The Carloway Review on Criminal Procedure

Written Response of JUSTICE

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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 Scottish Advisory Group.

2. The implications of the Criminal Procedure (Legal Assistance, Detention and Appeals) (Scotland) Act 2010[1] are yet to be fully felt. The Scottish Government has however set up a review entitled 'Access to Legal Advice in Police Detention: Consequences for Law and Practice', in light of the changes brought in by the Act, chaired by Lord Carloway (the Review). In accordance with the terms of reference given to Lord Carloway, the Consultation Document is very extensive, and over 34 questions, considers whether changes are needed to the use of custody, evidence and appeals. A continuing theme throughout our response will be that 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 Consultation Document with a proper degree of scrutiny and we hope that the Review recognises this with respect to those areas of concern. We also hope that the Review will recommend righting the wrongs that were placed on the statute book following the 2010 Act.

Questions and Answers

THE SUSPECT

1. Should the terms of article 5 be incorporated into Scots law to provide the sole grounds for taking a person into custody?

3. Article 5(1)(c) of the European Convention on Human Rights (ECHR) provides:

[1] Hereafter referred to as the 2010 Act.

> (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…

4. Section 14 of the Criminal Procedure (Scotland) Act 1995 (the 1995 Act) provides that a reasonable suspicion is required before a person can be detained and common law gives effect to the second limb as to prevention of the committal of an offence or fleeing from the scene of a crime. Section 14(1) goes on to specify that the detention will be for the purpose of facilitating the carrying out of an investigation. The European Court of Human Rights (ECtHR) has found article 6 to apply to pre-trial investigation.[2] In *Murray v UK* (1994) 19 EHRR 193 it further expressly interpreted article 5(1)(c) to allow police enquiries, including interrogation to be carried out during police detention, so long as they do not infringe the safeguards contained in the Convention (para 55 in particular). 'The competent legal authority' specified in article 5(1) can therefore be considered to include the custody sergeant at the police station.

5. However, article 5(3) provides:

> (3) Everyone arrested or detained in accordance with the provisions of paragraph 1 (c) of this Article shall be brought promptly before a judge or other officer authorised by law to exercise judicial power and shall be entitled to trial within a reasonable time or to release pending trial. Release may be conditioned by guarantees to appear for trial.

Section 14(2) explains that detention can last no longer than twelve hours, subject to the extension under s14A to 24 hours, or if earlier, after arrest, detention under another enactment or when the grounds for detention no longer exist. The 1995 Act does not give effect to the need for promptness that is required by article 5(3). Particularly given the extension of time from six hours provided by the 2010 Act, in our view, the 1995 Act ought to provide the requirement that detention should last for the shortest possible period.

[2] *Imbrioscia v Switzerland* (1994) 17 E.H.R.R. 441.

2. Should the law recognise the suspect as having a distinct legal status with statutorily defined rights?

6. A suspect in police detention has rights under articles 3, 5 and 6 ECHR, as to treatment, length of detention and assistance in the preparation of their defence. The European Committee for the Prevention of Torture attaches particular importance to three rights for persons detained by the police: the right of the person concerned to have the fact of his detention notified to a third party of his choice (family member, friend, consulate), the right of access to a lawyer, and the right to request a medical examination by a doctor of his choice (in addition to any medical examination carried out by a doctor called by the police authorities).[3]

7. The ECHR does not declare a right to be informed about rights that are held by suspects. However, the ECtHR has indicated in a number of cases that suspects must be informed of their rights. In *Panovitz v Cyprus* the Court held that effective exercise of the rights of the defence imports a positive obligation upon the prosecuting authorities to furnish a suspect with the necessary information to enable them to access legal representation and to actively ensure that a suspect understands he can access a lawyer, free of charge if necessary. [4]

8. Articles 5(2) and 6(3)(a) ECHR provide obligations upon the authorities to inform suspects of the nature and cause of the accusation against them. The ECtHR has held that the rationale behind these articles is to ensure that the suspect fully understands the allegations in order to prepare their defence[5] or to challenge their detention.[6]

9. The rights of a suspect should be clearly set out in legislation so that police officers who are in control of those rights understand the importance of respecting them. Whilst the right to consultation with a solicitor is set out in s15A, this does not explain clearly that there is a right to representation in police interview. There is also no explanation as to whether that legal advice will be free or to what extent payment

[3] See CPT Standards, CPT/Inf/E (2002) 1 - Rev. 2010, para 36 and Chapter 1 for details of these rights, available here: http://www.cpt.coe.int/en/documents/eng-standards.pdf

[4] *Panovits v Cyprus*, App. no. 4268/04 (judgment 11th December 2008) (ECtHR), para 72 applying *Padalov v Bulgaria,* App. no. 5478/00 (judgment 10th August 2006) (ECtHR), and *Talac Tunc v Turkey,* App. no. 32432/96 (judgment 27th March 2007) (ECtHR)

[5] *Mattoccia v Italy,* App. no. 23969/94 (judgment 25th July 2000) (ECtHR), para 60

[6] *Fox, Campbell and Hartley v UK*, App. nos. 12244/86; 12245/86; 12383/86 (judgment 30th August 1990) (ECtHR); (1991) 13 EHRR, para 40

must be made. Nor are the practical consequences of article 3 specified – as to treatment during detention.

10. The main rights should be set out in legislation to provide enforceable rights, which if breached will have an impact upon the evidence that can be used at trial, or on the discipline of the police officers who failed to safeguard the rights. Guidance as to how the rights should be safeguarded should follow the statutory provisions to ensure the police have as much assistance as possible in understanding how they should exercise their duties. Code C of the Codes of Practice to the Police and Criminal Evidence Act 1984 in England and Wales provides a useful example of how such guidance might be drafted.

11. The European Union is currently considering a proposal for a directive on the right to information in criminal proceedings which will be agreed in the autumn.[7] The directive proposes a letter of rights that should be made available to suspects in the police station as well as being informed orally of what their rights are. The model letter set out in the Annex is indicative and contains these rights:

- To know why you have been arrested
- The assistance of a lawyer
- To an interpreter and translation of documents, if you do not understand the language
- To know how long you can be detained

It is expected that the final directive will also include the right to remain silent.

12. Each right is then set out in further detail but in simple, easy to follow language. It follows the format of the Notice of Rights and Entitlements issued in England and Wales by the Home Office and Law Society,[8] which contains the further rights: to have someone told that you are at the police station; how you should be cared for; people who need help. The Notice is helpful for both the police and the detained person because it sets out the ground rules about what the police can and can't do. It

[7] COM(2010) 392 final (Brussels, 20 July 2010):
http://ec.europa.eu/governance/impact/ia_carried_out/docs/ia_2010/com_2010_0392_en.pdf
The proposal forms Measure B in the Roadmap on procedural safeguards in criminal proceedings adopted December 2009: Resolution of the Council of 30 November 2009 on a Roadmap for strengthening procedural rights of suspected or accused persons in criminal proceedings, OJ C 295, 4.12.2009, p. 1. The proposal for Measure C, a directive on the right to legal assistance and notification of detention is expected on the 7th June 2011.

[8] Available here:
http://webarchive.nationalarchives.gov.uk/20100413151426/http://police.homeoffice.gov.uk/operational-policing/powers-pace-codes/rights-entitlements-foreign-lang.html

also sets out the limits of the rights, for example that breath or blood tests cannot be refused on the ground that a solicitor has not yet given advice. JUSTICE has written a briefing on the proposed directive and been heavily involved in advising on the appropriate content both for the UK in Council and the EU Parliament.[9] In our view, the notification of rights in writing provides a crucial safeguard. The police station is a daunting and confusing place for people who are taken there. Often, being told rights by the custody sergeant will be insufficient to ensure that the suspect understands. Particularly with the new legislation providing the new right to legal advice and the possibility of extended detention times, it is in our view crucial that the suspect is given notification in writing of their rights whilst in detention.

RIGHTS RELATING TO CUSTODY AND QUESTIONING

3. When should a suspect's right to legal assistance arise?

13. In JUSTICE's view the right arises upon the point when a suspect is taken into police custody, which is crystallised by the reading of the caution to the suspect. Practically however, the possibility of obtaining legal advice will not arise until the suspect arrives at the police station. Once they have been booked in by the custody sergeant, subject to fitness, the suspect should immediately be offered the option of legal assistance. Until this point the best way of ensuring the right to legal assistance is not jeopardised is for the police to refrain from asking any questions which go to the nature of the offence and may illicit an answer which would be used to further a prosecution.

