial, is not led before the jury. That circumscribes the task of the jury – to decide what has occurred and whether the accused is culpable. To have it hear all evidence unhindered by rules of relevance and reliability runs the risk of it arriving at an arbitrary decision and one which has little or no discernible bearing upon the true issue for their determination; The jury may decide on guilt with little regard to the evidence on that issue: Prejudicial evidence bearing upon credibility may well determine the fate of an accused.
199. If absent corroboration the test is to be that *some* evidence will do, then the requirement of an assessment of quality is in danger of being vague and incapable of definition. As a consequence, the lack of any ultimate safeguard for an accused is of significant concern to us. As we have indicated previously, irrespective of any proposed amendment to rules of evidence, we consider it necessary to adopt a statutory test of fairness similar to section 78 PACE. However, the removal of all rules of evidence on the basis that a general requirement to comply with article 6 ECHR is wholly misguided.

The test of fairness under article 6 ECHR

200. In enforcing the rights guaranteed by Article 6, the general focus of the ECtHR is on the fairness of the proceedings as a whole, rather than the existence of particular evidential or procedural rules. It is trite that, while Article 6 guarantees the right to a fair hearing, it does not lay down any rules on the admissibility of evidence as such, which is primarily a matter for regulation under national law. The approach of the Court is not to require as a matter of principle or in the abstract, a particular rule, but to examine the facts of the case before it, within the context of the domestic proceedings as a whole. Given that, the absence of a rule requiring corroboration or indeed any other rule is unlikely of itself to give rise to adverse consequences. Its relevance to any challenge in terms of Article 6 will be the impact of removal, on the overall fairness of the trial achieved by the impugned *Scottish* proceedings.

201. The object and purpose of Article 6 is said to enshrine 'the fundamental principle of the rule of law' which lies at the heart of a democratic society.¹⁸¹ As such, it is to be given a broad and purposive interpretation.¹⁸² The specific guarantees of Article 6(3) are said to be illustrative rather than exhaustive and the question ultimately is whether the proceedings as a whole were fair. Whilst this approach has been criticised as lacking coherence,¹⁸³ three core concepts can be identified within the overall fair hearing protection: (1) proceedings which are adversarial in character; (2) fair rules of evidence; and (3) the issuing of a fair and reasoned judgement.¹⁸⁴
202. This has been viewed as reflecting the traditions of the common law, rather than the inquisitorial model found in European civilian systems. More recently it has been suggested that the preferred approach is better characterised as participatory, focused on the procedural opportunities for defence challenge and closely linked to the notion of equality of arms.¹⁸⁵ Important in this concept, is the right of an accused to be afforded a reasonable opportunity to present his case under conditions which do not place him at a substantial disadvantage in relation to his opponent.
203. In particular, in proceedings where article 6 has been raised, the role of corroboration and other safeguards in securing a fair trial has been repeatedly endorsed by judges in Edinburgh and Strasbourg. It would seem therefore counter-intuitive that their removal will be irrelevant to the outcome of future cases where a violation of article 6 is asserted. The following examples illustrate this:
- (1) Admissions to the police. In rejecting the view that the decision in *Salduz* amounted to a *requirement* that access to a lawyer must be provided, the High Court of Justiciary held,
- In particular, if other safeguards to secure a fair trial of the kind which we have described are in place, there is, notwithstanding that a lawyer is not so provided, no violation, in our view, of Art 6.¹⁸⁶
- (2) Hearsay. In *Campbell v H.M. Advocate*¹⁸⁷ the compatibility of hearsay evidence with Article 6 was considered,

¹⁸¹ *Golder v United Kingdom* [1975] 1 EHHR 524 at para 35.

¹⁸² *Delcourt v Belgium* [1970] 1 EHHR 355 at para 25.

¹⁸³ P van Dijk et al., *Theory and Practice of the European Convention on Human Rights*, 4th edn (2006) at 430.

¹⁸⁴ Reed & Murdoch, *A Guide to Human Rights Law in Scotland*, 3rd edn (2011). This third edition of the book identifies a fourth, "legal certainty."

¹⁸⁵ See S Summers, *Fair Trials: The European Criminal Procedural Tradition and the European Court of Human Rights* (2007).

¹⁸⁶ *HM Advocate v McLean* 2010 SCCR 59 at para 31 per Lord Justice-General Hamilton at para 31.

Most of the situations in which it has been held by the court that there had been a violation of art 6(1) and (3)(d) could not arise in Scotland. *Against the requirement for corroboration* of all crucial facts, a conviction could not be based solely on the evidence of a single witness. (Italics added)

The significance of the safeguard of corroboration within the Scottish system¹⁸⁸ lies in the lack of any statutory provision allowing for the exclusion of such evidence. In *N v H.M. Advocate*¹⁸⁹ the Lord Justice Clerk noted that the statutory scheme removed the common law discretion to exclude evidence, which he contrasted unfavourably with the equivalent English provisions.¹⁹⁰ It was the explicit safeguards provided in the English statutory provisions which lay at the heart of the debate as to the appropriateness of the sole and decisive rule; whose high water mark can now be seen to be the decision in *Al-Khawaja and Tahery v United Kingdom*.¹⁹¹ The ECtHR held that, despite the domestic court's view that the 'evidence against the appellant was very strong,' the decisive nature of witness statements had resulted in a violation of Article 6. In *R v Horncastle*¹⁹² the Supreme Court took the opportunity to explicitly state their objections to the rule, which was said to have paradoxical results and to permit the possibility of acquittals, even where cogent evidence of guilt existed. The Court did not rest however, on theoretical objection but rather set out in a very detailed way, the safeguards in the English system which it was said, ensured that the rights guaranteed by Articles 6(1) and 6(3)(d) were respected. In inviting a reconsideration of the rule, it undertook a survey of the Strasbourg case law and sought to demonstrate that protections afforded by the domestic statutory scheme would have achieved the same outcome as an application of the sole and decisive rule.

That invitation was taken up with the referral of *Al-Khawaja and Tahery* to the Grand Chamber.¹⁹³ The Court maintained that the reasons said to underpin the rule, including the inherent unreliability of hearsay evidence, remained valid. It also cited decisions of the High Court of Justiciary in rejecting the argument that the test was difficult for appellant courts to apply in practice. Despite this, and with little by way of explanation, the Grand Chamber signalled a retreat from a hard and fast rule, which was said to be a 'blunt and indiscriminate instrument'.¹⁹⁴ No longer would the fact that the hearsay evidence was a sole or decisive

¹⁸⁷ 2004 SCCR 220 at para 16 per Lord Justice General Hamilton.

¹⁸⁸ Criminal Procedure (Scotland) Act 1995 s 259.

¹⁸⁹ 2003 SLT 761.

¹⁹⁰ At that time, ss 23-28 Criminal Justice Act 1988 and s 78 Police and Criminal Evidence Act 1984.

¹⁹¹ [2009] ECHR 26766/05.

¹⁹² [2009] UKSC 14.

¹⁹³ Judgement of 15 December 2011.

¹⁹⁴ *Al-Khawaja* at para 146.

factor in a conviction result in an automatic breach of Article 6(1). Rather in such circumstances, courts must subject the proceedings to the 'most searching scrutiny.' Sufficient counterbalancing factors, including the existence of strong procedural safeguards, were required which were explicitly said to include 'measures that permit a fair and proper assessment of the reliability of that evidence to take place.'¹⁹⁵

In applying this test to Mr Al-Khawaja's case, the Grand Chamber noted the 'strong' safeguards provided by the English legislation, including the specific discretion of the judge to refuse to admit a hearsay statement if satisfied that the case for its exclusion substantially outweighs the case for admitting it, and the power to stop proceedings where reliance on a statement would make a conviction unsafe. Of importance was the testimony of another witness, of which it was said 'it would be difficult to conceive of stronger corroborative evidence.'¹⁹⁶ In finding no violation, the Grand Chamber noted that these amounted to sufficient counterbalancing factors. In contrast and against the same statutory background, Mr Tahery's trial was found to be unfair because of the decisive nature of the hearsay statement 'in the absence of any strong corroborative evidence.'¹⁹⁷ This lack of corroboration meant that the jury was unable to conduct a fair and proper assessment of the reliability of the hearsay evidence. It is the significance that the Grand Chamber attaches to corroboration which is almost as noteworthy as the departure from an inflexible sole or decisive test. Indeed one commentator has inquired whether the case marked "the return of corroboration."¹⁹⁸

Consequently, at the very least, the abolition of corroboration is likely to require reconsideration of the statutory hearsay scheme contained in the Criminal Procedure (Scotland) Act 1995. Of more general significance perhaps is the Grand Chamber's peremptory requirement for scrutiny to ensure measures exist which permit proper assessment of the 'reliability' of evidence.¹⁹⁹ It would seem that, to be understood, this would encompass reliability, as that term is employed in the Scottish procedure, but also a quantitative assessment, raising what a Scottish lawyer might regard as issues of 'sufficiency.' The *Horncastle* judgment reflected a high degree of judicial confidence that the English system's strong procedural safeguards would ensure a fair trial. Yet this approach was found lacking by the Grand Chamber. In our view, the proposed reforms in Scotland fall foul of the requirements propounded in *Al-Khawaja*.

¹⁹⁵ *Al-Khawaja* at para 147.

¹⁹⁶ *Al-Khawaja* at para 156.

¹⁹⁷ *Al-Khawaja* at para 165.

¹⁹⁸ Roberts, "*Al-Khawaja and Tahery v UK, case comment*" (2012) Crim LR 375 at 377.

¹⁹⁹ For a recent application of the reasoning in *Al-Khawaja*; see *Ellis v United Kingdom* (admissibility) 46099/06.

(3) Surveillance evidence. In *Allan v United Kingdom*,²⁰⁰ which involved the use of a covert device and a police informer to record conversations within police cells, the ECtHR noted that the recordings were the 'principal evidence relied on by the prosecution'²⁰¹ and that the statements could not be said to be truly voluntary²⁰² as they had been improperly obtained. A Scottish court arrived at a similar conclusion on similar facts. In *H.M. Advocate v Higgins*²⁰³, two men held on suspicion of bank robbery, were moved to adjacent cells to 'facilitate conversation(s)' which were then recorded. No authorisation for this procedure had been obtained in terms of the relevant statutory code.²⁰⁴ Lord Macphail, in rejecting the evidence as unfairly obtained, 'did not find it necessary to refer to the ECHR.' In his view the police tactics 'could only be described as a trap.' As has been noted, whilst the outcome was said to arise from the common law test of fairness, a similar approach would have been required by the ECtHR, otherwise a conviction would have been considered unfair.²⁰⁵

(4) The privilege against self incrimination. The right is said to lie in the protection of the accused against improper compulsion by the authorities, thereby contributing to the avoidance of miscarriages of justice and to the fulfilment of the aims of article 6 ECHR. In *Saunders v United Kingdom*²⁰⁶ the Court observed that the right lay at the heart of the notion of a fair procedure. The right not to incriminate oneself, it was noted, presupposes that the prosecution in a criminal case seeks to prove its case against the accused without resort to evidence obtained through methods of coercion, or oppression in defiance of the will of the accused. As provided in *O'Halloran and Frances v United Kingdom*²⁰⁷ this will involve a focus on the nature and degree of compulsion used to obtain the evidence; the existence of any relevant safeguards in the procedure; and the use to which any material so obtained is put.

(5) Dock identification. Whilst other jurisdictions allow dock identification there can be little doubt that Scotland is unique within the United Kingdom in the significance it attaches to it. The rules which are in place elsewhere, restricting the circumstances in which witnesses who have not attended an identification parade may identify an accused in court, have no Scottish equivalent. Dock identification can take place even where the identity of the perpetrator is a live issue in the trial and such evidence is routinely relied upon to secure convictions.²⁰⁸ Yet in

²⁰⁰ [2002] 36 EHHR 12.

²⁰¹ *Allan* at para 45.

²⁰² *Allan* at para 54.

²⁰³ 2006 SLT 946.

²⁰⁴ The Regulation of Investigatory Powers (Scotland) Act 2000 "RIPSA."

²⁰⁵ See J Chalmers, "More fair play for suspects: *H.M. Advocate v Higgins*" (2007) Edin LR 100.

²⁰⁶ [1996] 23 EHHR 313.

²⁰⁷ [2008] 46 EHHR 397.

²⁰⁸ See *Toal v H.M. Advocate* [2012] HCJAC 123.

such cases a specific jury direction should be given. In *Holland v H.M. Advocate* the High Court of Justiciary noted the safeguards available against inherently unreliable evidence:

Every dock identification is subject to the safeguards that *the accused is protected by the principle of corroboration*; and by the opportunity open to the defence to contrast an identification made in court with one made at an identification parade; to point out that if the witness failed to identify at such a parade, the identification in court is unconvincing; and so on.²⁰⁹ (Italics added)

On appeal to the Privy Council²¹⁰ the Board was that the use of dock identification was not *per se* incompatible with the Convention, given the *other available safeguards*.²¹¹ Given the prominence the High Court affords corroboration as a safeguard, its removal in our view would seem to have the potential to impact on the fairness of trials in which dock identification features.

(6) Giving reasons. Article 6 requires courts to give reasons for their judgments. In criminal proceedings an accused must be able to understand the verdict that has been given and, where relevant, understand the reasons for his conviction. Reasoned court decisions form part of the fair trial guarantee, reinforce the rule of law and protect against the arbitrary use of power; concepts which are said to lie at the heart of the Convention.²¹² A challenge to jury trial on the basis that such a requirement existed was made in *Beggs v H.M. Advocate*.²¹³ In rejecting this ground of appeal, the court noted the Strasbourg case law and observed that the speeches of counsel and the judge's charge to the jury provided a framework within which the reasons for the juries' decision could be ascertained.

The matter came before the Grand Chamber in *Taxquet v Belgium*²¹⁴ which reiterated the position set out in previous jurisprudence; the traditional jury delivering unreasoned verdicts was not incompatible with the fair trial guarantee of Article 6. Whilst strongly confirming the right of states to choose their own judicial systems, the Grand Chamber noted that, in ascertaining whether a fair trial had occurred, it would have regard to the method adopted, the specific circumstances and the nature and complexity of the case.²¹⁵ Trial by jury in Scotland

²⁰⁹ *Holland* at para 35 per Lord Justice Clerk Gill.

²¹⁰ 2005 1 SC 3.

²¹¹ However, reliance upon it, in the particular circumstances of the case, where there had been significant non-disclosure by the Crown rendered the trial as a whole unfair.