14. *Salduz v Turkey* (2009) 49 EHRR 19 (GC) makes clear that the right arises *at least* as early as from the first interrogation of the suspect.[10] In *Fatma Tunç v. Turkey (No. 2)* [2009] ECHR, application no. 18532/05 (13 October 2009) there was found to be a violation of the *Salduz* principle in a situation where the applicant's lawyer was able to see her for a period of some five minutes before a statement was taken from her by the police. At paragraph 14 the Court referred to its reasoning in *Salduz* and concluded that although the applicant had met her lawyer during police custody, this meeting could not be considered sufficient by Convention standards. The UK Supreme Court did not hear oral argument on the point this question raises during the hearing in *Cadder v HM Advocate* [UKSC] 43, for the reasons given by Lord Hope in his judgment:

[9] Our briefing is available here: http://www.justice.org.uk/resources.php/171/eu-commission-proposal-for-a-directive-on-the-right-to-information-in-criminal-proceedings

[10] At para 55.

> The narrow base – the need to protect the right against self-incrimination – from which the Grand Chamber in Salduz derives this right of access to a lawyer explains why, in its view, access is to be provided from the first interrogation of the suspect, rather than from the time when he is taken into police custody. As his concurring opinion shows, 49 EHRR 421, 441, para OI1, like Judge Zagrebelsky, the President, Judge Bratza, would have preferred to go further and to affirm that, as a rule, a suspect should be granted access to legal advice from the moment he is taken into police custody or pre-trial detention. A right to legal advice from that earlier stage could not, of course, be derived from the implied right against self incrimination, but would have to be derived from the need for legal assistance for other purposes – for example, to support the accused in distress, to check his conditions of detention etc. See p 446, para O-III5. It is unnecessary to express any view on the merits of that argument since the point does not arise in this case. But, as I see it, if a suspect had the right to access to legal assistance from the time of his detention, as envisaged by Judge Bratza, it would mean that he could not be refused such assistance if it were available. But the State would not be under a positive obligation to ensure the availability of legal assistance in all circumstances. So there would be no violation of the right simply because, due, say, to the time of night or the remoteness of the police station, no legal assistance was actually available when the suspect was detained. Cf Brennan v United Kingdom (2001) 34 EHRR 507, 521, para 47. I would read Judge Bratza's opinion in that sense.[11]

This obiter view certainly accords with the CPT position that there are other purposes for having legal advice than for representation for the purposes of an interview.

15. In England, the right arises following the decision of the custody officer at the police station to detain the suspect.[12] However, once a decision to arrest a person has been taken, he must only be interviewed at a police station or other authorised place of detention[13] and where he has requested legal advice, he must not be interviewed until that consultation has taken place.[14] An interview is widely defined by Code C para 11.1A: the questioning of a person regarding their involvement or suspected involvement in a criminal offence or offences which under para 10.1 must be carried out under caution.' Under para 10.1 where there are grounds to suspect an offence has been committed the suspect must be cautioned before any questions, or further

[11] Para 70

[12] *Kerawalla* [1991] Crim LR 451

[13] Code C, para 11.1

[14] Code C, para 6.6, subject to the narrow exceptions provided therein.

questions can be asked.[15] As such, questioning a person about an offence, even if he has not been arrested or no decision to arrest has been made, will amount to an interview. Given the ruling in *Salduz*, it may be that the English rules have to make clearer the correlation between the need for legal advice before questioning is undertaken. Scotland has the opportunity to ensure that the right arises as soon as is both possible and practicable.

16. In our view, the need for legal advice cannot however be circumvented by refraining from conducting interviews at all. Firstly, the CPT has repeatedly stressed that, in its experience, the period immediately following deprivation of liberty is when the risk of intimidation and physical ill-treatment is greatest. Consequently, the possibility for persons taken into police custody to have access to a lawyer during that period is a fundamental safeguard against ill-treatment. The existence of that possibility will have a dissuasive effect upon those minded to ill treat detained persons; further, a lawyer is well placed to take appropriate action if ill-treatment actually occurs.[16] The ill-treatment referred to does not have to be actual abuse of detained persons, it could be neglect, or failure to observe injury or illness as a result of drink or drugs intake; It could be unnecessary length of detention or failure to appoint an appropriate adult where necessary; It could be an improper use of the power to delay access to a lawyer.

17. Secondly, the interview process fulfils an important purpose. Not only does it provide a basis upon which the procurator fiscal can decide whether the reasonable suspicion the police held on detention is sufficient to charge through the exploration of the circumstances with the suspect, it also serves an important check upon the exercise of police powers. The interview provides a formal opportunity to the suspect to record any complaints or concerns they may have about the nature of their detention. It also provides an opportunity, should they wish to do so, to record their defence or guilt at the outset. This is important to enable the Crown to decide whether to proceed and for the defence advocate to present mitigation at the sentencing stage. Its value should not therefore be underestimated.

[15] The exceptions are solely to establish ownership of a vehicle or identity, to obtain information in accordance with a statutory requirement, in furtherance of the proper and effective conduct of a search – although if questioning goes further, e.g. upon finding drugs to establish whether there was an intent to supply, a caution is necessary, *Langiert* [1991] Crim LR 777; *Khan* [1993] Crim LR 54; *Raphaie* [1996] Crim LR.

[16] CPT Standards, para 41.

4. Should there be a statutory provision for the waiver of rights?

18. Yes, a statutory provision should set out the need to ensure that any waiver is fully informed. In *Pishchalnikov v Russia* [2009] ECHR 7025/04 (First Section, 24 September 2009) 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 conduct would be (at 77). 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 (at 78).

19. 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.

PUTTING RIGHTS INTO EFFECT

4. What forms of legal advice are sufficient?

20. Legal advice should be given in person unless the offence is very minor. Telephone or video advice is no substitute for having a lawyer present in the police station, for the reasons set out by the CPT above. Unless the offence is minor, it is unlikely that a lawyer will be able to offer effective advice because they will not have seen any details of the offence from the police. Whilst initial advice can be offered on the telephone, this should almost always be followed up by attendance in person, to ensure that the conditions and length of detention are acceptable, that advice can be given upon sufficient provision of information from the investigating officer and that the interview is conducted correctly.

21. Equally, in our view, so far as possible, the telephone advice should be given by the lawyer who attends the police station, to ensure consistency for the suspect in terms of advice and confidence. To this end we do not consider the proposed duty plan that has been presented by SLAB to adequately protect the right to legal advice. Whilst the aims of the plan are laudible, and will provide a substantial improvement in many respects, particularly in respect of qualifications of solicitors and ensuring all solicitors

sign up to the scheme for legal aid work, we are concerned that the proposed in house lawyers who will offer telephone advice (a) are not sufficiently independent from the funding provider (and therefore may indirectly be deterred from advising attendance of a lawyer at the police station due to either the costs or the lack of connection with the profession), (b) are not sufficiently identified with respect to their expertise, (c) will not be attending the police station to continue the conduct of the case and (d) if they are only to be employed in this capacity will not continue in their professional development adequately to ensure that they continue to give the best advice to suspects in the police station. Since the duty plan will require lawyers to be contacted where attendance is requested, we consider that the best advice would be given by directing calls to the lawyers on the duty plan rather than employing lawyers particularly for this role. We hope that the Memorandum of Understanding to be developed with the Law Society will explore this. We also consider that a training scheme ought to be provided for solicitors about this stage of representation to ensure that the best possible advice can be given. Furthermore, we understand from the Law Society of Scotland that low remuneration continues to keep solicitors from attending at police stations. Adequate remuneration must be provided to ensure that the right to legal advice is practical and effective.

6. In what circumstances, if any, should a suspect be entitled to a solicitor of choice?

22. The suspect should always be entitled to their solicitor of choice from the outset. When that solicitor is not available, however, the suspect should be given the option to have the duty solicitor, as this would be better that not having advice at all. If the solicitor of choice can attend but with a delay, the police should canvass how long a wait would be expected and see if the suspect wishes to wait that long or would prefer to see the duty solicitor.

7. What obligations, if any, should there be on the police in relation to the disclosure of information prior to questioning?

23. Article 6(3)(b) provides that the suspect must be afforded adequate time and facilities for the preparation of his defence. The ECtHR has confirmed that 'adequate facilities' encompass the opportunity to review the results of investigations carried out during the proceedings.[17] Established case law affirms that it is a fundamental aspect of a fair trial that proceedings be adversarial with equality of arms between the prosecution and defence. The right to an adversarial trial means, in a criminal case,

[17] See *C.G.P. v Netherlands*, App. no. 29835/96 (judgment 15th January 1997) (ECtHR), and *Galstyan v Armenia*, App. no. 26986/03 (judgment 15th November 2007) (ECtHR), para 84.

that both prosecution and defence must be given the opportunity to have knowledge of and comment on the observations filed and the evidence adduced by the other party.[18] To accord with these principles, all material evidence in favour or against the suspect must be disclosed.[19] However, there may be circumstances where on national security or public interest immunity or investigatory grounds, it is legitimate for evidence to be withheld. These grounds must be weighed against the interests of the defendant and only be used where strictly necessary.[20] The ECtHR further held in *Edwards* that the opportunity must be available for this refusal to be considered by the national court, which must then decide whether the proceedings as a whole are rendered unfair without the material. It stands to reason that a failure to disclose to the defence material evidence could prevent the accused being able to exonerate himself or have his sentence reduced.[21]

24. The obligation to comply with article 6 ECHR applies pre-trial as well as during trial, though the case will obviously not be fully developed at that stage. In order for the suspect to answer questions, they must know the nature of the case against them. Unless sufficient information which goes further than the charge is provided, suspects are likely to be advised to remain silent during interview, notwithstanding their right to do so, because solicitors will not have enough information upon which to advise them effectively. Once information is known about the circumstances of the suspected offence, the suspect will be in a better position to know how to answer the allegations, be it with a substantive defence, or in accepting the charge at the earliest opportunity.

25. The ACPOS Manual of Guidance on Solicitor Access[22] at section 14 considers pre-interview briefings with solicitors. The section sets out the above issue but places greater weight on the fact that there is no duty to disclose. It would be helpful for the police to hold greater obligation towards providing a narrative that goes further than simply the nature of the charge. The example information provided in that guidance at paras 14.9 and 14.10 could not be seen to place any harm on the conduct of police enquiries by being disclosed.

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[18] *Natunen v Finland,* App. no. 21022/04 (judgment 31st March 2009) (ECtHR); (2009) 49 EHRR 810, para 39, citing *Rowe and Davis v UK,* App. no. 28901/95 (judgment 16th February 2000) (ECtHR); (2000) 30 EHRR 1 and cases therein.

[19] *Edwards v UK,* App. no. 13071/87 (judgment 16th December 1992) (ECtHR); (1993) 15 EHRR 417

[20] *Natunen*, para 40

[21] *Natunen,* para 43

[22] Version 1.0, 2011, available at: http://www.acpos.police.uk/Documents/Policies/CJ_ACPOSManualofGuidanceOnSolicitorAccessv1.0.pdf

POLICE QUESTIONING

8. Are the parameters of legitimate police questioning clear?

26. Section 14(7)(a) of the 1995 Act allows police officers to put questions to suspects in relation to the suspected offence. Whilst the Consultation Document sets out the case law surrounding police questioning, the statutory provision could be seen as not providing sufficient accuracy of the purpose of asking questions. 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.[23] 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.

27. 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.

28. In our view, statutory provisions or a code of practice would provide helpful parameters to the police and defence lawyers as to the remit of their powers.

9. When must questioning stop?

29. There is already provision to question suspects after charge in certain limited circumstances in England and Wales and in the UK with respect to terrorism offences

[23] *Supra*, para 55.

(See Counter Terrorism Act 2008). 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.

30. Although we believe there is a principled case for these grounds for post-charge questioning, it is important to bear in mind that there is a general prohibition on questioning suspects after charge.

31. First, the key reason for prohibiting post-charge questioning by police has been 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. Unrestricted police questioning of a detained suspect for weeks or months on end is likely to be oppressive in any event, no matter how mild the treatment of the detainee is in other respects.

32. 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 right against self-incrimination.[24] 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:[25]

> 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.

33. The second main 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 the court that is responsible for

[24] 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.

[25] (2006) 42 EHRR 31 at para 38.

ensuring the suspect's rights are respected. As Professor Clive Walker explained to the Joint Committee on Human Rights:[26]

> [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.

34. 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 Rights has recommended that any provision for broader post-charge questioning should include the following safeguards:[27]

- 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 which 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.

35. 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. 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.[28] 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.

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[26] 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.

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

[28] Memorandum from Professor Clive Walker, n 26 above, paras 13-17.

36. In any event, we question the value of post-charge questioning given the limited utility the police have themselves appeared to attach to it.[29]

CHILD AND VULNERABLE SUSPECTS

10. What age should define the child suspect? Should any distinction be drawn between older and younger children?

37. Much comparative research is available on how to provide for children in the criminal justice system, which there is insufficient time to set out here, but should be considered before any conclusions are drawn.[30] JUSTICE recently concluded a study with the Police Foundation on alternative criminal proceedings for children and young people.[31] In it we review 16 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.

38. Article 1 of the UN Convention on the Rights of The Child 1989 defines a child as any person under the age of 18 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 18 years,[32] yet the 1995 Act states that a child is someone under the age of 16 years for the purpose of a decision to

[29] 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'.

[30] 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/fe80128045225193 89f2a9e6d4b02f11/VLRC_SupportingYoungpPeopleinPoliceInterviews_BackgroundPaper.pdf

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

[32] Section 15.

prosecute[33] and to be permitted access to their parent or guardian.[34] For certain offences, a child is defined as a person under the age of 17 years.[35]

39. 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, now governed by chapter 3 of Part II of the Children Act. The Sheriff's court can refer 16 and 17 year olds to the Hearing, but they must first proceed through the court system.

40. 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.[36] 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.[37]

41. Notwithstanding the raising of the age by 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.[38] 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

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[33] Section 42

[34] Section 15(4) and (7)

[35] Section 46(3) and (7)

[36] 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).

[37] *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

[38] 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.

American Medical Association et al.[39] which explained that 'perspective and temperance' are underdeveloped in children until late adolescence.[40] 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.

42. In our view 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.

11. Are current safeguards sufficient to protect the Convention rights of the child suspect? If not, what other provision should be made for the protection of child suspects?

43. In our view no child should be treated as a 'suspect', but rather should be diverted from the traditional criminal justice system. The European Court of Human Rights highlighted the problem of treating children as criminal in *T v UK; V v UK* 30 EHRR 121.[41] We set out in *Time for a New Hearing* the international human rights standards which should apply to children.[42]

44. Whilst children between the ages of 8 to 15 are 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 12 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 12 and 18, detention ought only to be as a last resort and for the shortest period possible.[43] ACPOS Guidance[44] 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

[39] Brief is available at: http://www.ama-assn.org/resources/doc/legal-issues/roper-v-simmons.pdf

[40] Id p 7.

[41] 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.*

[42] At page 30.

[43] Article 37 UNCRC

[44] ACPOS Custody Manual of Guidance (2010), part 14.

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 station at all, it is concerning that detention in a *police cell* is considered acceptable in any circumstances.

45. 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 appropriate adult to be given access instead. There is no provision to allow appropriate adults to accompany children into police interviews. In our view it is imperative that children are accompanied by an appropriate adult as soon as possible during their detention period, both whilst waiting to be processed, and during interview. Equally, the appropriate adult should always be present when the child is asked whether they require legal assistance in order to ensure that they understand the nature of the request.[45]

12. How should the question of waiver be approached in respect of children?

46. JUSTICE considers that great caution must be exercised with regard to any waiver, see the case of *Pishchalnikov* above. Any exercise of waiver must be done with the assistance of an appropriate adult and the police officer must make sure that the right to legal assistance is fully understood by the child before a waiver is accepted.[46]

47. Rogers et. al. observed in US research that in order to gain a genuine understanding of warnings, juveniles 'must be able to integrate the whole message and apply its meaning to their own case.'[47] Their research revealed that numerous variations of written warnings exist throughout the 50 states, federal, state and county jurisdictions. They also examined the content of Miranda warnings for juveniles from 109 counties in 29 states. Word length ranged from 52 to 526 (64 to 1020 with a right to waive component included) and a reading grade-level requirement from elementary school

[45] Research reviewing the uptake of advice in England and Wales has found there is a drop in rate at which police station detainees request advice between the ages of 16 and 17, which ties in with the end of the requirement that the police inform an appropriate adult and ask them to attend the police station: Pleasance, Kemp and Balmer, *The Justice Lottery? Police station advice 25 years on from PACE*, [2011] Crim LR, Issue 1, pp 3- 18.

[46] Ibid, and see Table 1 on rate of advice by age generally.

[47] Rogers, Hazelwood, Sewell, Harrison, & Shuman,*The Language of Miranda Warnings in American Jurisdictions: A replication and vocabulary analysis,* 32 Law and Human Behaviour (2008), pp 124-136.

to post college, depending on the composition of each individual Miranda component.[48] There were significant contrasts between jurisdictions.

48. The ACPOS guidance on solicitor access identifies the need to exercise caution and requires the assistance of a responsible adult.[49] It does not however provide a model form of words specifically for notifying a child of their right to representation, which in our view should be included, or at least a further duty upon the officer to ensure that children understand their rights. The option of waiver ought to remain available provided the appropriate adult is satisfied that the right has been properly explored with the child and adult. One way of proceeding might be to adopt the US approach of having various pro forma statements of rights of children appropriate to age. These could be adopted in consultation with experts on child psychology. At the very least, a notice or letter of rights should be available, in simple and clear language to aid the understanding of children.