²¹² *Roche v United Kingdom*, application no. 32555/96.

²¹³ *Beggs v H.M. Advocate* [2010] HCJAC 27.

²¹⁴ Application no. 926/05.

²¹⁵ *Taxquet* at para 84.

was the subject of application to the Court in *Judge v United Kingdom*.²¹⁶ In rejecting as inadmissible an application challenging a jury verdict given without reasons, it was noted,

... [A]s the Appeal Court observed in *Beggs* ... in Scotland the jury's verdict is not returned in isolation but is given in a framework which includes addresses by the prosecution and the defence as well as the presiding judge's charge to the jury. Scots law also ensures there is a clear demarcation between the respective roles of the judge and jury: it is the duty of the judge to ensure the proceedings are conducted fairly and to explain the law as it applies in the case to the jury; it is the duty of the jury to accept those directions and to determine all questions of fact ...²¹⁷

In the absence of reasons, the other aspects of criminal procedure ensure a fair trial, including the role of the judge in giving directions on law as it applies to the evidence. In this framework the Court held that the applicant "must know" that the jury accepted the evidence of the two complainers against him. This can be contrasted with the position in *Taxquet*, where a violation arose as the applicant could not know which evidence the prosecution had used against him and which had ultimately led to his conviction. The absence of a reasoned judgement from a jury is compensated for by careful directions from the judge, as in *Saric v Denmark*.²¹⁸ The care and detail which can be required of judges is illustrated by the facts of *Condrón v United Kingdom*²¹⁹ where the judge's directions on inference to be drawn from silence were held to be inadequate. In *Walker v H.M. Advocate*²²⁰ the High Court overturned a conviction as a result of a failure to give specific directions on the evidence, in an admittedly complex case involving expert evidence. Although it was not necessary to decide the point, an indication was given that the Court would have found that this failure had led to a breach of Article 6.

204. The Review concludes that a formal rule for corroboration is not required to ensure compliance with Article 6. However, the existence of corroborative evidence will frequently be an important factor in the final assessment of whether a fair trial has taken place. Whether it is in relation to dock identification, hearsay evidence or in other areas, it has been acknowledged as playing an important role in safeguarding the overall fairness of the trial. As a result of the above jurisprudence we consider that the proposal to leave all evidence to the jury without direction will not provide sufficient safeguards to satisfy article 6 ECHR.

²¹⁶ Application no. 35683/10.

²¹⁷ *Judge* at para 35.

²¹⁸ Application no. 31913/96.

²¹⁹ [2000] 31 EHHR 1.

²²⁰ [2011] HCJAC 51.

205. Whatever their comparative merits, as can be seen from the Annex, the Scottish system lacks some of the substantive safeguards of its English counterpart. A conviction can be attained by a simple majority of eight-seven and it has no direct equivalent to a number of the English protections, lacking for example, the codified regulation of police investigation as provided for in PACE, or the general discretion to exclude evidence whose admission would have such an adverse effect on the trial it ought not to be admitted.²²¹ Whilst Scottish judges are required to direct juries on the dangers of identification evidence it must be doubted they currently have the power to withdraw the case from the jury if, in their judgment, such evidence is of a poor quality. The Scottish procedure has no direct equivalent of the discretion, afforded to English judges, to warn juries about the evidence of witnesses tainted by improper motive or bad character. In the past such observations have been met with a restatement of the unique value of corroboration as a safeguard. In its absence the question arises whether Scottish judges will 'turn the jury loose on the evidence.'²²² However, it was confirmed in *Walker v HM Advocate*, a recent case concerning expert evidence, that:

*The passages cited ... might suggest that, in Scotland, there is no obligation on a trial judge in any circumstances to address the evidence when directing the jury; that whether he does so or not is a matter for his unfettered discretion, a discretion with which an appeal court will not interfere. But that would be a misunderstanding. The overarching responsibility of the judge is to ensure that there is a fair trial.*²²³

206. It might therefore be assumed that Scottish judges would over time develop safeguards, in the form of jury directions, as a consequence of the removal of corroboration. What is unresolved is whether this is the optimum outcome or indeed even a welcome one. Whilst the Report doubts the continuing value of corroboration it has surprisingly little to say about the worth of other measures which might be of greater utility.

34. Do you agree the rules distinguishing treatment of incriminatory, exculpatory and mixed statements should be simplified allowing the courts to assess them more freely? If you do not agree, should any other change be made regarding these statements?

207. The suggestion of 'clarification' or simplification in the Report continues to recognise that there are different types of statements made by suspects. The suggested clarification is expressed in general terms, it clearly being envisaged that exceptions will be required to be made. Whilst

²²¹ S78 PACE 1984.

²²² (1982) 136 DLR (3d) 89 at 831.

²²³ [2011] HCJAC 51.

the aim of simplification is one that can readily be agreed to, as is the presumption in favour of all evidence being led before the jury, the treatment of this issue points up the difficulty of such an enterprise. The Review recognises that what is suggested 'may be a step too far at present' and suggests further consideration be given to extending the application of what has been recommended to all pre trial statements. This is indicative of the significance of what is being suggested. The question is certainly deserving of further and more detailed treatment than it has been given by the Review.

208. In any event, in our view treatment of such statements is always going to be complex. It is significant to note that this area of law was authoritatively ruled upon by the Appeal Court in 2001.²²⁴ Again, it is submitted, the problems highlighted in the Review, arise not from the operation of complex or confusing rulings from the Appeal Court but from the application of the law to important and fact sensitive situations. In fact the Report recognises that the free assessment of evidence by juries would be difficult in this area: juries would expect to be guided by the trial judge as to how to analyse and weigh the statements made. The Appeal court has provided the structure to such directions in *McCutcheon*.

35. Currently no adverse inference can be taken from an accused person failing to answer police questions. Do you agree that this should not change?

207. We agree that no change should be made to the privilege against self incrimination. The operation of inferences in England and Wales is complex and often potentially unfair such that either the prosecution do not seek it or the court refuses to direct the jury that they may draw an inference. The operation is also premised upon what information has been given to the suspect or accused and whether they could reasonably be expected to provide an explanation. The introduction of inferences would further complicate the roles of the police and the lawyer without any obvious benefit to the administration of justice.

²²⁴ *McCutcheon v H. M. Advocate* 2002 SCCR 101, 2002 SLT 27

Appeals

208. There is no doubt that there have been significant delays in the determination of appeals against conviction in recent years. Thus this consultation provides a useful opportunity to take stock of the way in which the system has been operating. However, in order to determine whether significant changes are required, it is necessary to understand why those delays occurred.

36. Do you agree that time limits in appeal cases should be enforced? What sanctions do you consider might be appropriate?

209. In general, it should be said that the significant delays occurred mostly in relation to solemn appeals against conviction. However, there was a period when the delays in determining appeals by stated case were entirely unacceptable. This was referable to a lack of judicial resources. However, the same cannot be said in respect of solemn appeals against conviction.

210. Historically, as the court pointed out in *Gillespie*,²²⁵ there was a pressure on judicial resources and the court responded by introducing administrative reforms in an effort to ensure that such delays would not ensue in the future. The main practical measure was the requirement that counsel, instructed in an appeal against conviction, complete a form indicating whether the appeal was ready to proceed or not. If further enquiries were required then the nature of those inquiries was to be specified. When completing the form practitioners had to be mindful of the current interpretation of section 124(2) of the Criminal Procedure (Scotland) Act 1995 Act. The austerity of that interpretation has done much to shape past and current practice.

211. The main trigger for delay in recent years resulted from the decisions of the Judicial Committee of the Privy Council (JCPC) in *Holland and Sinclair* in May 2005.²²⁶ Following these decisions, those acting for appellants began to call on the Crown to disclose relevant material, since it was apparent that the duty had not been complied with. The Crown resisted those calls and the matter had to be determined by the Appeal Court²²⁷. Unfortunately, that was not done until December 2007. In the meantime the delay in resolving the scope of the Crown's duty of disclosure had begun to have a detrimental impact on the processing of a number of appeals. The matter was made worse by the need to appeal the decision of the

²²⁵ *Gillespie v HM Advocate* 2003 SCCR 82.

²²⁶ *Holland v HM Advocate* 2005 SCCR 417; *Sinclair v HM Advocate* 2005 SCCR 446.

²²⁷ *McDonald v HM Advocate* 2008 S.L.T. 144; 2008 S.C.L. 346; 2008 S.C.C.R. 154

Appeal Court to the JCPC²²⁸. Once judgment was given in 2008, the logjam began to clear, with the Crown reviewing existing appeals and making necessary disclosure.

212. With the benefit of hindsight, it is clear that a number of these appeals could have been argued, pending the Crown complying with its duty of disclosure. Then, if that process yielded new grounds of appeal, those grounds could have been argued with leave of the court. Instead, the administration simply did not list the appeals for a hearing during that time, thus extending the process by years. From the practitioners' perspective, much of that thinking appears to have been influenced by an unduly rigid view of section 124(2) of the 1995 Act.
213. In some instances the process was further complicated by the decision in *Salduz*.²²⁹ In a number of the pending cases, the Crown had relied on evidence derived from police interviews, which prompted new grounds of appeal to be tabled in appropriate cases. As a result of the decision in *Cadder*²³⁰ and subsequent cases decided in its wake, a number of the cases were not determined until 2012, although in at least one case the conviction was in 2005.
214. The purpose of giving this account of the history is to emphasise that it was important developments in the law which resulted in some appeals taking years to determine. Now these questions have been resolved, and there is accordingly no backlog, it should mean that delays of that order should not ensue in the future, unless of course there is a crisis in resources. It is against that background that the observations in the introduction to Chapter 8 of the Report need to be considered.

General observations

215. At paragraph 8.1.3 of the Report Lord Carloway states that some practitioners who contributed to the Review did not see it as part of their responsibility to progress appeals with due speed and diligence, it being a matter for the court. It is difficult to analyse that finding without some account of the way in which those views were expressed.
216. Under Article 6(1) ECHR, it is the responsibility of the administrative authorities to organise the system so as to comply with the reasonable time guarantee. Thus, there is no onus on an appellant to take steps to expedite his or her appeal in order to argue later that his or her right has been breached. In Scotland, the responsibility of those conducting appeals is to ensure that the appellant's case is properly prepared. Generally speaking, the relevant steps will have to be taken in accordance with the timetable prescribed by the statute or the court. Thus the

²²⁸ McDonald v HM Advocate [2008] UKPC 46; 2010 S.C. (P.C.) 1; 2008 S.L.T. 993; 2008 S.C.C.R. 954

²²⁹ Salduz v Turkey (2009) 49 E.H.R.R. 19; 26 B.H.R.C. 223; [2010] Crim. L.R. 419

²³⁰ Cadder v HM Advocate (Scotland) [2010] UKSC 43; [2010] 1 W.L.R. 2601; 2011 S.C. (U.K.S.C.) 13; 2010 S.L.T. 1125; 2010 S.C.C.R. 951

attitude of the individual practitioner is of limited importance to the speed at which the appeal is prosecuted. If the court does not consider that appropriate progress has been made then no further time will be permitted to undertake the desired inquiries. The converse is also true. All those who practise regularly in the Appeal Court are aware of the relevant time limits.

217. At paragraph 8.1.4 attention is drawn to the apparent disadvantage of not having counsel who conducted the trial argue the appeal arising from the trial. However, we understand that the disadvantage is much more apparent than real from the practitioner's point of view. In the first place, the instructing agents will often be those who acted at the trial. In those circumstances, counsel conducting the appeal and thus the court, are not at any disadvantage of the kind referred to. It also overlooks the practical reality that counsel will discuss the case with each other when the need arises.
218. It is also necessary to say, as clearly as possible, that there is no significant duplication of work. Most appeal points require no greater understanding of the position at trial than is contained in the judge's report. The assertion that counsel new to a case, seek transcription of parts of the evidence merely because they did not conduct the trial, is simply not borne out in practice. Transcription of the evidence can only be sought to support an existing ground of appeal. Any application is under the control of the court.
219. No evidence is produced to vouch the conclusion that this is 'a significant problem and a major cause of unnecessary delay.'²³¹ We also understand it is neither in the experience of practitioners. The instruction of counsel and solicitor-advocates is a matter for instructing agents. No doubt they approach that task with the best interests of their client in mind. It is perhaps also worth stressing that an appellant has the right to choose his representation. It would be unsurprising if the choice was someone with a particular expertise in appellate advocacy. Thus we welcome the concession in the Review that there is insufficient information upon which to recommend any positive changes.

37. Do the amendments Lord Carloway recommends to sections 74 and 174 of the 1995 Act, together with the retention of the *nobile officium*, cover all situations in which *Bills of Advocation and Suspension* might reasonably be used?

220. At paragraph 8.1.19 the suggestion appears to be made that the use of petitions to the *nobile officium* is productive of delays in the resolution of appeals. Firstly we understand that the number of petitions lodged represents a very small fraction of all applications lodged with the Clerk of Justiciary. In recent years, the practice was that, when a petition was lodged, the first

²³¹ Carloway Report, para 8.1.4.

step was to consider whether it should be warranted or not. If a warrant was granted, then it was open to the petitioner to argue the petition before the court.

221. If a warrant was refused, then the practice was to convene a hearing before three judges in order that the question of whether to grant a warrant was reconsidered. Surprisingly, and without explanation, that practice has been discontinued with the effect that, if a warrant is not granted, then the petitioner has no means of obtaining access to the court. This is a very significant restriction on the right of access which has not, so far, been scrutinised to ascertain whether there is any basis for it.
222. This is particularly troubling in light of the decision of five judges in *Beck, Petitioner*.²³² The effect of that decision is that the only means by which an appellant can complain of a breach of his Convention rights by the administration or the court is to have recourse to the *nobile officium*. The court expressly rejected the contention that an appellant could simply lodge a petition under the Human Rights Act 1998. That was a regrettable conclusion given the terms of the Human Rights Act 1998 which appear to provide for a straightforward remedial structure in the event of a breach of the appellant's Convention rights. It should be emphasised that, since challenges of this character are not devolution issues, then there is no remedy by way of appeal to the Supreme Court.
223. Thus, the effect of the decision in *Beck* was to give the *nobile officium* a vital importance which it had not had previously. It is now the only vehicle by which Convention rights can be asserted in the face of a decision of the Appeal Court which is in conflict with those rights. Thus, some of the observations made in this section of the Report are surprising. At paragraph 8.1.21 reference is made to the decision in *Hoekstra*.²³³ The original decision in that case was vitiated by apparent bias on the part of one of the members of the court. Analysed in terms of the Human Rights Act, the decision of the original court was unlawful and thus the appellants were entitled to a remedy. As such, the analysis of *Beck* in the Report is, for the reasons set out, a misunderstanding of the nature and scope of the decision. Far from discouraging the use of such petitions, it gave a new impetus to their use.
224. It was accepted, in argument before the court in *Beck*, that the *nobile officium* could not be used to challenge the merits of a decision. However, since the decision, there have been a number of petitions lodged which have been refused a warrant, despite the fact that they were not designed to challenge the merits of the decision. Thus, while in responding we cannot claim to have knowledge of every petition lodged since 2010, it can be said that there is a

²³² 2010 SLT 519

²³³ *Hoekstra v HM Advocate* (No 2) 2000 JC 387.

worrying trend in refusing to warrant petitions and then refusing the petitioner the opportunity to argue before the court that the petition is competent.