13. How should the vulnerable adult suspect be defined?

49. In *Stanford v UK,* application no. 16757/90 (ECtHR), judgment delivered 23rd February 1994, the Court held that the right of an accused to effective participation in his or her trial includes not only the right to be present, but also to hear and follow the proceedings. The UN Convention on the Rights of Persons with Disabilities has been ratified by the UK and provides a definition of disability. Section 6 of the Equality Act 2010 also applies in relation to disability. These disabilities extend to hearing, speech and sight impairments as well as physical and mental impairment.

50. Furthermore, foreign nationals who cannot speak the local language are particularly vulnerable by way of unfamiliarity and inability to understand procedure at the police station. The EU adopted a directive on the right to interpretation and translation in October last year,[50] which requires the availability of an interpreter without delay, and translation of essential written documents, including any decision depriving a person of his liberty, any charge or indictment, and any judgment. The directive extends to hearing and speech impaired persons. It must be implemented by 27 October 2013. Equally, the EU letter of rights, once the directive on the right to information is adopted will have to be available in multiple languages, brail and as an audio file.

[48] Ibid, p 63.

[49] Section 16.

[50] Directive 2010/64/EU of the European Parliament and of the Council of 20 October 2010 on the right to interpretation and translation in criminal proceedings, OJ L 280, 26.10.2010, p. 1–7

51. Children have been considered above, but elderly suspects should also be recognised, as an independent category, who may display a number of disabilities through age. Women can be a vulnerable group, by separation from their children, or if pregnant, as well as having particular hygiene needs.

52. The nature of the suspected offence may have an impact on the vulnerability of the detained person, e.g. following a multiple public disorder incident or road traffic accident. Finally, people who are under the influence of drink or drugs are also vulnerable, even though their incapacity may be self induced.

53. All of these groups require some form of special treatment, either through an appropriate adult, an interpreter, medical assistance or an aid particular to their impairment. The police must be able to accommodate all of these needs. Code C of the PACE Codes provides guidance throughout in relation to vulnerable persons and their treatment, in particular at paragraph 3.

54. ACPOS provides extensive guidance to custody suites on identifying vulnerabilities, particularly in relation to physical and mental impairments.[51] 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. Equally, a statutory definition identifying all types of vulnerability is necessary in addition to s271 of the 1995 Act which is very limited and does not cover suspects in police detention.

KEY STAGES OF CUSTODY

15. Should the concepts of detention and arrest continue or should a system of arrest on reasonable suspicion replace them?

55. In JUSTICE's view the system of detention does not need to be altered. It was created by the Thomson Committee following a review of the practice then in place whereby it was found necessary to have a formal period of detention during which the police must treat a person as a suspect and carry out their investigations, including interview. The period of time in which detention takes place was also specifically set out to ensure that the police did not extend detention unduly. Detention is clearly understood to allow the Police to detain in custody upon suspicion for a fixed period of time within which further enquiries can be made, further information obtained from witnesses, evidence tested and where appropriate a detained person can be

[51] ACPOS Custody Manual of Guidance (2010)

interviewed. Arrest is equally clearly understood to be the point at which that suspicion is, or should be, formulated into a charge, sufficient grounds having been established and at that point the Police are authorised and enabled to move to the next stage of the process by either releasing the arrested person for report or for undertaking, or keeping them in custody to appear before the Court on the next lawful day. We understand that detention is seen by the Police as being a fundamental tool in the investigation of crime and we can accept that.

56. It is in the interests of both suspects and the police to have a precise framework within which to work. At the end of a detention period a detained person would be entitled to be released if it was established that any suspicion upon which detention was based was not well founded or no longer existed. We are concerned that proceeding straight to arrest might result in suspects being in custody more often and for longer than is necessary or reasonable. Suspects understand the difference between detention on the one hand and arrest and charge on the other, and we are of the opinion that the two concepts are important in Scots Law. In our view the question is one of semantics. However, there are important safeguards in the detention stage and were one period of arrest deemed appropriate, it would be imperative that the powers of police during that period and the time a suspect could spend in police custody remained the same.

16. Does the police charge serve any useful practical function?

57. Yes. The charge in common law systems is the formal notification to the suspect that he is going to be prosecuted. It clearly delineates the ending of police custody and the commencement of Crown proceedings. Albeit the charge may be changed by the Crown, the police charge provides an accused with some clarity as to the extent of the allegation at that stage in proceedings. Furthermore, the Crown should not routinely amend police charges.

17. Instead of charging a suspect should the police simply notify the suspect that the case is to be referred to the Procurator Fiscal to consider whether charges should be brought and, if so, what form these charges should take?

58. We are concerned that an element of uncertainty would be introduced if a suspect is simply to be informed that a case is to be referred to the procurator fiscal. Although a person arrested and charged with an offence is not inevitably prosecuted, at least they know that the police have concluded at that point that there was sufficient evidence to justify arrest and charge and that a prosecution is therefore a probable outcome. Article 5(2) ECHR requires any person arrested to be informed promptly

and as fully as possible, of any charge against them. In Scotland, formal arrest and charge go some way towards achieving that clarity. A person charged with an offence may, for instance, wish to go about preparing their defence by investigating and preserving evidence at an early stage. This could only be done if a clear statement of what charge(s) a person faces is given to that person at the earliest opportunity. Moreover, the police in most cases should decide whether a case is suitable for charge. Without holding this responsibility themselves there is a possibility that they will not consider all lines of enquiry and investigation in order to make their decision. In complex cases it may be appropriate to require a decision of the procurator fiscal. However, referring the case for consideration should not lengthen the period of detention that a suspect faces. In circumstances where it is appropriate, bail should be used pending the decision. Where this is not appropriate the decision must be expedited.

18. What should the time limits for custody be and under what circumstances should they be extended?

59. As we made clear in our submission to the Justice Committee inquiry into the emergency legislation,[52] section 3 of the 2010 Act provides for an extension of the current detention period from six to twelve hours. When detention was introduced in 1980 there had been a considerable number of differing views as to what the appropriate period of detention should be. A variety of periods were considered and the Government eventually, following consultation and debate, arrived at a figure of six hours being a reasonable period. The principal reason for extending the time limit was the perceived difficulty which the police maintain they had in contacting a legal representative to give advice to a client by telephone or to attend for interview. An extension of detention 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. As such, it would have been possible to collect evidence of how the change brought about by the Guidance was affecting detention. If this largely related 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. Furthermore, the amendment could have been drafted to reflect that particular concern. It is our understanding that this has not proved to be a problem in the vast majority of cases. In addition it is understood that there are

[52] JUSTICE, Written Evidence to the Justice Committee on the Criminal Procedure (Legal Assistance, Detention and Appeals) (Scotland) Act 2010, (March 2011)

provisions being put in place to ensure that ready access is going to be made available to solicitors and accordingly there should be no difficulty within the six hour period of obtaining advice from a legal representative, at least in the majority of cases.

60. Notwithstanding, the proposed *period* of detention is entirely arbitrary; A blanket extension to twelve hours with the potential for up to 24 hours does not build in sufficient consideration of the right to liberty under article 5 of the ECHR. In our view, any extension of detention past six hours *must be subject to review by a senior officer* to ensure that grounds for detention still exist and also that the welfare of the detained person has been verified. Thereafter, a review must take place every six hours. Whilst in England detention can last for up to 24 hours without requiring court authorisation of extension, and then further periods after that, under Part IV of PACE these welfare checks and authorisation of continuing grounds for detention are required. Twelve hours of detention without review is an extremely concerning development in our view. Any grant should not be issued for a fixed period but any extension should be for such period as is reasonably necessary to complete the necessary investigations. The same arguments can be made in respect of delay to intimation and advice under section 1.

61. A review must now be conducted into how long people are being detained as a result of legal advice and assistance. If there are circumstances in which the six hour period is insufficient, exceptional grounds can be set out in statute for an independent supervising officer to authorise the extension. These grounds must be able to satisfy, for example, that concrete and essential further enquiries are being made, or due to the location and/or hour it is not possible for a solicitor to reach the police station within the time period. In our view the starting point should revert to six hours. We do not consider that it is necessary for a judge to make this decision given the time periods at issue as in order for the review to be placed before a judge, the detention period will be extended.

62. It should be recalled that article 5(4) ECHR requires suspects to be taken before the courts promptly.[53] In *Brogan v United Kingdom* (1988) 11 EHRR 117 the ECtHR found that holding suspected IRA members on suspicion of terrorism for up to four days violated article 5. The UN Human Rights Committee has also considered that in order to comply with the requirement of promptness, delay in being taken before a

[53] The right is replicated in article 9(2)(3) and (4) of the International Covenant on Civil and Political Rights and the UN Principles for the Protection of All Persons under Any Form of Detention or Imprisonment Principle 10, Adopted by General Assembly resolution 43/173 of 9 December 1988 as to being informed of the nature of the allegation, charge and being taken before a court.

court cannot exceed a few days.[54] Whilst the period of detention in Scotland, even with the extension does not reach this, there is no time limit on detention following arrest pending appearance before the court.

63. In order to assess whether this period exceeds what is acceptable to comply with our international obligations, it is necessary to review the periods of *total* detention in police custody. We have been unable to find these statistics publicly and consider that the Review should request these from Government. It will then be necessary to enquire as to the reasons for the periods recorded and in our view impose a statutory limit which ensures promptness, but is supported by appropriate resources to ensure that it is effective.

19. Should the police have the power to liberate a suspect from custody temporarily subject to certain conditions?

64. We note that the Criminal Justice Bill 1980 included a proposal which allowed're-detention.' There was considerable resistance to this concept. The Government had to withdraw it. We are of the view that 'split' periods of detention would be unsatisfactory. Suspects should have a clear understanding of their rights and of the time limits to be applied in any circumstances. We feel that splitting a fixed period of detention with a temporary release would detract from that certainty. With reference to the conditions to be applied we are of the view that there would have to be some procedure by which those conditions could be challenged or varied at a point before the case has reached the Court. At the moment if an accused person is released, for instance, on a bail undertaking there is no method of reviewing the conditions without the procurator fiscal agreeing to do so. They can only exercise that power once the case has been reported to the procurator fiscal by the police and, in the event that there has been no report, there is no remedy open to an accused person.

65. Careful consideration would have to be given to any conditions upon which an accused person was to be released *ad interim.* The fact that an accused person would be subject to physical detention on more than one occasion is in our view unfair. We are unaware of any research or information available to support this proposal and to support the contention that releasing a suspect part of the way through detention and then enforcing a later period of detention would be of any benefit in an investigation. We are of the view that a flexible procedure such as

[54] Human Rights Committee, General Comment 8, Article 9 (Sixteenth session, 1982), Compilation of General Comments and General Recommendations Adopted by Human Rights Treaty Bodies, U.N. Doc. HRI/GEN/1/Rev.1 at 8 (1994)

proposed would remove the sort of certainty which we believe is necessary when issues of personal liberty arise.

20. Should a Saturday Custody Court be reintroduced?

66. We agree that a Saturday court is necessary. If a person is detained on a Friday, they will otherwise have to wait in police detention until Monday. Where there are bank holidays, an early detention on Thursday would result in five days in custody, which would infringe article 5 ECHR. We agree that it is unlikely to be necessary to open all court centres for this purpose and that centralised custody courts could be utilised. Defendants should be taken to court as promptly as possible and not detained in police cells simply awaiting being taken before a judge.

SUFFICIENCY OF EVIDENCE

21. Should the requirement for corroboration be abolished?

67. The requirement of corroboration is the most fundamental principle of Scots criminal law. Its purpose is to protect against miscarriages of justice. As the consultation document has acknowledged the principle is deep rooted. There has to be very good reason for this principle to be considered as being departed from. The starting point here is to consider why corroboration arises as a problem or an issue and to examine the reasoning for making it part of this reference.

68. The historical prominence that corroboration holds has meant that many modern developments in our procedure have been shaped by this requirement – not least in that other safeguards incorporated in other systems have been rejected or not applied in Scotland, because of the pre-eminent safeguard of corroboration. A clear example is the rejection of additional safeguards in respect of the admission of identification evidence.[55] This raises at least two issues. First, consideration of what measures require to be addressed if corroboration were to be removed – such as safeguards regarding the admission of and quality of evidence, and secondly, the need to look carefully at the range of safeguards employed by comparable jurisdictions employed in place of corroboration. Any such considerations must look not only at other safeguards or controls over the evidence which can be relied upon to convict – such as quality controls – but also controls at every stage of criminal proceedings guarding against injustice or miscarriage of justice – such as the role of the judge at trial and in particular regarding the admission of evidence; requirements

[55] W. J. Bryden, *Identification Procedure under Scottish Criminal Law,* Report to the Scottish Home and Health Department, Cmd 7096 (1978).

as to verdicts and whether a majority suffices; the scope of appeals and the role of the court of appeal.

69. Accordingly any review of corroboration and its shortcomings must consider what other measures exist or should exist to safeguard against miscarriages of justice. This would necessarily entail a wide ranging review, which cannot possibly be undertaken in the context of this Review other than superficially. It is the strong view of JUSTICE that any review of corroboration would need to be conducted much more comprehensively, preferably, given the import of the proposal, by a Royal Commission or perhaps by the Scottish Law Commission.

Why is Corroboration an Issue?

70. The parliamentary debate and reports of reaction on the effect of the Cadder ruling seemed to imply that because the accused had been given this 'new' right to legal assistance before interview there needed to be a 'balancing' of competing rights available to the accused, as if the provision of this new right took something away from the prosecution or the police. This does not bear proper examination. Allowing the right of access to legal assistance does not take anything away from the police in the conduct of their investigation. The police can still question a suspect – the right of access to a solicitor only protects against unfair questioning and ensuring that the right against self incrimination is preserved. The provision of this right has nothing to do with other legal rights or principles which operate to safeguard against miscarriages of justice.

71. The consultation document seems to envisage that the right to legal access prior to and during interview will result in a greater exercise of the right to silence in the context of the need for corroboration. We consider this to be somewhat simplistic, and cannot be assumed. Firstly, the right already exists. Secondly, research on the experience in England does not support the view that once legal assistance is accessed it results in a much greater exercise of the right to silence (see below). Indeed there is a basis to suggest the involvement of legal representation at this early stage, in the context of a good relationship between solicitors and police results in greater co-operation and provision of information on both sides.

72. It is of note that whilst there is no corroboration rule as such in England and Wales, three exceptions exist: (1) where corroboration is required by statute (in cases of treason, perjury, speeding offences and attempts to commit any of these offences), (2) where care warnings are necessary and (3) in relation to four specific types of cases – confessions by mentally handicapped persons, identification evidence,

sudden unexplained infant deaths and unconvincing hearsay evidence – where caution is necessary due to the nature of the evidence given.

73. With respect to the second exception, the judge may warn the jury to exercise caution before relying on unsupported evidence of certain types of witness. The categories include accomplices giving evidence for the prosecution, complainants in sexual cases, other witnesses whose evidence may be unreliable (such as that of a co-accused, and almost always where there are cut-throat defences), witnesses whose evidence may be tainted by an improper motive (such as prisoner informers), children, and patients at a secure hospital. Whether a care warning should be given is a matter of judicial discretion and will depend on the particular circumstances of the case, the issues raised and the content and quality of the witness's evidence, now governed by s32 Criminal Justice and Public Order Act 1994. When warnings should be given is extensively considered in *Makanjuola [1995] 1 WLR 1348.*

74. In any event, it might be observed that there is nothing wrong in the police having to seek additional sources of evidence where hitherto it could be said that they have been over reliant on statements being obtained from the accused. Even if difficulties of proof arise by the exercise of the right of silence, this is not a principled basis upon which to remove other safeguards and to weaken the principle of corroboration. When the principle of corroboration was emphasised by the institutional writers, it was raised in a context where police statements did not exist to aid the case against the accused.

75. Arguments have been raised in particular in regard to rape cases that absent a statement by the accused, proof of rape will become very difficult. Evidence to support this contention should be sought and carefully examined. It seems to us that the real issue here is the low conviction rate. Corroboration is not properly related to this problem. The starting point may be researching the decision making of juries – now generally recognised as a real possibility following recent research.[56] The conviction rate in England, absent the requirement for corroboration is only marginally higher and still seen as too low.[57] As the consultation paper notes, the majority of respondents to the Scottish Law Commission rejected the proposal to remove

[56] Thomas, *Are Juries Fair?* Ministry of Justice Research Series, 1/10 (2010)

[57] See Regan and Kelly, *Rape: Still a Forgotten Issue?,* Briefing Document (London Met: 2003) and Charts 4 and 8, available at http://www.cwasu.org/publication_display.asp?pageid=PAPERS&type=1&pagekey=44&year=2003 and follow up Lovett and Kelly, *Different Systems, Similar Outcomes: Tracking attrition in reported rape cases across Europe* (London Met, 2009) available at: http://www.cwasu.org/publication_display.asp?pageid=PAPERS&type=1&pagekey=44&year=2009

corroboration in sexual offences.[58] In our view, the issues that are raised in respect of the prosecution of sexual offences do not properly support consideration of the removal of corroboration.

Purpose

76. As indicated above the rule of corroboration is the primary safeguard Scots criminal law has long held in order to prevent miscarriages of justice. It is recognised in every comparable jurisdiction that legal safeguards are needed to prevent miscarriages of justice and that whilst various safeguards have been developed there is always a threshold requirement in respect of evidence in place. The thresholds address sufficiency of evidence and quality of evidence. Sufficiency and quality are often connected and cannot always be easily separated.