225. The use of the *nobile officium* has already attracted negative scrutiny from the ECtHR in *Mackay & BBC Scotland v United Kingdom*.²³⁴ That decision serves to emphasise that there must be an effective remedy for a breach of Convention rights. To elevate the status of the *nobile officium* in *Beck*, while at the same time refusing warrants and hearings, gives rise to serious questions about the protection of Convention rights in Scotland. So far as JUSTICE Scotland is aware, in no other part of the UK is there such difficulty in asserting Convention rights under the Human Rights Act.
226. The true principle in respect of an apex court is to be found in *Pinochet (No 2)*.²³⁵ While the occasions on which the decisions of the Appeal Court will be in conflict with the appellant's Convention rights might be expected to be few, nevertheless it is vital that an appellant can assert his or her Convention rights in the manner in which Parliament intended when it enacted the Human Rights Act.
227. It should also be emphasised that the *nobile officium* has more prosaic uses which can be just as vital to the appellant and which serve to illustrate the danger of interpreting section 124(2) too literally. It is hoped that the following example may give an indication of the problem: Suppose an appellant challenges a sentence imposed upon him in a solemn court; Pending the appeal he is released on bail. On the day of the hearing he is involved in an accident *en route* to court. His solicitors and counsel are unaware of this development and when the case calls it is dismissed by the court for want of insistence. Subsequently the appellant invokes the *nobile officium* to restore his appeal to the roll. The Crown opposes his application as incompetent given the provisions of section 124(2) of the 1995 Act. A few years ago, a case of this kind came before the Appeal Court and the court rejected the notion that the petition was incompetent, conscious of the obvious injustice that would be caused otherwise.
228. Thus, while JUSTICE Scotland sees no reason why a rational process of reform might render the use of the *nobile officium* obsolete, at present it serves a vital function to prevent injustice and to remedy breaches of Convention rights. It is perhaps worth emphasising that, from a technical point of view, the court which is convened to hear a petition to the *nobile officium* is not sitting as the Appeal Court and thus it is not obvious why there seems to be some anxiety expressed over the quorum of the court at paragraph 8.1.21.

²³⁴ (2011) 53 E.H.R.R. 19.

²³⁵ *Bow Street Metropolitan Stipendiary Magistrate, Ex parte Pinochet Ugarte (No 2)*, [2000] 1 A.C. 119; [1999] 2 W.L.R. 272; [1999] 1 All ER 577.

229. It needs to be stressed that the *nobile officium* is not a mode of appeal; It is an application to the equitable jurisdiction of the court. In *Akram*²³⁶ cited at paragraph 8.1.22, the petition was not directed to a review of the merits of the decision of the Appeal Court to refuse leave to appeal. Had it been, the petition would have been refused. Rather the argument, briefly expressed, was that the petitioner had been denied the reasoned judgement to which he was entitled. That was the argument which prevailed. As a matter of principle it is consistent with the later decision in *Beck*.

38. Do you have any comments on Lord Carloway's recommendations for appeals?

230. Before considering each recommendation, in the order in which they appear, it is perhaps worth emphasising that there is no indication that, in Scotland, there has ever been an appreciable problem for the system when the law is 'changed' by virtue of a judicial decision. There are two recent examples of this. Following *Starrs v Ruxton*²³⁷ convictions and sentences recorded in courts in which a temporary Sheriff presided were vulnerable to challenge. That decision affected thousands of cases during the relevant period. In the event, very few challenges were raised. In some instances, the court dismissed the appeals on grounds of acquiescence. However, it is notable that the court did not develop jurisprudence to deal with 'change of law' cases, such as has developed in England and Wales. Presumably, the reason for that is that the Appeal Court saw no need to do so.

231. Secondly, the decision in *Cadder* was raised much anxiety about the prospect of cases thousands of cases being re-opened. However, guidance was provided by the Supreme Court on where finality should be drawn.²³⁸ That guidance operated as a practical bar on the assertion of Convention rights by those whose cases had already been determined and the floodgates have remained firmly closed. No case in recent history has had a sufficient impact to cause change to be prompted by virtue of that reason alone. It is also worth stressing that the number of old convictions coming before the court is very few in number and most of those are references made by the SCCRC. Thus, there is no threat to the stability of the system from that direction either.

232. With regard to the recommendations in the Report, we make the following observations on each in turn:

- (1) In our view, no power to impose sanctions should be introduced. The existing arrangements are entirely adequate, if reasonably applied, to prevent the court from

²³⁶ *Akram v H.M. Advocate* 2010 SCCR 30.

²³⁷ 2000 J.C. 208; 2000 S.L.T. 42; 1999 S.C.C.R. 1052

²³⁸ Per Lord Hope at [60] – [62]

being burdened with unnecessary cases. In fact the power to impose sanctions is likely to be productive of greater delay and expense in the administration of justice. The experience in England and Wales suggests that such a power would be counterproductive. In any event, it is likely to be perceived as a threat to the duty of agents and counsel to represent appellants fearlessly and to the best of their ability.

- (2)
 - (i) We do not consider the first proposal to be objectionable.
 - (ii) Unfortunately the second is. There is no reason why a test of 'special cause' should be introduced, not least because it adds little to the existing approach. At present it is necessary to justify any application made. The test proposed would be unhelpful; If an appeal is presented timeously the only standard to be reached is whether the point is arguable. In practice, counsel would normally be expected to provide some explanation as to the point sought to be raised and it is no doubt correct that the court would be more likely to grant the application if the argument is a strong one. However, to have to demonstrate that on a balance of probabilities would be bound to lead to the court having to investigate the merits of the argument at an earlier stage and to a much greater degree than at present. After all, if an application of this kind is granted the appellant is still required to demonstrate that the points of appeal are arguable. At paragraph 8.1.27 it is suggested that the test proposed is comparable to the one utilised by the Scottish Criminal Cases Review Commission (the Commission). However, that it is in our view to misunderstand the test applied by the Commission. There is no warrant in practice for suggesting that the Commission applies that standard.
 - (iii) There seems to be no good reason to restrict the present right and no justification is given for this proposal by Lord Carloway.
 - (iv) We make the same observation to this recommendation.
- (3) While there is no objection in principle to this proposal, there is no obvious need for it to be enshrined in statute.
- (4) There is no compelling need to abolish these modes of appeal. While a rationalisation of their use would be helpful, it should be borne in mind that bills of suspension in particular are used for a variety of purposes, including challenging the granting of warrants. These appeals proceed without leave and are not noted to have caused any particular problems in practice. Furthermore, they are small in number and thus not a burden on the administrative resources of the court. If there is to be rationalisation then the existing rights of appeal should be preserved, without the additional requirement for leave.
- (5) This proposal is to be welcomed as part of an overall rationalisation of the system but subject to the point made above.
- (6) There should be an appeal to the Court in both solemn and summary cases in the event of a refusal. There is no reason not to treat the modes of procedure in the same way and thus the protection of an appeal to the Court in solemn cases should be

extended to summary cases.

- (7) The proposal is objectionable for the reasons set out earlier, at least until the process of asserting Convention rights is rationalised. It does seem surprising that people in Scotland should have to surmount additional hurdles in order to assert their rights under the Human Rights Act.
- (8) There is no evidence of any problem of the kind referred to here. Any radical reform of the kind apparently contemplated would have to be justified on the basis of evidence that the instruction of other counsel had any appreciable bearing on the length of time it took to determine an appeal.

233. The recommendations seem to come from concerns arising from delays in recent years in the hearing of appeals. On the whole these delays have now subsided. It would be most unfortunate if further significant changes were made to the appeals procedure which had the effect of preventing genuine miscarriages of justice from proper, or any, consideration as a result of strict time limits and inflexible gate-keeping requirements. Clearly certainty and finality are important matters in the administration of justice but at least equal in importance is the need for any system to allow all potential miscarriages of justice to be considered on appeal.

Finality and Certainty

39. **Do you agree that section 194C(2) of the 1995 Act should be retained and that there should be no further statutory listing of the criteria included in the “interests of justice” test for SCCRC references?**

234. Lord Kerr of Tonaghmore commented in a recent speech²³⁹:

Lord Atkin’s remark in *Ras Behari Lal v King Emperor* (1933) that ‘finality is a good thing, but justice is better’ seems to me to be infinitely preferable to that of his near contemporary Justice Brandeis in 1927 in *Di Santo v Pennsylvania* that it is “usually more important that the law be settled than it be settled right.”

We respectfully agree. We therefore consider that the requirement for finality and certainty should be repealed. Much of JUSTICE’s early work related to miscarriages of justice. Working with the BBC’s *Rough Justice* and Channel Four’s *Trial and Error* programmes, JUSTICE secured the release of many prisoners who had been wrongly imprisoned. JUSTICE played a significant role in changing the legal establishment’s view of the inadequacies of the system. We highlighted these in evidence to the Runciman Commission, which finally led to the establishment of the Criminal Cases Review Commission in 1997.

235. The Scottish Criminal Cases Review Commission was set up shortly after as a result of the concerning miscarriage cases in England. The Sutherland Committee²⁴⁰ reviewed the position in Scotland and recommended a Commission for Scotland that would operate with very broad and flexible criteria. The Commission has performed a valuable function, out of necessity, of referring cases to the appeal court. However it would be right to record that in the first 10 years of its existence it referred a very small number of cases where the issue was whether the applicant’s conviction was unsound or not.²⁴¹ Thus the scale of any perceived problem should be measured against the number of referrals made. With so few cases being referred there may be a question of whether the Commission is referring too few cases rather than too many.
236. The Commission is necessary to enable cases which otherwise would not be open to review by the courts because of the rules of evidence, to be reconsidered due to the clear possibility

²³⁹ *Dissenting judgments - self indulgence or self sacrifice?* The Birkenhead Lecture (8th October 2012), p 13, available at <http://www.supremecourt.gov.uk/docs/speech-121008.pdf>

²⁴⁰ Report by the Committee on Criminal Appeals and Miscarriages of Justice Procedures chaired by Sir Stewart Sutherland, (1996) Cmnd 3245.

²⁴¹ See Scottish Criminal Cases Review Commission Annual Report 2010/2011 available at <http://www.sccrc.org.uk/viewfile.aspx?id=518>, page 16

that a miscarriage of justice had occurred. The very essence of the Commission's role is to investigate all the circumstances of an application through a mechanism not constrained by the rules of court.

237. As such, we do not think there is a need for any limitation to be imposed upon the role of the Commission, which is what occurs when definitions are set out in statute. The need for certainty and finality can only be seen as limiting the ability of the Commission to consider all cases before it thoroughly.

40. What are your views on Lord Carloway's recommendation that section 194D of the 1995 Act should be repealed?

238. We agree. Perhaps the most controversial feature of the emergency legislation was the introduction of a power given to the High Court to refuse to hear an appeal referred to it by the Commission. JUSTICE Scotland considers that this was a most regrettable step confusing as it does the separate roles of the Commission and the Court. Finality is only one of the values at play in our system of criminal justice. It can come into conflict with the need to do justice in individual cases.

239. The High Court should not have the power to refuse to entertain appeals in cases referred by the SCCRC for the reasons set out in the Report. Hitherto, the High Court had to accept a case from the Commission. Currently, it can decide not to consider a referral, despite having been the prior decision maker. There is no requirement in *Cadder* that this be affected, on the contrary, their Lordships made clear that such cases should be considered through the mechanism of the SCCRC.²⁴² It would appear that the amendment has provided a restriction *for all cases* as a result of irrational concerns about how the Commission and Court will treat with closed cases potentially affected by *Cadder*.

41. Do you agree with the recommendation that, when considering appeals following upon references from the SCCRC, the test for allowing an appeal should be:

- (a) there has been a miscarriage of justice; and**
- (b) it is in the interests of justice that the appeal be allowed**

240. We see no need for the High Court to apply the same test as the Commission. This could operate in the same way that s194DA of the 1995 Act does, and Lord Carloway has recognised that this can place an undue fetter on the role of the Commission, For the same reasons he considers it inappropriate to have a 'gate-keeping' role in the terms set out in the

²⁴² Per Lord Hope at para 62 and Lord Rodger at para 103.

current section,²⁴³ we consider the provision of an interests of justice test for the Court will have the same impact. Once the case is before the Court it can simply be treated in the same way as other appeals with the same powers of disposal. We do not agree that an additional power of refusal is required given that the Court could exercise it differently to the Commission, applying alternative considerations. Given the volume of referrals to date (inclusive of post-*Cadder* applications) it seems most unlikely that the Commission will refer cases in the kind of numbers that would provoke any anxiety on the part of the Court that the stability of the system might be being undermined.

241. The recent decision in *RM & others*²⁴⁴ indicates that there would be very few occasions on which the court would be in a position to exercise its power to refuse an appeal. This is because the Commission will have already considered whether it was in the interests of justice to refer the case, including considering the principles of finality and certainty. The Court reviewed the proposals in the Report and on the reference made the following observations:

An independent body specifically entrusted with considering cases of possible miscarriages of justice has decided that it is in the interests of justice that it should make these references (1995 Act, s 194C(1)). In making that decision the Commission has considered the interests of finality and certainty (s 194C(2)). Although this court has been given the power to reject a reference in language that replicates the provision applicable to the Commission (s 194DA(1), (2)), it cannot be right for us simply to duplicate the Commission's function and give effect to our own view. In light of the impressive record of the Commission, it is unlikely that we will have cause to differ from its judgment on this point. I think that we are entitled to assume, unless the contrary is apparent, that the Commission has considered the criteria set out in section 194C and has duly made its independent and informed judgment on them. In my view, we should reject a reference only where the Commission has demonstrably failed in its task; for example, by failing to apply the statutory test at all; by ignoring relevant factors; by considering irrelevant factors; by giving inadequate reasons, or by making a decision that is perverse.²⁴⁵

In any event while it might be understandable that Parliament thought it necessary to constrain the power of the Commission to make referrals by directing the Commission to consider the interests of justice, the Court is in a different position. It is not an independent arbiter. It would be a strange and unsatisfactory position for the appeal court which once upheld the conviction to be given the power to refuse an appeal where there has been a miscarriage of justice.

²⁴³ See paras 8.2.19- 8.2.24 of the Report.

²⁴⁴ *SCCRC v RM and Gallagher* [2012] HCJAC 121.

²⁴⁵ At [33].

ANNEX

England

The Current Approach

In English civil and criminal law the evidence of one competent witness is sufficient to support a determination for one party or the other.²⁴⁶ A recent example in criminal proceedings is *R v B*,²⁴⁷ where the appellant's conviction was very heavily dependent on the evidence of a four-year-old child. Judge LCJ said this:

The short answer is that it is open to a properly directed jury, unequivocally directed about the dangers and difficulties of doing so, to reach a safe conclusion on the basis of the evidence of a single competent witness, whatever his or her age, and whatever his or her disability.

In criminal cases, the word corroboration is rarely used. Juries are directed to consider whether other evidence provides support for the allegation.

The Definition of Corroboration

In criminal proceedings, Hailsham LC defined the term as follows:

The word "corroboration" by itself means no more than evidence tending to confirm other evidence. In my opinion, evidence which is (a) admissible and (b) relevant to the evidence requiring corroboration, and, if believed, confirming it in the required particulars, is capable of being corroboration of that evidence and, when believed, is in fact such corroboration.²⁴⁸

That decision was handed down when a more technical approach was taken. In criminal proceedings at least, that approach has now been simplified to one where 'all that is required of it is that it makes the tribunal of fact sure that the suspect evidence is in fact accurate.'²⁴⁹

Abolition

It used to be the case that if a warning was not given to the jury in respect of uncorroborated evidence of accomplices, children and complainants in sexual offences, a conviction would be overturned on appeal.²⁵⁰ The requirement for a corroboration warning has now been abolished by statute:

²⁴⁶ *DPP v Kilbourne* [1973] AC 729; cf *Hawkins' Pleas of the Crown*, vol 4, c 46, s2; Foster's Crown Cases (1762) 233; and, *DPP v Hester* [1973] AC 296; see also *Archbold* 2012, 4-468 and P Murphy, Murphy on evidence, 12th edn, OUP, 2011.

²⁴⁷ [2010] EWCA Crim 4.

²⁴⁸ [2010] EWCA Crim 4.

²⁴⁹ *Archbold* 2012, 4-481.

In relation to unsworn evidence of children, s34 Criminal Justice Act 1988 provides:

The requirement whereby at a trial on indictment it is obligatory for the court to give the jury a warning about convicting the accused on the uncorroborated evidence of a child is abrogated.

(3) Unsworn evidence admitted by virtue of section 56 of the Youth Justice and Criminal Evidence Act [YJCEA] 1999 may corroborate evidence (sworn or unsworn) given by any other person.

(Sections 53-56 of the YCEA, which govern competency of witnesses and sworn evidence, contain no requirements for corroboration).

In relation to accomplices and complainants of sexual offences, s32 Criminal Justice and Public Order Act 1992 states:

32 — Abolition of corroboration rules.

Any requirement whereby at a trial on indictment it is obligatory for the court to give the jury a warning about convicting the accused on the uncorroborated evidence of a person merely because that person is —

an alleged accomplice of the accused, or

where the offence charged is a sexual offence, the person in respect of whom it is alleged to have been committed, is hereby abrogated.

Prior to abolition, a judge was required to give quite technical directions to a jury on corroboration. These were subject to considerable criticism because they were unintelligible. Diplock L in *Director of Public Prosecutions v Hester*,²⁵¹ said as much and disavowed any attempt to have a model direction:

My Lords, if a summing up is to perform its proper function in a criminal trial by jury it should not contain a general disquisition on the law of corroboration couched in lawyer's language but should be tailored to the particular circumstances of the case. It would be highly dangerous to suppose that there is any such thing as a model summing up appropriate to all cases of this kind.

The technicality of the corroboration warning was the main reason why the law on corroboration changed. *Cross and Tapper on Evidence* say:

... much of the momentum for reform was sustained by the technicality with which the old law of corroboration was engulfed, principally in the definition of what amounted to corroboration, and in the obligation upon the judge to direct the jury in detail as to what could and could not amount to corroboration.²⁵²

²⁵⁰ *R v Baskerville* [1916] 2 KB 658; *Davies v DPP* [1954] AC 378.

²⁵¹ [1973] AC 296, 328.

²⁵² C Tapper, *Cross and Tapper on evidence*, 12th edn, OUP, 2010 p264.

Going into these criticisms in more detail they can be found set out at some length in the Law Commission's Working Paper No 115, "Corroboration of Evidence in Criminal Trials," 1990. The heads of criticism were – rigidity, complexity, the rules produce anomalies and they operate to the detriment of the accused.²⁵³ To summarise:

Rigidity – in some cases a corroboration warning may not be required. It was inflexible to require it in every case that fell within one of the three categories. The report cites the decision of Lane LCJ in *R v Chance*:

The aim of any direction to a jury must be to provide realistic, comprehensible and common sense guidance to enable them to avoid pitfalls and to come to a fair and just conclusion as to the guilt or innocence of the defendant. This involves the necessity of the judge tailoring his direction to the facts of the particular case. If he is required to apply rigid rules, there will inevitably be occasions when the direction will be inappropriate to the facts. Juries are quick to spot such anomalies, and will understandably view the anomaly, and often, as a result, the rest of the directions, with suspicion, thus undermining the judge's purpose. Directions on corroboration are particularly subject to this danger ...²⁵⁴

Complexity (see Diplock L's remarks above) – a similar view was expounded by May LJ in *R v Spencer*:

It is our combined experience, both from sitting at first instance and also in this court, that where the full warning has to be given as a matter of law it is very difficult to direct the jury in terms which they can clearly understand, particularly when one has to go on and direct them about which part of the other evidence can or cannot be considered to be corroborative.²⁵⁵

Anomalies – some have been stated above (eg not given if accomplice a co-defendant but given if he is a Crown witness) and others include that the rule only applied where the accomplice was involved in the same offence and so not if he was involved in a lesser associated offence committed on the same occasion. Another example was in sexual offences where consent was in issue, a recent complaint by a complainant in a sexual offence could not be treated as corroboration.

Detrimental effect - the Commission cited research by the LSE²⁵⁶ that in mock trial experiments in a rape case, a jury was more willing to convict after a formal corroboration warning. The Commission

²⁵³ Law Commission's Working Paper No 115 pp45-54.

²⁵⁴ [1988] QC 932.

²⁵⁵ [1985] QB 771 at 786A-B.

²⁵⁶ [1973] Crim LR 2008.

also referred to a Canadian case *Vetrovec*,²⁵⁷ where the Supreme Court criticised the approach where a judge drew particular attention to the evidence to be corroborated, thus highlighting prejudicial evidence.

Where corroboration is still required by statute

The circumstances where corroboration is required by statute are very limited: Perjury – s13 of the Perjury Act 1911; a claim against the estate of a deceased person will generally not be permitted on the unsupported evidence of the claimant (but there is no rule not allowing it and claims have been allowed where there is corroborating evidence);²⁵⁸ and speeding – s89 of the Road Traffic Regulation Act 1984. This section is intended to safeguard defendants from the unreliability of opinion evidence on the speed of a vehicle.²⁵⁹ It does not affect evidence from a machine such a speedometer.²⁶⁰

Evidence that should not stand alone

Whilst there is no requirement to have corroborative evidence, in some cases there are obstacles to proceeding against a defendant on the basis of limited and, arguably in certain circumstances, uncorroborated, evidence. In essence, certain evidence cannot stand alone. This includes silence in interview, evidence from absent or anonymous witnesses and evidence of bad character.

Silence in interview

The Criminal Justice and Public Order Act 1994 created a series of inferences that could be drawn against the accused. These could be drawn where the accused failed to mention when questioned under caution, or when charged, facts on which he later relied in his defence and which he could have reasonably have been expected to have disclosed at the time.²⁶¹ Sections 35, 36 and 37 also allow for such inferences ‘as appear proper’ from an accused’s failure to give evidence or account for substances in his possession or marks on his body. S38(3) of the Act prevents convictions solely on the basis of such evidence:

38.— Interpretation and savings for sections 34, 35, 36 and 37.

(3) A person shall not have the proceedings against him transferred to the Crown Court for trial, have a case to answer or be convicted of an offence solely on an inference drawn from such a failure or refusal as is mentioned in section 34(2), 35(3), 36(2) or 37(2).

Absent witnesses

By Chapter 2 (ss114-136) Criminal Justice Act 2003, hearsay evidence is admissible in criminal proceedings. This is effectively defined as any representation of fact or opinion made by a person

²⁵⁷ (1982) 136 DLR (3d) 89.

²⁵⁸ C Tapper, *Cross and Tapper on evidence*, 12th edn, OUP, 2010 p262.

²⁵⁹ P Murphy, *Murphy on evidence*, 12th edn, OUP, 2011 p642.

²⁶⁰ *Nicholas v Penny* [1950] 2 KB 466; *Swain v Gillett* [1974] RTR 446.

²⁶¹ S34 Criminal Justice and Public Order Act 1994.

other than in oral evidence in the proceedings in question which is tendered as evidence of any matter stated therein. By s114 hearsay is only admissible as follows:

- By the provisions of chapter 2 of that Act; or;
- By certain preserved rules of law; or
- Parties agree; or
- Court is satisfied it is in the interests of justice.

In deciding whether hearsay evidence is admissible in the interests of justice, the court must have regard to the factors set out in s144(2), and of particular relevance here:

- (a) How much probative value the statement has (assuming it to be true) in relation to a matter in issue in the proceedings, or how valuable it is for the understanding of other evidence in the case;
- (b) What other evidence has been, or can be, given on the matter or evidence mentioned in paragraph (a);

In *R v Xhabri*,²⁶² it was held that s114 is not incompatible with Article 6 European Convention on Human Rights (ECHR) on account of the fact that it allows for the admission of a statement by a witness who is not available for cross examination. The court's approach was that a trial, as a whole, could be fair, notwithstanding non-compliance with Article 6(3)(d).

Where hearsay evidence is admitted there are a wide range of safeguards available in the Criminal Justice Act 1988 and Criminal Justice Act 2003, including exploring whether the witness was genuinely in fear of attending Court, whether they can give evidence using special measures (pre-recorded DVD, TV link, screens etc), consideration of the interests of justice, less stringent rules on the admissibility of evidence to the credibility of the witness and, most importantly, the requirement that the judge stop the proceedings if the Crown's case is wholly or partly based on a hearsay statement that is so unconvincing the conviction would be unsafe.

Over and above these safeguards is the judges' general discretion under s78 of the Police and Criminal Evidence Act 1984 (PACE) to exclude evidence whose admission would have such an adverse effect on the trial it ought not to be admitted (see below). In addition, there is the judges' role in providing directions and a warning to the jury on how to treat untested hearsay evidence. In the view of the ECtHR these safeguards can be sufficient to protect the accused's right to a fair trial.²⁶³

²⁶² [2006] 1 Cr App R 26 CA.

²⁶³ *Al-Khawaja and Tahery v the UK* (2012) 54 EHRR 23 para 151.

Following *Al-Khawaja*, in *R v J*²⁶⁴ a 3-year-old child was too young to give evidence but evidence was admitted of what the child said to carers and doctors in order to prove who was responsible for severe non-accidental bruising. It was held that the child's evidence was not the 'sole or decisive' evidence in the case. There was other evidence including accounts from mother and grandmother that it had not been them and therefore it could be inferred that mother's boyfriend was responsible.

The test applied in *R v J* was two-fold:

- (a) Whether the untested hearsay evidence was the sole or decisive evidence upon which the conviction is based;
- (b) For evidence that is decisive, the court will address reliability, weight and prejudice to the defence.

Whilst this has not created a corroboration rule, it follows that; in cases where a complaint is made by an absent witness (whether through fear or infirmity etc) there will need to be other evidence to support the allegation in order for the complaint to be admissible.

Anonymous witnesses

There is no power to admit anonymous hearsay.²⁶⁵ In *R v Davis*, Bingham L considered 'sole and decisive' evidence in relation to anonymous witnesses:

It is that no conviction should be based solely or to a decisive extent upon the statements or testimony of anonymous witnesses. The reason is that such a conviction results from a trial which cannot be regarded as fair. This is the view traditionally taken by the common law of England.²⁶⁶

This is now included in statute as one of the relevant considerations in making a witness anonymity order under s89 of the Coroners and Justice Act 2009. Whether the evidence of such a witness is corroborated was not included as a relevant consideration. But following *Al-Khawaja* it might be said that such evidence may not be decisive if there is other evidence to support what the anonymous witness alleges.

Evidence of bad character

Evidence of the bad character of a defendant is admissible by virtue of s101 Criminal Justice act 2003. In general terms, bad character can cover any reprehensible conduct other than the offence charged. It is admissible via seven gateways set out in the Act.

²⁶⁴ [2011] EWCA Crim 3201.

²⁶⁵ *R v Ford* [2011] Crim LR 475

²⁶⁶ [2008] UKHL 36 para 25.