77. The view expressed in the consultation paper is that it should simply be for the jury to decide whether the prosecution has proved the accused's guilt beyond a reasonable doubt. We strongly disagree with this view. In *Thomson v Crowe 2000 JC 173* it was concluded that decisions on admissibility of evidence were being wrongly left to the jury. The full bench in *Thomson* held that this view abdicated to the jury what was in truth the historic and peculiar duty of the court to determine issues of competence and admissibility of evidence, in particular the admissibility of extra-judicial confessions.[59] The history of the approach of the courts to the admission of evidence, particularly of confessions, highlights the traditional role of the court in the early 19th Century in protecting an accused from 'poor' or questionably reliable evidence.[60]

78. Corroboration is the only legal safeguard in place to protect the accused in respect of the evidence founding any conviction. Since the introduction of s97D of the 1995 Act there is no other basis upon which to challenge the sufficiency or quality of evidence at trial. Challenges to admissibility are restricted to evidence unfairly or illegally obtained, or evidence which is in breach of the broad rules of evidence, for example that it is hearsay. The quality of evidence cannot be reviewed in such a challenge. Only on appeal can it be argued that no reasonable jury could have convicted having regard to the whole evidence and including considerations of the quality of the evidence. In this context, removal of corroboration would leave the accused without any protection or safeguard in respect of the evidence led and therefore utterly vulnerable to wrongful conviction. There would be no legal basis to challenge a

[58] Scottish Law Commission, *Report Rape and Other Sexual Offences*, Scot Law Com No. 209 (2007)

[59] Lord Justice General Rodger at 176H

[60] Ibid at 176 -177.

conviction based upon the paucity or quality of the evidence. Scots would be placed in another unique position - of leaving an accused absent the protection of law.

79. As such, we see no sound reason or necessity for the requirement of corroboration to be abolished.

22. What should the test for sufficiency of evidence be?

80. We agree that in not properly addressing the issue of quality of evidence corroboration as a protection is limited. Not least, by being reduced to a technical objection related only to quantity whereby there is no proper protection against unreliable or misleading testimony. It is difficult to reconcile this absence of protection with securing the right to a fair trial. A fair trial should not allow for the possibility of a verdict based upon evidence that may be misleading or highly unreliable.[61]

81. There are real concerns within the legal profession related to the quality of evidence which is led before the jury – not least the quality of expert evidence, the weakness of evidence and the inferences sought to be drawn from it in circumstantial cases. That being so it is our view that additional safeguards, in addition to corroboration, need to be considered.

Other Safeguards

82. It is important to note that comparable jurisdictions have well established procedures regarding the quality of evidence and preventing convictions on poor quality evidence. The best examples are the provisions in PACE under s76 with regard to unreliable confession evidence and s78 in relation to overall fairness. In particular, there are a number of areas where Scots law will not provide ample protection without a corroboration rule, and which in our view require reform in any event.

(1) <u>Rules Regarding the admission of Eye witness identification evidence</u>

83. It is generally recognised internationally that eyewitness misidentification is the single most important factor leading to wrongful convictions.[62] It has also been recognised

[61] See Lord Bingham of Cornhill in *Bain v The Queen* [2007] UKPC 33 at para 115 and *Nulty v HMA 2003 SCCR 378*

[62] See P. Devlin, *Report to the Secretary of State for the Home Department of the Departmental Committee on Evidence of Identification in Criminal Cases* (HMSO, 1976); Bruce A MacFarlane QC Attorney General for Manitoba Canada, *Convicting the Innocent: A triple failure of the justice system,* (2004), available at: http://www.canadiancriminallaw.com/articles/articles%20pdf/Convicting%20the%20Innocent.pdf

here that the fairness of the accused's trial may be compromised by reliance upon identification evidence which is of doubtful reliability or has been unfairly obtained.[63]

84. As a result comparable jurisdictions have in place rules of law regarding the obtaining of such evidence and the admission of such evidence. In Canada the appeal court is more inclined to review the quality of this kind of evidence in an assessment of whether there was a miscarriage of justice.[64] In England safeguards regarding this kind of evidence include:

(a) identification procedures regulated under statute (PACE);

(b) restrictions on the admission of such evidence – such as not allowing dock identification evidence (except essentially where it is formal evidence);

(c) comprehensive directions to juries on the dangers of this kind of evidence (more comprehensive directions than here, albeit the Scottish directions are modelled on *R v Turnbull* 1977 1QB 224);

(d) withdrawal of such evidence from the jury under s78 of PACE.

85. In Scotland such reforms were resisted specifically on the basis that protection was provided by the rule of corroboration.[65]

(2) Other Rules Regarding Evidence

86. One important safeguard which exists in England is the statutory regulation regarding how evidence is obtained and in respect of record keeping, which, in the context of a system of disclosure enables the defence – and the court – access to information bearing upon the reliability or credibility of evidence.[66] Whilst there is new legislation in Scotland regarding disclosure,[67] we do not have the same statutory regulation in place.

87. Furthermore, many other jurisdictions are reviewing the need for protection against the admission and use of unreliable expert evidence in the courts. Most are moving towards introducing quality requirements and a gate-keeping function for the trial judge.[68]

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[63] *Holland v HMA* 2005 SC (PC) 3, per Lord Hope at 6, Lord Rodger at 41-42 and 48-49.

[64] *R. v. Reitsma,* [1998] 1 S.C.R. 769; *R. v. Tat* 1997 CanLII 2234

[65] See Bryden Report, ibid, at 2.05; 3.04 & 5.01

[66] See PACE generally and the Criminal Procedure and Investigations Act 1996.

[67] Criminal Justice and Licensing (Scotland) Act 2010.

[68] See Law Commission, *Expert Evidence in Criminal Proceedings in England and Wales*, Law Com No. 325 (HMSO: 2011) None of the considered protections under review are in place in Scotland.

(3) Role of Appeal Court

88. The ground of appeal in Scotland of miscarriage of justice was retained following a review by the Sutherland Committee.[69] At the same time Sutherland recommended a broader and more flexible approach be adopted to appeals. It further recommended that the statute should specify that miscarriages of justice could be based upon evidence where no reasonable jury, properly directed, could convict upon that evidence. This expectation of a broad approach has not been followed in practice. There are concerns that the Appeal Court in Scotland continues to take a narrow and restrictive approach to appeals.

89. In England the sole ground of appeal is that the conviction is unsafe. Whilst the meaning of unsafe incorporates the possibility of subjective assessment made by the court – the lurking doubt test,[70] this was rarely employed and the courts in England have moved away from this approach. An assessment of the safety of a conviction is made on an objective basis similar to that employed in other jurisdictions with the same ground. The background to the introduction of the single ground of appeal had similar aims to the Sutherland Committee here – the need to emphasise a broad and flexible approach.[71] The purpose was also to emphasise the predominant issue of a miscarriage of justice and the safety of the conviction.[72] Accordingly 'the ultimate question was always whether a miscarriage of justice had occurred and this is the same as whether the conviction was unsafe. So the effect is simply to concentrate the mind on the real issue in every appeal from the outset.'[73] Generally, comparable jurisdictions have emphasised that the overriding concern is the safety of the conviction, the fairness of the trial and whether there has been a miscarriage of justice, which concern overrides any qualifying requirements in such appeals.[74]

90. Accordingly, comparable jurisdictions demonstrate that in Scotland a more restrictive approach is taken, in particular to appeals based upon fresh evidence or upon defective representation. In Scotland the emphasis is put on qualifying requirements

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[69] Sutherland Committee*, Report on Criminal Appeals and Miscarriages of Justice Procedure,* Cmnd 3245 (1996)

[70] *Cooper* [1969] 1 QB 267

[71] Royal Commission on Criminal Justice (1993); *Mullen* [2000] QB 520

[72] *Thakrar* [2001] EWCA Crim 1096;*R v Day* [2003] EWCA Crim 1060 at 15.

[73] Professor JC Smith, *The Criminal Appeal Act 1995*, [1995] Crim L R 920 at 925; Archbold at 7.46

[74] See for example *Sungsuwan v Queen* [2005] NZSC 57*; R. v McLoughlin,* [1985] 1 N.Z.L.R. 106*;R v Nangle* [2001] Crim LR 506 (not fully reported) at paragraph 64)*; R v Allen* [2001] EWCA Crim 1607 at paragraph 29-30*; R v Scollan* [1998] EWCA Crim 2895*; Boodram v The State,* (2002) 1 Cr App R 12 (PC) (Trinidad and Tobago).

which must be met before consideration is given to whether the trial was fair or there was a miscarriage of justice.[75]

(4) Jury Verdicts

91. Finally as the consultation paper acknowledges[76] a change which might be required is that of the majority verdict in Scotland. We would support this as a basic requirement that would have to be put in place. Otherwise, convictions in Scotland will be obtained on a single source of poor quality evidence by the decision of 8 people, which could not be reviewed on appeal. In our view the requirement for a unanimous verdict would operate as a measure to ensure that the prosecution case reached the required standard of proof to obtain a conviction.