These provisions are most commonly used to admit previous criminal convictions to show a propensity to commit an offence of the type charged where such a conviction makes it more likely that the defendant has committed the instant allegation. In any case where evidence of bad character is admitted to show propensity to commit offences or to be untruthful, the summing up should warn the jury clearly against placing any undue reliance on previous convictions and should, in particular direct them carefully on how to treat the convictions, including that although they were entitled, if they found propensity shown, to take that into account when determining guilt, propensity was only one relevant factor and they should assess its significance in the light of all other evidence in the case.²⁶⁷

Evidence generally

The basic rule in the law of evidence is that, subject to exclusionary rules, all evidence which is sufficiently relevant to the facts in issue is admissible, and therefore all evidence which is insufficiently relevant to the facts should be excluded. However, evidence which is relevant may be excluded if it is such that no reasonable jury, properly directed of its defects, could place weight on it.²⁶⁸

Circumstantial evidence

Cases can be proved by a network of circumstantial evidence even where individual pieces of evidence would not be sufficient, on their own, to prove guilt to the requisite standard. Recent examples have included cases where a rape allegation was supported by other evidence including small amounts of DNA, some fibres and the defendant's links to the location.²⁶⁹

Circumstantial evidence is to be contrasted with direct evidence. Direct evidence is evidence of facts in issue and therefore, relevant facts. It is evidence of facts from which the existence or non-existence of facts in issue may be inferred. It does not necessarily follow that the weight to be attached to circumstantial evidence will be less than that to be attached to direct evidence. For example, the tribunal of fact is likely to attach more weight to a culmination of individual items of circumstantial evidence which all lead to the same conclusion, than to direct evidence to the contrary coming from witnesses lacking in credibility.

It is necessary before drawing the inference of the accused's guilt from circumstantial evidence for a jury to be sure that there are no other co-existing circumstances which would weaken or destroy the inference.²⁷⁰ However, there is no requirement that the judge direct the jury to acquit where the facts proved are consistent with guilt but also inconsistent with any other reasonable conclusion.²⁷¹ It is a matter for a jury to reach a verdict on all the evidence available although the trial judge will give a 'circumstantial evidence direction' which essentially explains how inferences can be drawn and

²⁶⁷ *R v Hanson*; *R v Gilmore*; *R v P* [2005] 2 Cr App R 21.

²⁶⁸ *Robinson* [2006] 1 Cr App R 221, a case concerning voice recognition.

²⁶⁹ See *R v Reed, Reed and Garmson* [2010] 1 Cr App R 23 and *R v C* [2011] 3 All ER 509.

²⁷⁰ *Teper v The Queen* [1952] AC 480 at 489, per Lord Normand.

²⁷¹ *McGreevy v DPP* [1973] 1 WLR 276.

reinforces the standard of proof. Such a direction is in no special form but should explain that they should not convict unless they are able to reject and exclude any alternative explanation.

Expert Evidence

Expert evidence is admissible opinion evidence independent of any allegation. The general rule is that witnesses can only give evidence of facts they personally perceived and not evidence of their opinion, i.e. evidence of inference drawn from such facts. There are two exceptions to the general rule:

- (a) Non-experts. A statement of opinion on any matter not calling for expertise, if made by a witness as a way of conveying relevant facts personally perceived by him, is admissible as evidence of what he perceived.
- (b) Experts. Subject to compliance with the Criminal Procedure Rules, part 33 (expert evidence), a statement of opinion on any relevant matter calling for expertise may be made by a witness qualified to give such an expert opinion.

If objection to the admissibility of expert opinion evidence is made, it is for the party proffering the evidence to prove its admissibility.²⁷²

Safeguards

These will be examined under three headings.

- (a) Police
- (b) Prosecutor
- (c) Court

Safeguards relating to a police investigation

In addition to ss76 and 78 PACE, it is worth considering the protection that PACE provides generally in relation to an investigation and therefore on the quantity and reliability of evidence subsequently used in court. Police powers of investigation, including arrest, detention, interrogation, entry and search of premises, personal search and the taking of samples are governed by PACE. The legislative aim of PACE is to strike a balance between the powers of the police and the rights of individuals. This legislative framework guides the powers of police officers in England and Wales to combat crime, as well as providing codes of practice for the exercise of those powers. Specific legislation as to more wide ranging conduct of a criminal investigation is contained within the Criminal Procedures and Investigation Act 1996.

²⁷² *Atkins* [2010] 1 Cr App R 117, approved in *Reed* [2010] 1 Cr App R 310, where it was said (at 113) that, unless the admissibility is challenged, the judge will admit the evidence as sufficiently safe.

Criminal liability may arise if the specific terms of PACE are not conformed to. Failure to conform to the codes of practice while searching, arresting, detaining or interviewing a suspect may also lead to evidence obtained during the process becoming inadmissible in court.

PACE was significantly modified by the Serious Organised Crime and Police Act 2005. This replaced nearly all existing powers of arrest, including the category of arrestable offences, with a new general power of arrest for all offences.

Safeguards relating to decisions to prosecute

Further safeguards also exist by virtue of the criteria which must be applied before a decision to charge. The Crown Prosecution Service publishes guidance and policy in relation to individual offences which can be found at www.cps.com.

By s10 Prosecution of Offences Act 1985, prosecutors must apply specific tests (evidential and public interest) before making a decision to charge:

10(1) The Director shall issue a Code for Crown Prosecutors giving guidance on general principles to be applied by them —

in determining, in any case —

(i) whether proceedings for an offence should be instituted or, where proceedings have been instituted, whether they should be discontinued; or

(ii) what charges should be preferred; and

(b) in considering, in any case, representations to be made by them to any magistrates' court about the mode of trial suitable for that case.

(2) The Director may from time to time make alterations in the Code.

(3) The provisions of the Code shall be set out in the Director's report under section 9 of this Act for the year in which the Code is issued; and any alteration in the Code shall be set out in his report under that section for the year in which the alteration is made.

The Crown Prosecution Service decides whether or not to prosecute by applying the Code for Crown Prosecutors and any relevant policies to the facts of the particular case. Whilst there is currently a move to return many decisions to charge to the police, it is anticipated that the criteria and formulated policies will continue to apply.

The Code for Crown Prosecutors (the Code) is a public document that sets out the basic principles prosecutors should follow when they make decisions on cases. The Code sits alongside the Core Quality Standards booklet, and the two documents together let the public know what prosecutors do, including how they take their decisions and the level of service that the prosecution service is committed to providing in every key aspect of its work.

Although each case is unique and must be considered on its own facts and merits, there are certain general principles that apply to the way in which prosecutors must approach every case. They must be fair, independent and objective. They must not let any personal views about the ethnic or national origin, gender, disability, age, religion or belief, political views, sexual orientation or gender identity of the suspect, victim or any witness influence their decisions.

It is their duty to make sure that the right person is prosecuted for the right offence. In doing so, prosecutors must always act in the interests of justice and not only for the purpose of obtaining a conviction.

Prosecutors have to ask themselves the following two questions when they are making their decisions:

Is there enough evidence against the defendant? There must be enough evidence to provide a 'realistic prospect of conviction' against the defendant. A realistic prospect of conviction is an objective test. It means that a jury or bench of magistrates, or judge hearing a case alone, properly directed and acting in accordance with the law, is more likely than not to convict the defendant of the alleged charge. This is a different test from the one that the criminal courts must apply. Magistrates or a jury should only convict the defendant if they are sure that he or she is guilty.

When deciding whether there is enough evidence to prosecute, prosecutors must consider whether the evidence can be used in court and whether it is reliable. This means that they must assess the quality of the evidence from all witnesses before reaching a decision. Where it is considered that it would be helpful in assessing the reliability of a witness's evidence or in better understanding complex evidence, an appropriately trained and authorised prosecutor should conduct a pre-trial interview with the witness. A decision to drop a case does not mean that the prosecutor has decided to believe one witness and not believe another. If there is not a realistic prospect of conviction, the case must not go ahead, no matter how serious or sensitive it may be.

If there is a realistic prospect of conviction, the prosecutor will ask the next question.

Is a prosecution required in the public interest? It has never been the rule in this country that every criminal offence must automatically be prosecuted. For this reason, in each case, the prosecutor must consider whether a prosecution is required in the public interest. A prosecution will usually take place unless the prosecutor is sure that there are public interest factors tending against prosecution which outweigh those tending in favour, or unless the prosecutor is satisfied that the public interest may be properly served, in the first instance, by offering the offender the opportunity to have the matter dealt with by an out-of-court disposal.

The public interest factors that can affect the decision to prosecute vary from case to case. The more serious the offence or the offender's record of criminal behaviour, the more likely it is that a prosecution will be required in the public interest. On the other hand, a prosecution is less likely to be required if, for example, a court would be likely to impose a nominal penalty or the loss or harm connected with the offence was minor and the result of a single incident.

In deciding whether a prosecution is required in the public interest, prosecutors should take into account any views expressed by the victim regarding the impact that the offence has had. In some cases, prosecutors should take into account any views expressed by the victim's family. But the prosecution service does not act for victims or their families in the same way as solicitors act for their clients, and prosecutors must form an overall view of the public interest.

Judicial Review of decisions to charge

There are few safeguards once a decision to charge has been made although in any case, the prosecution are under a continuing duty to review. Generally, a decision to prosecute is not susceptible to judicial review since it may be challenged within the trial process itself, notably by an application to stay proceedings on the grounds of abuse of process (continuation would be vexatious and oppressive). Arguments relating to abuse of process may and should be raised in the course of the criminal trial itself, save in wholly exceptional circumstances.²⁷³

It thus appears that in the absence of dishonesty, mala fides or some exceptional circumstance, a decision to prosecute cannot be raised by way of judicial review.²⁷⁴ Some recent progress has been made in relation to judicially reviewing decisions to charge children where there are significant consequences for the child defendant such that the decision to charge can be shown to be unreasonable (in the Wednesbury sense), notably *R (on the application of (1) E (2) S and (3) R) Claimants v the Director of Public Prosecutions*.²⁷⁵

Safeguards in Court procedure

These will be examined under four headings:

Committal

Applications to dismiss

Preparatory hearings

Binding rulings

²⁷³ *R (Pepushi) v CPS* (2004) *Times* 21 May 2004.

²⁷⁴ *DPP, ex p Kebilene* [2000] 2 AC 326.

²⁷⁵ [2011] EWHC 1465 (Admin).

Committal. Many committal proceedings are in the process of being abolished creating a situation where there are fewer checks on serious cases before they reach the Crown Court.

Either-way offences which are to be tried in the Crown Court are currently sent there through committal proceedings held in the magistrates' court. However, Sch 3 of the CJA 2003, when it is brought into force, will abolish committal proceedings for either-way offences. Instead, they will be sent to the Crown Court under the Crime and Disorder Act 1998, s. 51 (which apply to either-way and indictable-only offences). Until the implementation of the CJA 2003, sch. 3, either way offences are transferred from the magistrates' court to the Crown Court by means of committal proceedings pursuant to the MCA 1980, s. 6. Such committal proceedings will be necessary only if the magistrates declined jurisdiction at the mode of trial hearing (usually on the basis that the case is beyond their sentencing powers) or the accused was offered summary trial but decided to elect Crown Court trial.

Committal proceedings under s6 Magistrates' Courts Act 1980 (MCA), can take two forms:

- (a) with consideration of the evidence (very rare); and
- (b) without consideration of the evidence (much more common).

Under s6(2) MCA, committal without consideration of the evidence may take place if:

- (a) All the evidence before the court consists of written statements tendered under s5A(3) of the 1980 Act;
- (b) The accused has a legal representative acting for him in the case; and
- (c) The legal representative for the accused has not requested the justices consider a submission that the statements disclose insufficient evidence to put to the accused on trial by jury for the offence into which the court is inquiring.
- (d) The greater speed of the procedure under s6(2) makes it appropriate for the defence to agree to its use unless there is a specific reason for having the evidence considered. The obvious case of a committal with consideration of the evidence (usually referred to as an 'old style' committal) is when the defence consider that there is a realistic chance of a submission of no case to answer.

In reality, s6(2) committals are a simple paper exercise and, with recent legal aid cuts, rarely create any check on the passage of a case to the Crown Court.

The procedure for committals with consideration of the evidence can be found chiefly in CrimPR r10.3. These provisions apply where the accused does not have a legal representative acting for him in the case or where the legal representative has asked the court to consider a submission that there is no case to answer.

The prosecutor is entitled to make an opening speech before tendering the evidence (all of which is written). The evidence may be read through or, with the leave of the court, summarised. The magistrates' court may view any original exhibits and may retain them. No witnesses are called and no evidence can be tendered by the defence. The accused may then make a submission of no case to answer and, if s/he does so or if the court is minded not to commit for trial, the prosecutor is entitled to respond. The court then reaches its decision as to whether to commit the accused for trial in the Crown Court, on the basis of the test laid down in s6(1) MCA 1980, namely whether there is 'sufficient evidence to put to him on trial by jury for any indictable offence.'

Committal proceedings are generally an inappropriate forum in which to raise objections to the admissibility of prosecution evidence. This is because the standard of proof that the prosecution are (at that stage) required to satisfy is a very low one, and because, assuming that there is a committal for trial, the admissibility of evidence at the trial on indictment is a matter entirely for the Crown Court judge. Furthermore, by virtue of ss76(9) and 78(3) PACE, examining justices are not permitted to consider whether confessions are inadmissible under s76 or should be excluded under s78 of the Act.

The correct approach appears to be that examining justices should exclude and ignore proposed evidence which no reasonable tribunal could hold to be admissible, but where the admissibility of evidence is doubtful and especially where its exclusion depends on the exercise of discretion by the court, the evidence should be received by the justices and any challenge to it reserved for trial.²⁷⁶

The magistrates must commit for trial if they are of the opinion that there is sufficient evidence to put the accused on trial for any indictable offence and they must discharge the accused if they are not of that opinion. In practice the standard of proof the prosecution are required to satisfy at committal proceedings is very low. Commonly expressed as a 'prima facie case.'

A decision to commit for trial cannot be appealed to the High Court by way of case stated, since there has not been a 'final determination.'²⁷⁷ Judicial review is available, but only in the case of a 'really substantial error leading to demonstrable injustice' such that the Divisional Court should contemplate granting a remedy.²⁷⁸

Applications to dismiss

By Sch 3(2), para 2 Crime and Disorder Act 1998, a person who is sent for trial under ss51 or 51A (currently indictable only cases or those involving children) may, after service of papers and before arraignment, apply orally or in writing to the Crown Court for the charge(s) to be dismissed. The judge

²⁷⁶ *Highbury Magistrates Court, ex p Boyce* (1984) 79 Cr App R 132.

²⁷⁷ *Cragg v Lewes District Council* [1986] Crim LR 800.

²⁷⁸ *Neill v North Antrim Magistrates' Court* [1992] 1 WLR 1220, AT 1231 per Lord Mustill.

must dismiss a charge if it appears to him that the evidence against the applicant would not be sufficient for him to be properly convicted.