92. This last issue and the other possible changes are acknowledged by the Consultation report to be 'outwith the scope of the review.' We accept this. But the question of sufficiency of evidence cannot be answered by simply suggesting a test. A comprehensive review of the entire criminal procedural law is required. Any such test would have to include a threshold test of sufficiency and be allied to, or incorporate, measures to protect against poor quality evidence.

ADMISSIBILITY OF STATEMENTS

23. If exclusionary rules exist, should they be set out in statute?

24. Should the common law fairness test for the admissibility of statements be clarified in statute?

93. It is helpful to have rules as to admissibility and exclusion set out in stature to ensure that the rules are clear and are applied consistently.

25. What standard of proof should be applied in determining whether a statement was fairly obtained?

94. The Consultation Document suggests that the test applied in England is 'beyond reasonable doubt'. However, the general test of fairness set out in s.78(1) of PACE provides:

[75] *Megrahi v HMA,* 2002 JC 99*; Fraser v HMA,* 2008 SCCR 407*; Grant v HMA,* 2006 SCCR 365

[76] At para 33

> In any proceedings the court may refuse to allow evidence on which the prosecution proposes 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 the proceedings that the court ought not to admit it.

95. Where there is a dispute as to the circumstances in which the evidence was obtained, the burden is on the Crown to *disprove* beyond reasonable doubt the version that the accused relies upon.[77] Otherwise, s78 is a balancing test, which considers the whole circumstances of the case. It is therefore a balance of probability test, and not one of beyond reasonable doubt. Moreover, the test sets out on a statutory footing a very similar observation to that made in *Miln v Cullen*[78] mentioned in the Consultation Document. We agree that the test should be the balance of probabilities, save for where there is a dispute as to the evidence, when the Crown must disprove beyond reasonable doubt.

26. Should all statements made by accused persons be admissible as proof of fact?

96. We do not think this is a question which this Review should focus its attention upon, but if of concern, should be the subject of a particular inquiry. The presumption is that rules will confuse juries. This requires research to bare out.[79] There are reasons why statements can be used for different purposes, and there are consequences for the fairness of the trial if they are not used in that way. It is not possible to set these out definitively here. In our view the focus of the question is how statements made by accused persons outwith the benefit of legal advice should be used. In *Zaichenko v Russia* [2010] ECHR, application no. 39660/02 (judgment delivered 18 February 2010), whilst it was found that to simply stop a person for a road check and ask questions relating to a search of the vehicle did not infringe the right to legal assistance because there was not a sufficient curtailment of the person's freedom, use of the statement at trial violated the privilege against self-incrimination.

97. In our view, no statements obtained without cautioning the suspect or affording the option of legal advice should be admissible following *Salduz* and *Cadder* as they will infringe the right against self incrimination. However, there will be circumstances where, following caution, some practical questions will be necessary which do not go

[77] *Anderson* [1993] Crim LR 447.

[78] 1967 JC 21.

[79] Though there is support for the presumption from the recent study in England and Wales, see above.

to the prosecution (see above for the case law in England and Wales). Equally, where a suspect *volunteers* a statement without being asked, subject to the possibility to argue exclusion on the grounds of fairness, such statements ought to be admissible. Code C of PACE[80] requires such statements to be recorded by the police officer, who must attempt to obtain the signature of the suspect, which must then be put to the suspect during formal police interview. If this procedure does not take place, an application to exclude under s78 of PACE is likely to be made by the defence at trial.

INFERENCES FROM SILENCE

27. Should the court be allowed to draw an adverse inference from a suspect's silence when questioned by the police?
28. What practical difference would such a provision make, especially where silence is maintained upon the advice of a solicitor?

98. JUSTICE reported five decades ago that the right of silence forms a necessary corollary of both the privilege against self-incrimination and the doctrine of presumed innocence.[81] If silence during police interrogation may be used to draw adverse inferences, the privilege against self-incrimination is effectively rendered redundant. This is particularly acute in cases of vulnerable and disorientated suspects, for whom adverse inference will cause the greatest injustice. By allowing adverse inferences to be drawn from a suspect's silence the criminal burden of proof is effectively shifted from the prosecution to the defence, with those who do not answer certain questions under police interrogation effectively being forced to provide an adequate explanation for their silence in court.

99. Most common law jurisdictions preserve the right to silence.[82] There is no evidence to show that the right to silence should be curtailed following the Lord Advocate's Guidance and the emergency legislation. The Royal Commission on Criminal Justice, which reported in 1993 (the Runciman Commission)[83] considered the right to silence in detail along with other studies.

100. A number of commonly encountered myths are revealed from that research:[84]

[80] Paragraphs 11.4, 11.13 and 11.14.

[81] JUSTICE, *Preliminary Investigations of Criminal Offences*, (Stevens & Sons Ltd: London, 1960)

[82] See annex 1.

[83] Available here: http://www.official-documents.gov.uk/document/cm22/2263/2263.pdf

[84] For a useful discussion see D Dixon, 'Common Sense, legal advice and the right of silence', *Public Law* [1991] 233.

i. The innocent have nothing to hide

> [T]he so called right of silence […] is contrary to common sense. It runs counter to our realisation of how we ourselves would behave if we were faced with a criminal charge.[85]

101. Speaking in the House of Commons, Michael Howard, the then Home Secretary, outlined the government's justification for the introduction of adverse inferences under the Criminal Justice and Public Order Bill:

> We believe that it is reasonable to expect an accused person to offer an explanation of circumstances that appear to be incriminating and that if he does not do so there is no reason why a court or jury should be prevented from taking account of his silence when considering the strength of the case against him.[86]

102. Underlying this justification is the 'common sense' assumption, famously voiced by Jeremy Bentham, that '[i]nnocence claims to the right of speaking, as guilt invokes the privilege of silence'.[87]

103. In our view, such reasoning should be guarded against. There are many reasons why an innocent person might choose to remain silent during police questioning.[88]

- Confusion;
- Desire to protect himself/herself or another person; [89]
- Fear of reprisal;
- Dependency problems (drugs/alcohol);
- Lack of understanding of the caution administered by the police;
- Lack of awareness that there were certain facts that were likely to prove his or her innocence;
- Fear that he or she will perform badly, as unlike the experienced police officer or prosecutor, he or she is uninformed about the law.[90]

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[85] G Williams, 'The Tactic of Silence', 137 *N.L.J.* 1107 (1997).

[86] Michael Howard *HC* Deb, 13 April 1994, vol 241, cc279.

[87] Treatise on Evidence at 241.

[88] For an extensive review see, The Balance in Criminal Law Review Group, Final Report, (15th March 2007) available here: http://www.justice.ie/en/JELR/BalanceRpt.pdf/Files/BalanceRpt.pdf

[89] See also on protecting other persons Gudjohnson, *The Psychology of Interrogations, Confessions and Testimony*, (Wiley: Chichester, 1992) cited in the Runciman Commission, Ch. 4, Para. 32.

[90] Michael Farrell, *The Right to Silence and the Criminal Justice Bill*, a paper delivered to the School of Law, Trinity College Dublin,9 May 2007, at p. 5: A great many people questioned in Garda stations are

104. The Balance Review took many of these observations from the Report of the Criminal Law Revisions Committee.[91] The Runciman Commission came to similar conclusions in favour of the reasons the right is exercised:

> Police interrogations are disorienting and intimidating. The suspect may be unclear about both the nature of the offence which he or she allegedly committed and about the legal definitions of intent, dishonesty etc…[92]

105. Indeed, academic research on the right to silence has consistently demonstrated that innocent persons may have legitimate justifications for exercising the right.[93] JUSTICE therefore rejects the argument that the innocent have nothing to hide as narrowly conceived and often ill-founded.

ii. The right to silence places an unreasonable burden on police investigations

106. Another concern raised to the Runciman Commission was that it would be impossible for the police to carry out effective investigations without asking suspects to explain the conduct which brought them under suspicion at an early stage.[94] Innocent suspects, it was argued, should exonerate themselves as soon as is practically possible thereby allowing police investigators to direct their attention towards the guilty. It was further claimed that the problem is compounded by obstructive criminal solicitors advising their clients to remain silent under all circumstances.

107. Empirical studies suggest that these concerns are ill-founded. Firstly, the right to silence is, in practice, invoked in relatively few cases. David Brown reviewed a number of past studies (carried out prior to the introduction of adverse inferences) and estimated that outside of the Metropolitan Police District the right of silence was used 'to some extent' in only 6 – 10% of cases. The number of people who refused to answer any questions at all was estimated as being only 5% in most provincial police areas.[95] Equally, Leng[96] found from a sample of more than 1000 cases between 1986

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poorly educated, come from deprived backgrounds and are often vulnerable due to addiction to drugs or alcohol. They are likely to be frightened and confused and may not remember where they were or who they were with on any given date and they may have no idea what facts may be relevant to their defence.