Preparatory hearings

In serious and complex cases application can be made for a preparatory hearing where questions of law and other matters can be resolved and powers of case management are said to be insufficient. It is worth noting in passing that the criminal procedure rules have created a duty for judges to manage cases and one safety valve in any case is that some judges take it upon themselves to analyse the likelihood of conviction which can concentrate the minds of all parties on the strengths and weaknesses in any given case.

Binding rulings

Part IV of the Criminal Procedure and Investigations Act 1996 (ss39-43) gives judges power to make binding rulings on points of law before the start of the trial (see. s39(3)). The judge will be able to discharge or vary any such ruling if he considers it in the interests of justice to do so.

A judge should not hear legal argument and then rule upon agreed facts before arraignment. Taking such a course means that the judge is less likely to usurp the function of the jury and there can be no difficulty about an appeal.²⁷⁹

Where a judge is invited at such a hearing to make a ruling in law as to whether or not the facts support a particular charge, it is always desirable, if not essential, that the facts upon which such a ruling is sought are committed to writing, so that on any subsequent appeal, the Court of Appeal will know the factual basis upon which the ruling was made.²⁸⁰

Exclusion of evidence

Plainly, issues as to what evidence is relevant and admissible can give rise to all sorts of applications in different cases. This area is examined in relation to confessions and other evidence.

Confession

Cases can proceed on a defendant's confession alone, although generally one would expect a wider police investigation to ensure the confession was accurate.

Police interviews with a defendant are governed by PACE Code C. There are a number of relevant safeguards.

²⁷⁹ *R v Vickers*, 61 Cr App R 48, CA.

²⁸⁰ *R v Marshall, Coombes and Eren* [1998] 2 Cr App R 282, CA.

If it represented to the court that a confession made by an accused person was or may have been obtained by the means set out in s76(2) PACE, the court shall not allow the confession to be given in evidence against him except insofar as the prosecution proves to the court beyond reasonable doubt that the confession (notwithstanding that the contents of the confession may be true) was not so obtained. Section 76(2) sets out the following:

- (a) That the confession was or may have been obtained —
 - (i) by oppression of the person who made it; or
 - (ii) in consequence of anything said or done which was likely, in the circumstances existing at the time, to render unreliable any confession which might be made by him in consequence thereof,
- (b) The court shall not allow the confession to be given in evidence against him except in so far as the prosecution proves to the court beyond reasonable doubt that the confession (notwithstanding that it may be true) was not obtained as aforesaid.

Section 78 PACE (general fairness provision – see below) also empowers a court to exclude evidence that may prejudice the fairness of the proceedings. The court also retains the ‘common law discretion’ to exclude evidence under s82(3) PACE, eg by preventing questions.²⁸¹

At common law, there is also a broader, general principle, as established in *A v Secretary of State for the Home Department (No. 2)*,²⁸² that evidence obtained by torture is inadmissible.

These exclusionary provisions are not always triggered by a breach of a Code. There are a number of areas that are relevant here –

- (a) Access to solicitor (see s58 PACE and para 3(1)(ii) and s6 of Code C) – this is a right and a person cannot be interviewed or continued to be interviewed if they wish to have access to legal advice. This is subject to limited qualifications allowing the police to delay access to legal advice in certain circumstances. The consequences are that a confession may be excluded if it is obtained after wrongful refusal of access to legal advice.²⁸³ Exceptions to this include ‘safety interviews’ where terrorism suspects may be interviewed without a legal representative present under the Terrorism Act 2000 and Code H²⁸⁴ in order to obtain information to safeguard the public.

²⁸¹ *R v Sang* [1980] AC 402.

²⁸² [2006] 2 AC 221.

²⁸³ *R v Franklin* (1994) *Times* 16 June; *Magee v UK* (2000) 31 EHRR 822.

²⁸⁴ See also *R v Ibrahim* [2008] EWCA Crim 880.

- (b) The Codes also provide that any questioning of a suspect with the intent to obtain admissions of guilt will be an 'interview' and will require the person to be properly cautioned.²⁸⁵
- (c) Code C also sets down how and where such questioning should be conducted, The Court of Appeal's approach to these provisions has tended to be strict, eg the importance of note taking was stressed by Lane LCJ on two occasions in *R v Canale*²⁸⁶ and *R v Delaney*.²⁸⁷ See also *R v Khan*²⁸⁸ on the approach to questioning other than at a police station.

Breach of these Codes does not necessarily trigger exclusion of evidence under ss76 or 78. The exclusion under s76 is by rule and s78 discretionary. The latter is governed by *Wednesbury* principles.²⁸⁹ The general approach being that significant and substantial' breaches are necessary to engage s78.²⁹⁰ For example, a failure to caution a suspect in circumstances where it should have been administered is usually regarded as a significant and substantial breach of the Code.²⁹¹

In cases where a person is mentally handicapped s77 PACE provides that the judge warn the jury, as above, of the 'special need for caution' in dealing with the confession of such a defendant. This applies where the confession is made in the absence of an independent person and forms the whole or substantially the whole of the case against him. PACE Code C prescribes a special set of rules for such persons that, for example, require the attendance of an appropriate adult.²⁹²

Similar provisions apply to child suspects requiring presence of an appropriate adult and for the person responsible for the welfare of the child to be informed of their arrest and whereabouts.²⁹³

Other evidence

Section 78(1) PACE provides that in any criminal proceedings 'the court may refuse to allow evidence on which the prosecution propose to rely to be given if it appears to the court that, having regard to all the circumstances, including the circumstances in which the evidence was obtained, the admission of the evidence would have such an adverse effect on the fairness of proceedings that the court ought

²⁸⁵ The case law on this area is extensive – see C Tapper, *Cross and Tapper on evidence*, 12th edn, OUP, 2010 pp660-661.

²⁸⁶ [1990] 91 Cr App R 1, CA.

²⁸⁷ [1989] 88 Cr App R 338, CA.

²⁸⁸ [1993] Crim LR 54, CA.

²⁸⁹ *Thompson v R* [1998] AC 811.

²⁹⁰ See *R v Keenan* [1990] 2 QB 54 (verballing).

²⁹¹ *R v Sparks* [1991] Crim LR 128; *R v Pall* [1992] Crim LR 126, CA.

²⁹² Code C para 1.7(b) PACE 1984.

²⁹³ Code C para 3.13 PACE 1984.

not to admit it.' Section 78 applies to 'evidence on which the prosecution *proposes* to rely' and therefore applications to exclude evidence under the section should be made before the evidence is adduced. If a court decides that admission of the evidence in question would have such an adverse effect on the fairness of proceedings that it ought not to admit it, it cannot logically exercise discretion to admit it.²⁹⁴ Either way, the Court of Appeal will intervene only if the judge has not exercised his discretion at all or has done so in a *Wednesbury* unreasonable manner.²⁹⁵ Where the Court of Appeal does intervene, it will exercise its own discretion.²⁹⁶

However, the true test for the Court of Appeal may lie in whether the admission of the evidence in question renders the conviction unsafe, since that is now the only ground on which it may allow an appeal against conviction. It is worth noting that s78 is capable of application to *any* evidence obtained by improper or unfair means and on which the prosecution seek to rely, whereas the common law powers are restricted to admissions, confessions and other evidence obtained from the accused after the commission of the offence.²⁹⁷

Section 78(1) PACE directs the court, in deciding whether to exercise the statutory discretion, to have regard to all the circumstances, including those in which the evidence was obtained. The critical test under s78 is whether any impropriety affects the fairness of proceedings: the court cannot exclude evidence under the section simply as a mark of its disapproval of the way in which it was obtained.²⁹⁸

The leading authority on the application of s78(1) PACE, to a prosecution founded on entrapment, is the decision of the House of Lords in *Loosely*,²⁹⁹ from which the following propositions derive in relation to safeguarding the fairness of a trial:

Although in English law entrapment is not a substantive defence, where an accused can show entrapment, the court may stay the proceedings as an abuse of process or it may exclude evidence pursuant to s78.

A decision on whether to stay criminal proceedings is distinct from a decision on the forensic fairness of admitting evidence.³⁰⁰ Thus, if the court is not satisfied that a stay should be granted and the trial proceeds, the question under s78 is not whether the proceedings should have been brought but whether the fairness of proceedings will be adversely affected by, for example, admitting the evidence

²⁹⁴ *Chalkley* [1988] QB 848 at 874, per Auld LJ.

²⁹⁵ *Associated Provincial Picture Houses Ltd v Wednesbury Corporation* [1948] 1 KB 223.

²⁹⁶ See *O'Leary* (1988) 87 Cr App R 387 at 391, per May LJ.

²⁹⁷ *Sang* [1980] AC 402.

²⁹⁸ *Chalkley* [1988] QB 848, per Auld LJ.

²⁹⁹ [2001] 1 WLR 2060.

³⁰⁰ *Chalkley* [1988] 2 Cr App R 79 at 105.

of the agent provocateur or evidence which is available as a result of his activities.³⁰¹ However, if an application to exclude evidence under s78 is in substance a belated application for stay, it should be treated as such and decided according to the principles appropriate to the grant of a stay.

Neither the judicial discretion conferred by s78, nor the court's power to stay proceedings as an abuse of the court, has been modified by Article 6 ECHR and the jurisprudence of the ECtHR. There is no appreciable difference between the requirements of Article 6, or the Strasbourg jurisprudence on Article 6, and the English law as it has developed in recent years.³⁰²

Common law

It is well established that a judge has an overriding duty and inherent power in every case to ensure that the accused receives a fair trial and thus a discretion to exclude otherwise admissible prosecution evidence if its prejudicial effect on the minds of the jury outweighs its probative value.

The first clear statements as to the existence of this exclusionary discretion are to be found in the speeches of Lord Moulton and Lord Reading CJ in *Christie*.³⁰³ Thereafter, the discretion developed on a case by case basis in relation to particular and different types of otherwise admissible evidence. In *Sang*,³⁰⁴ the House of Lords was firmly of the opinion that, notwithstanding its case-by-case development, under the modern law the discretion is a general one. The cases, therefore, are not treated as a closed list of the situations in which the discretion may be exercised.³⁰⁵ The cases are nothing more than examples of a single discretion founded on the duty of the judge to ensure that every accused person has a fair trial.³⁰⁶

The discretion of a judge to exclude evidence also extends to other evidence which may operate unfairly against the accused, namely admissions, confessions and other evidence obtained from the accused after the commission of the offence by improper or unfair means.³⁰⁷

Submissions of no case

It should be noted that, at the close of the prosecution case, in appropriate cases, the defendant can make a submission of no case to answer which, if accepted by the judge (either because there is no evidence or the evidence is so weak that no properly directed jury could convict) leads to a direction to the jury to acquit.

³⁰¹ *Shannon* [2001] 1 WLR 51 at 68.

³⁰² *P* [2002] 1 AC 46.

³⁰³ [1914] AC 545, at 559 and 564 respectively.

³⁰⁴ [1980] AC 402.

³⁰⁵ *Sang* [1980] AC 402 at 438 and 445, per Viscount Dilhorne and Salmon L respectively).

³⁰⁶ *Sang* [1980] AC 402 at 452 and 447, per Scarman L and Fraser L respectively.

³⁰⁷ *Sang* [1980] AC 402 at 436, 450 and 456, per Diplock L, Fraser L and Scarman L respectively.

Abuse of process

A judge can stay an indictment at any time if the continuation of a prosecution is vexatious or oppressive. Generally, despite rules on the service of skeleton arguments early in any proceedings, such considerations are dealt with at the close of the evidence, particularly in historic sex cases.

Judicial Directions

Generally, judges are expected to direct a jury on the law in a way that is 'fact specific.' Recently, specimen directions have been removed from the Bench Book and judges are encouraged to tailor their directions in a balanced way. Whilst the philosophy is that the ultimate decision is for the jury, this does not mean that the jury are left without assistance. Indeed, it is becoming more commonplace to provide a jury with a written 'route map' to verdict, setting out the relevant legal questions which have to be answered before conviction or acquittal.

The history of judicial directions shows that from an early stage, eg Diplock L in *Hester*,³⁰⁸ the Courts were reluctant to provide a model direction in relation to corroboration for the reasons outlined above. Sexual offences became the beacon for reform but the Law Commission's concerns were more wide ranging.³⁰⁹ Jury directions were too technical and confusing and attitudes to evidence from children and those with mental incapacity have changed. Measures have become available to assist vulnerable witnesses to give their best evidence whilst preserving cross-examination whether by video link or from behind a screen. Judges direct juries that such measures are routine, to concentrate on the evidence and not to hold the use of those measures against a defendant.

There are cases where safeguards have developed by way of the provision for judicial warnings about the evidence. This applies particularly in sexual cases and cases where identification is in issue:

Identification evidence

In English law, a person may be convicted on the basis of uncorroborated identification evidence. There are some safeguards: where such a conviction is based 'wholly or substantially' on such evidence the Court of Appeal in *R v Turnbull*³¹⁰ recommended the jury be warned of the special need for caution. A detailed direction is routinely given in relation to the dangers of mistaken identification.

In addition, where the quality of such evidence is poor, the judge should withdraw the case from the jury's consideration, unless there is other supporting evidence:

When, in the judgment of the trial judge, the quality of the identifying evidence is poor, as for example when it depends solely on a fleeting glance or on a longer observation made in

³⁰⁸ *DPP v Hester* [1973] AC 296.

³⁰⁹ Interestingly though, one of the first cases to break from the cumbersome and overly technical approach was *R v Chance* [1988] QC 932, a sexual offences case (see above).

³¹⁰ [1977] QB 224.

difficult conditions, the situation is very different. The judge should then withdraw the case from the jury and direct an acquittal unless there is other evidence which goes to support the correctness of the identification. This may be corroboration in the sense lawyers use that word; but it need not be so if its effect is to make the jury sure that there has been no mistaken identification ...³¹¹

Sexual cases / accomplices

The effect of the abolition of the corroboration rule, was considered in *R v Makanjuola; R v Easton*.³¹² The trial judge was invited to give the full corroboration warning in a case of sexual assault despite the statutory abrogations. He refused. On appeal Taylor LCJ held that, in certain cases the trial judge has a discretion to give a warning on the dangers of convicting on the unsupported evidence from certain witnesses, particularly those who may be tainted with an improper motive or where there is proved dishonesty in some respect. He gave the following guidance:³¹³

(3) In some cases, it may be appropriate for the judge to warn the jury to exercise caution before acting upon the unsupported evidence of a witness. This will not be so simply because the witness is a complainant of a sexual offence nor will it necessarily be so because a witness is alleged to be an accomplice. There will need to be an evidential basis for suggesting that the evidence of the witness may be unreliable. An evidential basis does not include mere suggestion by cross-examining counsel.

Other warnings

The idea of warning a jury also holds good for witnesses in 'analogous' cases.³¹⁴ The latter category includes co-defendants, witnesses tainted by improper motive and witnesses of bad character.³¹⁵

Co-defendants (lead authority: *R v Knowlden and Knowlden*³¹⁶) – the judge has a discretion as to what to say to the jury. At minimum, he should give a clear warning to treat the evidence of co-defendants against one another with care because each has their own interest.

Witnesses tainted by improper motive (see *R v Beck*)³¹⁷ – broadly speaking the approach depends on the facts of the case. It may extend to witnesses motivated by jealousy, spite, financial advantage, revenge. A particularly acute form of this category are 'cell confessions' where the Crown relies on the

³¹¹ *R v Turnbull* [1977] QB 224 at 230.

³¹² [1995] 2 Cr App R 469, CA (see *Archbold 2012*, 4-474).

³¹³ *R v Makanjuola; R v Easton* [1995] 2 Cr App R 469, per Taylor LCJ.

³¹⁴ *R v Muncaster* [1999] Crim LR 409, CA.

³¹⁵ See *Archbold 2012* 4-476 to 4-481.

³¹⁶ 77 Cr App R 94, CA.

³¹⁷ 74 Cr App R 221, 228 approved in *R v Spencer* [1987] AC 128, 140.

evidence of an untried prisoner.³¹⁸ Interestingly, such evidence was admissible and the Court said that not every case required a warning.

Witnesses of bad character - in *R v Spencer*, Hailsham LC recommended that judges must always warn juries of evidence of witnesses of 'admittedly bad character ... in whatever terms they think appropriate to the case.'³¹⁹ The content of any warning is down to the discretion of the judge.³²⁰ It is to be crafted in light of the issues in the case, the nature of the bad character and the evidence in the case. As with *R v Turnbull*, the judge should advise the jury of the 'special need for caution.'

Directions on evidence that is capable of support

Whilst there is no rule for a judge to explain to a jury in relation to corroboration, there are judicial directions that have developed to ensure that juries approach certain evidence fairly before deciding whether it is capable of supporting an allegation. Some examples are evidence that there was a complaint (recent or delayed), distress and lies.

Complaint

By s120 Criminal Justice Act 2003, evidence that an alleged victim complained about the subject in hand, is admissible as evidence. This can be a recent or a delayed complaint. The judge will remind a jury that this is not independent evidence but, nonetheless, complaint evidence can support an allegation. In relation to delayed complaints in sexual cases, judges also direct a jury that experience shows that people do delay complaining for various reasons (usually tailored to the reasons given by the witness). Evidence of repeated complaints is often restricted out of fairness.³²¹

Distress

Evidence of the complainant's distress is also admissible, and not to be considered of little weight, as long as the jury is directed to be sure it is genuine before using it to support the allegation.³²²

Lies

English law allows lies by a defendant to be used as supporting evidence, but only where the jury is directed that it should be satisfied that the lie related to something other than the defendant's response to the allegation:

³¹⁸ *Benedetto v R; Labrador v R* [2003] 1 WLR 1545, PC.

³¹⁹ [1987] AC 128 at 784.

³²⁰ Cf *Makanjuola* [1995] 2 Cr App R 469, CA and *Muncaster* [1999] Crim LR 409, CA above.

³²¹ See *R v JD* [2008] EWCA Crim 2557 and *R v O* [2006] 2 Cr App R 27.

³²² *R v Romeo* [2003] EWCA Crim 2844 at 13. But it is not always necessary to warn the jury about this: *R v Parkin and Irwin* [2004] EWCA Crim 2975 at 10.

To be capable of amounting to corroboration the lie told out of court must first of all be deliberate. Secondly it must relate to a material issue. Thirdly the motive for the lie must be a realisation of guilt and a fear of the truth. The jury should in appropriate cases be reminded that people sometimes lie, for example, in an attempt to bolster up a just cause, or out of shame or out of a wish to conceal disgraceful behaviour from their family. Fourthly the statement must be clearly shown to be a lie by evidence other than that of the accomplice who is to be corroborated, that is to say by admission or by evidence from an independent witness.³²³

This applies to lies told in Court as well as out, plus lies told by others.³²⁴ It would be over-simplifying the matter to state that this direction is used every time a defendant lies: It is unnecessary if a lie is used to discredit a witness;³²⁵ It is unnecessary and may confuse a jury where there is simply a conflict of evidence;³²⁶

Verdicts

In order to convict, the standard is beyond a reasonable doubt. A jury of 12 (majority can be 10:2) is usually directed that they should be 'sure' of guilt before they convict and that nothing less will do. A jury is directed to reach a unanimous verdict. The Practice Direction (Criminal Proceedings: Consolidation),³²⁷ states the following:

Majority Verdicts

IV.46.1 It is very important that all those trying indictable offences should, so far as possible, adopt a uniform practice when complying with section 17 of the Juries Act 1974, both in directing the jury in summing-up and also in receiving the verdict or giving further directions after retirement. So far as the summing-up is concerned, it is inadvisable for the judge, and indeed for advocates, to attempt an explanation of the section for fear that the jury will be confused. Before the jury retires, however, the judge should direct the jury in some such words as the following:

"As you may know, the law permits me, in certain circumstances, to accept a verdict which is not the verdict of you all. Those circumstances have not as yet arisen, so that when you retire I must ask you to reach a verdict upon which each one of you is agreed. Should, however, the time come when it is possible for me to accept a majority verdict, I will give you a further direction."

³²³ *R v Lucas* [1981] QB 720 at 724.

³²⁴ *R v Perrera* [1982] VR 901).

³²⁵ *R v Smith* [1995] Crim LR 305.

³²⁶ *R v Barnett* [2002] EWCA Crim 454.

³²⁷ Para IV.46.1 [2002] 1 WLR.

A majority direction can be given after a minimum of two hours and ten minutes but it is not a bare majority. At least ten members of the jury must agree (this can go down to 9:1 if two jurors have been discharged during the course of a trial).

Appeal

By virtue of s2 Criminal Appeal Act 1968, the principal question for the Court of Appeal in the determination of an appeal against conviction is whether the conviction is unsafe:

Subject to the provisions of this Act, the Court of Appeal –
Shall allow an appeal against conviction if they think that the conviction is unsafe; and
Shall dismiss such an appeal in any other case.

The wrongful exclusion of admissible evidence or wrongful inclusion of inadmissible evidence will lead to the quashing of a conviction if the error means that the conviction is unsafe. That remains true even if the appellant's advocate failed to object to the admission of the evidence when it was adduced. But the fact that the advocate did not object to the evidence will be a factor in determining whether its admission was sufficiently prejudicial to render the conviction unsafe.³²⁸

The exercise of discretion has to be decided in the context of each case and on its own particular facts.³²⁹ It follows from this that the Court of Appeal will not lightly interfere with judicial exercise of the discretion. It was held that the Court of Appeal will not interfere unless the judge has failed even to consider exercise of discretion, in which case the appeal court may exercise its own discretion;³³⁰ or he has erred in principle, or there is material on which he could properly have arrived at his decision.³³¹

The Court of Appeal has often said that it will not interfere to quash a conviction on the basis of an erroneous exercise of discretion save in very limited circumstances.³³² The prospects of an appeal succeeding in relation to a matter in the judge's discretion are much improved if there has been a failure to exercise the discretion or a failure to take relevant factors into account, or the judge has taken irrelevant factors into account in the exercise of his discretion.³³³ Occasionally, the Court of Appeal has suggested a wider approach to its function of reviewing the exercise of the judge's discretion. In *McCann*,³³⁴ the Court of Appeal said that the review was not limited to cases in which a

³²⁸ *Stirland v DPP* [1944] AC 315; *Mustafa* (1977) 65 Cr App R 26.

³²⁹ See *R v Sang* [1980] AC 402.

³³⁰ See *Cook* [1959] 1 QB 340.

³³¹ *Cook* [1959] 1 QB 340 at 348, per Devlin J, approved by Viscount Dilhorne in *Selvey v DPP* [1970] AC 304 at 342, and applied in *Burke* (1985) 82 Cr App R 156.

³³² *Grondkowski* [1946] KB 369; *Selvey v DPP* [1970] AC 304; *Moghal* (1977) 65 Cr App.

³³³ *Sullivan* [1971] 1 QB 253; *Quinn* [1996] Crim LR 516.

³³⁴ (1991) 92 App R 239.

trial judge had erred in principle or where there was no material on which the decision he reached could properly have been arrived at. If necessary, the court could examine afresh the relevant facts and circumstances in order to exercise a discretion by way of review where the judge's ruling may have resulted in an injustice to the appellants.

Australia

As with other common law jurisdictions, the law of Australia allows a conviction on the testimony of a single witness. Certain classes of witnesses such as sexual assault complainants³³⁵ and children³³⁶ were, at one time, considered to be inherently unreliable. In *Bromley v The Queen*, it was noted:

The courts have had experience of the reasons why ... [children and sexual assault complainants] may give untruthful evidence wider than the experience of the general public, and the courts have a sharpened awareness of the danger of acting on the uncorroborated evidence of such witnesses.³³⁷

As a result, Australian common law required corroboration warnings to be given by trial judges to juries in respect of the evidence of an accomplice, sexual assault complainants and child witnesses. In contemporary Australia, as elsewhere, corroboration warnings about the potential unreliability of certain categories of witness have come to be regarded as discriminatory and based on prejudice, rather than empirical evidence.³³⁸ All Australian jurisdictions have now abolished some or all requirements for a mandatory corroboration warning. In Queensland, Western Australia and all other uniform evidence legislation jurisdictions, warnings are either exclusively at the trial judge's discretion or expressly prohibited in relation to all three categories of witness.³³⁹ Furthermore, all remaining jurisdictions have effectively barred the delivery of a generalised corroboration warning in relation to complainants in sexual cases³⁴⁰ and child witnesses.³⁴¹ A warning remains mandatory in the Northern Territory, South Australia and Victoria in relation to evidence given by an accomplice.³⁴²

The approach taken, in terms of legislation, has been to move from a focus on classes of witness to the reliability of categories of evidence. Section 164 Evidence Act 1995 confirms that neither corroboration nor a requirement that a trial judge warn the jury of the dangers of acting upon uncorroborated evidence is necessary. Section 165 identifies categories of evidence which are deemed to be unreliable:

³³⁵ *Kelleher v The Queen* (1974) 131 CLR 534.

³³⁶ *Hargan v The King* (1919) 27 CLR 13.

³³⁷ *Bromley v The Queen* (1989) 161 CLR 315 at 324, per Brennan J.

³³⁸ A Cossins, *Alternative Models for Prosecuting Child Sex Offences in Australia*, National Child Sexual Assault Reform Committee (2010) pp114-124.

³³⁹ S164(3) Uniform Evidence Legislation; s632(2) Criminal Code (Qld); s50 Evidence Act 1906 (WA).

³⁴⁰ S4(5)(a) Sexual Offences (Evidence and Procedure) Act 1983 (NT); s341(5) Evidence Act 1929 (SA); s61 Crimes Act 1958 (Vic).

³⁴¹ S9C Evidence Act 1939 (NT); s12A Evidence Act 1929 (SA); s23(2A) Evidence Act 1958 (Vic).

³⁴² J Gans, *Australian principles of evidence*, 2nd edn, Cavendish, 2005 p346.

- (a) evidence in relation to which Part 3.2 (hearsay evidence) or 3.4 (admissions) applies;
- (b) identification evidence;
- (c) evidence the reliability of which may be affected by age, ill health (whether physical or mental), injury or the like;
- (d) evidence given in a criminal proceeding by a witness, being a witness who might reasonably be supposed to have been criminally concerned in the events giving rise to the proceeding;
- (e) evidence given in a criminal proceeding by a witness who is a prison informer;
- (f) oral evidence of questioning by an investigating official of a defendant that is questioning recorded in writing that has not been signed, or otherwise acknowledged in writing, by the defendant;
- (g) in a proceeding against the estate of a deceased person --evidence adduced by or on behalf of a person seeking relief in the proceeding that is evidence about a matter about which the deceased person could have given evidence if he or she were alive.³⁴³

Absent from the list are complainants in sexual cases, but it includes categories corresponding to the 'accomplice' and 'child witness' classification, albeit more broadly described. The latter category includes, 'all evidence, the reliability of which may be affected by age, ill health (whether physical or mental) injury, or the like.'³⁴⁴ In a case where the section applies, judges are required:

- (a) to warn the jury that the evidence may be unreliable;
- (b) to inform the jury of matters that may cause the evidence to be unreliable; and,
- (c) to warn the jury of the need for caution in determining whether to accept the evidence, and the appropriate weight to be given to it.

The enactment does not employ the word corroboration nor oblige a trial judge to warn jurors of the dangers of convicting on the basis of uncorroborated evidence, indeed it expressly provides that 'no particular form of words' is required. Further, the requirement applies only where a party expressly requests that the judge provides the jury with a warning³⁴⁵ and a judge can decline to give it where, 'there are good reasons for not doing so.'³⁴⁶

This legislative approach might be thought to mark the end of requirements for jury warnings in relation to the absence of corroboration or judicial comment on the potential unreliability of evidence (save for the prescribed categories). However, in a series of decisions, the Australian High Court has marked out for itself a significant and continuing role in regulating potentially unreliable evidence,

³⁴³ S165 Uniform Evidence Legislation.

³⁴⁴ S165(1)(c) Uniform Evidence Legislation.

³⁴⁵ S165(2) Uniform Evidence Legislation.

³⁴⁶ S165(3) Uniform Evidence Legislation.

which is said to arise from its inherent duty to prevent miscarriages of justice. Section 165(5) of the legislation expressly reserves 'any other power of the judge to give a warning to, or to inform, the jury.' The legislation has been held by the Court not to remove obligations imposed on trial judges under the common law, to give appropriate warnings 'necessary to avoid the perceptible risk of miscarriage of justice arising from the circumstances of the case.'³⁴⁷

The Australian High Court regards warnings as to the dangers of conviction, and explanations as to the reasons for potential unreliability, as mandatory whenever there is a risk of a miscarriage of justice.³⁴⁸ Indeed, where a defendant appeals a conviction, all appeal courts are required to determine whether the defendant has 'lost a real chance of an acquittal' by reason that the jury was not warned about a matter that it otherwise may have appreciated.³⁴⁹ Such warnings must be delivered regardless of whether they are requested during the trial.³⁵⁰ This requirement has the effect that trial judges must examine all evidence; identify any evidence which falls within a category mandated by the court; and finally, assess any evidence which may support an argument that the absence of a judicial warning may give rise to a miscarriage of justice. Specifically, where a warning is required with respect to a particular item of evidence, it has been held that a trial judge shall inform the jury that it must scrutinise the evidence with great care,³⁵¹ and instruct the jury on every feature of the evidence which may affect its reliability.³⁵²

Positive-identification evidence has often proved to be unreliable. This Court has insisted that where identification evidence, direct or circumstantial, represents a significant part of the proof of guilt of an offence, trial judges must warn juries not only of the potential unreliability of that evidence but also of any particular weaknesses in the evidence, in the case being tried.

In the particular circumstances of the case it was held that 'mistakes made in admitting the worthless courthouse identification evidence and in failing to provide adequate and specific directions to the jury on the dangers of the identification evidence,' had not resulted in a miscarriage of justice. However, the case was said to:

... [stand] as a warning of the need for continuing vigilance in the reception of identification evidence at trial, the provision of proper and detailed warnings related to the evidence when such evidence is received and the attention required by appellate courts to ensure that the stringent requirements of Australian law concerning identification evidence are fully complied with.

³⁴⁷ *Longman v The Queen* (1989) 168 CLR 79 at 86.

³⁴⁸ J Gans, *Australian principles of evidence*, 2nd edn, Cavendish, 2005 p349.

³⁴⁹ *Doggett v R* (2001) 208 CLR 343 at 357.

³⁵⁰ *Doggett v R* (2001) 208 CLR 343.

³⁵¹ *Robinson v R* (1999) HCA 42.

³⁵² *Festa v R* (2001) 208 CLR 593.

Moreover, the High Court held in *Robinson v R*³⁵³ that, despite abrogation of mandatory corroboration warnings in many Australian jurisdictions, the interests of justice may necessitate reference by the judge to other sources of evidence in the trial.

... [the legislative provision] is not aimed at, and does not abrogate, the general requirement to give a warning whenever it is necessary to do so in order to avoid a risk of miscarriage of justice arising from the circumstances of the case, but is directed to the warnings required by the common law to be given in relation to certain categories of evidence.

Such reference should be made so as to adequately inform the jury about matters considered relevant in the circumstances of the particular case. Such an approach requires juries to be cautioned where the successful prosecution of a case rests upon the evidence of a single witness. Accordingly in *R v Murray* it was held that:

In all cases of serious crime it is customary for judges to stress that where there is only one witness asserting the commission of the crime, the evidence of that witness must be scrutinised with great care before a conclusion is arrived at that a verdict of guilty should be brought in; but a direction of that kind does not of itself imply that the witness' evidence is unreliable.³⁵⁴

This approach extends to sexual offences, as can be seen from *Longman v R*:

The jury should have been told that, as the evidence of the complainant could not be adequately tested after the passage of more than 20 years, it would be dangerous to convict on that evidence alone unless the jury, scrutinizing the evidence with great care, considering the circumstances relevant to its evaluation and paying heed to the warning, were satisfied of its truth and accuracy. To leave a jury without such a full appreciation of the danger was to risk a miscarriage of justice. The jury were told simply to consider the relative credibility of the complainant and the appellant without either a warning or a mention of the factors relevant to the evaluation of the evidence. That was not sufficient.³⁵⁵

Notwithstanding the absence of a formal requirement for corroboration or corroboration warnings, the Australian judiciary has assumed responsibility for ensuring that the admission of potentially unreliable evidence does not result in a miscarriage of justice. This role requires not only identifying potential unreliable evidence for the jury, but also directing them, where appropriate, to sources of evidence

³⁵³ (1999) 197 CLR 162.

³⁵⁴ *R v Murray* (1987) 30 A Crim R 315.

³⁵⁵ *Longman v R* [1989] HCA 60.

that might provide support for potentially unreliable evidence, distinguishing with precision between evidence capable of corroborating and evidence which does not amount to corroboration.

The task faced by a trial judge was discussed in *Regina v BWT*,³⁵⁶ a sexual assault case:

- (a) It needs to be borne in mind that the direction presently under consideration is but one of a multitude of directions which now fall to be considered by a trial judge faced with the task of summing up to a jury in a sexual assault case. They include:
- (b) the Murray direction (*R v Murray* (1987) 11 NSWLR 12) to the effect that where there is only one witness asserting the commission of a crime, the evidence of that witness “must be scrutinized with great care” before a conclusion is arrived at that a verdict of guilty should be brought in;
- (c) The Longman direction (as reinforced in *Crampton and Doggett*), that by reason of delay, it would be “unsafe or dangerous” to convict on the uncorroborated evidence of the complainant alone, unless the jury scrutinizing the evidence with great care, considering the circumstances relevant to its evaluation and paying heed to the warning, were satisfied of its truth and accuracy;
- (d) The Crofts direction (*Crofts v The Queen* [1996] HCA 22; (1996) 186 CLR 427), if a jury is to be informed, in accordance with s 107 of the Criminal Procedure Act, that a delay in complaint does not necessarily indicate that the allegation is false, and that there may be good reasons why a victim of sexual assault may hesitate in complaining about it, then it should also be informed that the absence of a complaint or a delay in the making of it may be taken into account in evaluating the evidence of the complainant, and in determining whether to believe him or her (but not in terms reviving the stereotyped view that complainants in sexual assault cases are unreliable or that delay is invariably a sign of the falsity of the complaint: *Crofts* at 451);
- (e) The KRM direction (*KRM v The Queen* (2001) 75 ALJR 550) to the effect that, except where the evidence relating to one count charging sexual assault is admissible, in relation to another count or counts alleging a separate occasion of such an assault, the jury must consider each count separately, and only by reference to the evidence which applies to it; balancing that direction, where appropriate, by a reminder that if the jury has a reasonable doubt concerning the credibility of the complainant's evidence on one or more counts, they can take that into account when assessing his

³⁵⁶ [2002] NSWCCA 60.

or her reliability on the other counts (see Regina v Markuleski [2001] NSWCCA 290 at paras 259-263);

- (f) Any warning which may be required by reason of a ruling that limits the use of evidence concerning a complaint, or delay in complaint, to the question of credibility (eg under s 108(3) of the Evidence Act as an exception to the credibility rule), or alternatively that allows it to be taken into account (under s 66 of the Evidence Act as an exception to the hearsay rule) as evidence of the facts asserted;
- (g) The Gipp warning (conveniently so called, although there was divided reasoning in Gipp v the Queen [1998] HCA 21; (1998) 194 CLR 106) concerning the way in which evidence of uncharged sexual conduct between an accused and a complainant can be taken into account as showing the nature of the relationship between them, but not so as to substitute satisfaction of the occurrence of such conduct for proof of the act charged;
- (f) Any warning that may be necessary in relation to the use of coincidence evidence (under s 98 Evidence Act) where the accused is charged in the one indictment with sexual assault against two or more complainants, requiring the jury to be satisfied beyond reasonable doubt first of the offences alleged in respect of one complainant, and then of the existence of such a substantial and relevant similarity between the two sets of acts as to exclude any acceptable explanation other than that the accused committed the offences against both complainants;
- (h) A BRS direction (BRS v The Queen [1997] HCA 47; (1997) 191 CLR 275) that where evidence revealing criminal or reprehensible propensity is admitted, but its use is limited to non propensity or tendency purposes, for example those considered proper in that case, then it is to be used only for those purposes and not as proof of the accused's guilt.

The court further remarked, with some understatement, that 'in combination with the other standard directions customarily given in a criminal trial ... the trial judge is faced with a somewhat formidable task in sufficiently directing a jury in this category of case.'

Despite legislative change, and never having had a general requirement for corroboration, Australian juries will often be directed in some detail as to evidence which is said to be corroborative and potentially supportive of otherwise unreliable evidence. It could be argued with some force that the net result of the reforms has been the replacement of one set of complex legal rules with another. In the absence of formal rules, judicial intervention in the jury's traditional role of assessment of evidence has continued, necessitated by the obligation to guard against potential miscarriages of justice.

Canada

The evidence of a single witness is sufficient to support a conviction for any offence under Canadian law, other than treason, perjury or procuring a feigned marriage.³⁵⁷ In keeping with its common law heritage, until the early 1980s, Canadian law required mandatory warnings to be given to juries in relation to certain categories of witnesses not to rely on the witness unless they found corroboration for the evidence or were sure that it might safely be relied upon.³⁵⁸

In *Vetrovec v R*,³⁵⁹ the Supreme Court of Canada asserted its power to depart from its previous decisions and abolished all rules concerning the warning against relying on the uncorroborated evidence of accomplices. This 'bold step of judicial reform,'³⁶⁰ had in due course, the effect of eliminating many other common law rules of corroboration. Delivering the judgment of the court, Dickson J addressed what was said to be the inadequacy of the common law rules on corroboration. Broadly speaking, the current practice of jury warnings was said to confuse the jury or was rejected by them as contrary to common sense. It was further contended that the Canadian law on corroboration did not serve as a safeguard against wrongful conviction. The inherent difficulty of developing more satisfactory corroboration rules required a more flexible, discretionary-based approach:

There is nothing inherent in the evidence of an accomplice which automatically renders it untrustworthy. To construct a universal rule singling out accomplices then, is to fasten upon this branch of the law of evidence a blind and empty formalism. Rather than attempting to pigeon-hole a witness into a category and then recite a ritualistic incantation, the trial judge might better direct his mind to the facts of the case, and thoroughly examine all the factors which might impair the worth of a particular witness. If, in his judgment, the credit of the witness is such that the jury should be cautioned, then he may instruct accordingly. If, on the other hand, he believes the witness to be trustworthy, then, regardless of whether the witness is technically an 'accomplice' no warning is necessary.³⁶¹

Vetrovec came to be understood as having more general application. No particular category of witness required a warning. Where a caution was found to be necessary or appropriate, it need not be framed in technical or formulaic language. Nor must the judge include in the caution any legal definition of 'corroboration' in explaining to the jury the type of evidence that is capable of supporting the testimony of the tainted witness. In cases where a witness's testimony might be suspect, common sense might

³⁵⁷ Statutory exceptions under ss47(2), 123 and 325(1) Criminal Code, RSC, c C-34.

³⁵⁸ Exceptional cases requiring corroboration viz, child witnesses and complainants in sexual assaults were also repealed.

³⁵⁹ (1982) 1 SCR 811.

³⁶⁰ A Zuckerman, 'Corroboration: judicial reform in Canada' (1984) 4(1) *Oxford Journal of Legal Studies* 147, p147.

³⁶¹ (1982) 1 SCR 811 at 823.

require 'something in the nature of confirmatory evidence.' In some circumstances it would be sufficient for the trial judge to give 'a clear and sharp warning to attract the attention of the jurors to the risks of adopting, without more, the evidence of such witness.' In other circumstances, the trial judge ought to do more in terms of assisting the jury in deciding the reliance to be placed upon crucial witnesses. Fundamentally, the court emphasised that this 'general advice' was not to be taken as either, confined to accomplice witnesses, or as imposing a new and special burden on trial judges. Rather it represented a back-to-basics approach, merely setting out what was already considered to be the judge's task: to sum up the available evidence in a manner both fair and helpful. Formal rules were to be avoided in the search for common sense.

In *R v G (B)*³⁶² it was put thus, '... this Court has clearly rejected an ultra technical approach to corroboration and has returned to a common sense approach which reflects the original rationale for the rule and allows cases to be determined on their merits.'³⁶³ Yet in the years that followed, what was required in the application of common sense came to be given more content. In *R v Sauvé* four characteristics of a 'proper *Vetrovec* warning' were observed:

- (a) The evidence of certain witnesses is identified as requiring special scrutiny;
- (b) The characteristics of the witness that bring his or her evidence into serious question are identified;
- (c) The jury is cautioned that, although entitled to convict on the unconfirmed evidence of such a witness, it is dangerous to do so; and,
- (d) The jury is cautioned to look for other independent evidence which tends to confirm material parts of the evidence of the witness subject to the warning.³⁶⁴

The subsequent case of *R v Chenier*³⁶⁵ affirmed that 'confirmatory evidence' should be evidence considered independent and reliable. Whilst such evidence does not need to confirm every aspect of the case it should rather corroborate significant parts of the evidence.³⁶⁶ The Supreme Court of Canada took the opportunity in *R v Khela* to approve the four elements of a *Vetrovec* warning. It emphasised that the decision in *Vetrovec* had been intended to remove corroboration warnings of their archaic and technical content but did not 'deprive an accused of the protection that the warning has historically been meant to provide.' The dual purpose of the warning was said to be, 'first, to alert the jury to the danger of relying on the unsupported evidence of unsavoury witnesses and to explain the reasons for special scrutiny of their testimony; and second, in appropriate cases, to give the jury the tools necessary to identify evidence capable of enhancing the trustworthiness of those witnesses.'³⁶⁷

³⁶² [1990] 2 SCR 3.

³⁶³ [1990] 2 SCR 3 at 24, per Wilson J.

³⁶⁴ *R v Sauvé* (2004) 182 CCC (3d) 321.

³⁶⁵ [2006] OJ No 489 (Ont CA).

³⁶⁶ *R v Kehler* (2000) ABCA 104.

³⁶⁷ [2009] SCR 4 para 47.

The decision in *Khela* was concerned with the adequacy of the fourth element of the warning, whether the jury had been given sufficient guidance on the kind of evidence that is capable of confirming the suspect testimony of an impugned witness. Common sense, on this occasion, was said to dictate that not all evidence presented at trial was capable of confirming the testimony of an impugned witness. What was required was that the items of confirmatory evidence should give comfort to the jury that the witness can be trusted in his or her assertion that the accused is the person who committed the offence. Materiality and independence from the *Vetrovec* witness were important. Most tellingly it was noted that:

... the absence or presence of confirmatory evidence plays a key role in determining whether it is safe to rely on the testimony of an impugned witness. Accordingly, the instruction to the jury must make clear the type of evidence capable of offering support. It is not sufficient to simply tell the jury to look for whatever it feels confirms the truth of a witness. It is not “overly formalistic” to ensure that triers of fact attain the appropriate level of comfort before convicting an accused on the basis of what has for centuries been considered unreliable evidence.³⁶⁸

³⁶⁸ [2009] SCR 4 paras 46-47.