[91] Eleventh Report, Evidence (General) Cmnd. 4991 (1972)

[92] Ch. 4, para. 13.

[93] *Ibid.*

[94] *Ibid*, para. 7.

[95] D Brown, *The Incidence of Right to Silence in Police Interviews: The Research Evidence Reviewed*, Home Office Research & Planning Unit (1993).

and 1988, that there was a significant exercise of the right to silence in only 5% of cases, and concluded that the abolition of the right to silence would have an impact on very few cases.

108. Furthermore, research conducted by Sanders encountered 'only the occasional solicitor' who said that s/he advised silence in the majority of cases.[97] Similarly, studies reviewed by Dixon found that none of the legal advisors interviewed advised silence as a matter of course. Indeed, 'some reported that they never advised silence, either because it was thought to be unhelpful to the client or because of principled objections to the right of silence.' The general consensus amongst the lawyers interviewed was that they would only advise silence in certain circumstances, such as prior to the arrival of the solicitor at the police station or where the suspect was intoxicated. Dixon observed in his research that the nature of police interrogations is often incorrectly characterised as an adversarial process. He contends that, in reality, legal advisors will often have informal, working relations with police officers and will typically have a vested interest in cooperating with police officers. He suggests that the process would be better categorised as a bargaining process.

109. Therefore it can be concluded from these studies that the impact of the right to silence on the effective investigation of criminal offences where legal advice is exercised in police stations is not nearly as great as might be suggested. Moreover, the commonly voiced fear that, if introduced, lawyers would use the right to silence to obstruct the administration of justice appears unfounded.

iii. The right to silence leads to an increase in wrongful acquittals

110. A related assumption is that those guilty of having committed an offence will be able to avoid prosecution by exploiting their right to silence. In fact, Moston's[98] research suggested that silence had no effect on the likelihood of a suspect being charged where the evidence was clearly strong or clearly weak. In fact, where the amount of available evidence was on the borderline, a suspect's silence made a charge more rather than less likely. Interestingly, the study also found that suspects who exercised

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[96] R Leng, *The Right to Silence in Police Interrogation: A Study of Some of the Issues Underlying the Debate,* Royal Commission on Criminal Justice Research Study No. 10, (HMSO: 1993).

[97] A Sanders *et al*., *Advice and Assistance at Police Stations and the 24 Hour Duty Solicitor Scheme* (Lord Chancellor's Department, 1989).

[98] S Moston, G Stephenson and T Williamson, University of Kent Institute of Social and applied Psychology, 'Police Investigation Styles and Suspect Behaviour, Final Report to the Police Requirements Support Unit', *Criminal Behaviour and Mental Health*, [1993] 3.

their right of silence were more likely to plead guilty than those who answered police questions.

111. More importantly, where an adverse inference can be drawn from silence, a judicial warning alone is unlikely to prove sufficient to dispel the Benthamite assumption 'that the innocent have nothing to hide' in the minds of the jury.[99]

iv. Ambush defences permit incomplete, inaccurate or false defences to be used in court

112. It is often suggested that allowing defence counsel to withhold their client's defence without prejudice until the day of trial gives them an unfair advantage and is therefore likely to be employed over-frequently. These assertions are contradicted by Leng's study where '[o]f the 59 contested trials examined there was only one clear case of an ambush defence and two other cases in which the prosecution claimed that there had been an ambush but this was in effect contested by the defence. The proportion of contested cases in which ambush defences were raised was therefore at most 5 per cent.'[100]

113. It is significant to note that, having considered all the arguments put before it at length, a majority of the Runciman Commission[101] concluded that:

> [T]he possibility of an increase in the convictions of the guilty is outweighed by the risk that the extra pressure on suspects to talk in the police station and the adverse inferences invited if they do not may result in more convictions of the innocent.[102]

114. Though not explicitly referred to in the Convention, the right to silence has attained the status of a generally recognised international standard and has been described by the ECtHR as lying 'at the heart of the notion of a fair procedure under article 6.' [103] Most crucially, the right to silence has formed part of Scots common law for at least 200 years.[104] In our view, given the research available on the effect of limitation to the

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[99] A similar argument was submitted by Liberty in their oral evidence to the Runciman Commission with regard to confession evidence, para. 78.

[100] Note 93 above.

[101] By 9 to 2.

[102] The Runciman Report, ch. 4, para. 22.

[103] *Saunders v UK* [1996] 23 EHRR 313, 337, para. 68. This rationale was accepted in *Salduz*.

[104] See *Livingstone v Murray* (1830) 9 S 161; *Robertson v Maxwell* 1951 JC 11; *Chalmers v HM Advocate* 1954 JC 66. See also: the recent comments of Lord Hope of Craighead in *Brown v Stott* [2003] 1 A.C.681, 718 and the Rt Honorable Ian Kirkwood at 729, citing Hume, Commentaries on the

right to silence, it is illogical to suggest that the introduction of a right to legal advice prior to and during police interrogation may justify the curtailment of this long-standing right. As was made clear by Lord Hope in *Cadder:* 'The emphasis throughout is on the presence of a lawyer as necessary to *ensure respect for the right of the detainee not to incriminate himself*.'[105]

115. In our view all the evidence points against allowing the court to draw adverse inferences from silence. The practical difference can be significant as jurors where once advised about the right to silence, will be specifically instructed that they are allowed to hold that against the accused. Notwithstanding, if any limitation upon the right to silence were to be imposed, this must only engage when sufficient disclosure has been given for the suspect to understand the nature of the case against them, when the evidence put to the suspect calls for an answer, and when they have had the opportunity to receive the benefit of legal advice, as held in *Murray v UK*. Careful consideration of the disclosure obligations upon the police and procurator fiscals in Scots law will have to be undertaken if this route is to be followed.

APPEALS

29. Should there be a time limit for the lodging of a Notice of Intention to Appeal and/or a note of Appeal beyond which no application for leave to appeal can be considered? If so what should that time limit be?

30. Should the test for allowing a late appeal and for allowing amendments to the grounds be provided for in statute? If so, what should that test be?

116. The first matter to note is that it is not obvious to JUSTICE why there is any need to include appeals within the ambit of this Review standing the terms of reference with the exception of the position relating to the Scottish Criminal Cases Review Commission.

117. The main problem with appeals in recent years has been the delays occasioned by the court in processing cases. It is the perception of those involved in the preparation and presentation of such cases that the principal difficulty has been lack of judicial resources. In addition there have been certain categories of appeal which have been delayed because of profound misunderstandings as to the law. Perhaps the two most obvious examples have been cases where the Crown declined to obtemper its disclosure obligations which necessitated appeals to the Judicial Committee of the

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Law of Scotland (1844), vol 2. pp 336-337 and Alison, Practice of the Criminal Law of Scotland (1833), pp 586-587.

[105] *Ibid.*,para. 55.

Privy Council to clarify the law, and the issues finally resolved in the appeals of *Petch* and *Foye* [2011] HCJAC 20 where the law had been wrongly stated in the earlier case of *Ansari* 2003 JC 105. This is despite the observations of the Court in the case of *Gillespie v HMA* 2003 SCCR as to the judicial management of appeals. However it is to be noted that much of the backlog has now been cleared and the misunderstandings about the law in relation to disclosure clarified so that the problems of recent years should not readily recur.

118. Against that background it is not obvious that there is any merit in considering the introduction of new time limits which may have the effect of frustrating the interests of justice. It needs to be appreciated there is no obvious problem in Scotland with appeals being advanced years out of time. The number of cases in which that occurs is very small and most historic cases which reach the court now come by means of a referral from the Scottish Criminal Cases Review Commission.

119. The observations at paragraph 8 of the Consultation Document do not in our view reflect the experience of practitioners, nor is there any obvious need for a test to be fashioned to deal with late applications. Historically at least the Court has been well placed to balance the perceived need for finality against its responsibility to correct any apparent miscarriage of justice.

31. Should there be statutory provision entitling the court to dismiss an appeal, or to apply lesser sanctions where the appellant has not conducted the appeal in accordance with the rules or the orders of the court?

32. Is there any purpose in retaining Petitions to the *nobile officium* and Bills of Advocation and Suspension as a mode of appeal or review?

120. It needs to be appreciated that at present the only way in which to bring under review breaches of Convention rights by the appeal court is by means of the *nobile officium*. The Court was invited to allow petitions to be brought under the Human Rights Act 1998 in the cases of *Beck and others* [2010] HCJAC 8. However it concluded that such petitions were incompetent. Thus at present it is vital to maintain this equitable jurisdiction at least until the necessary orders are made under the Human Rights Act to allow petitions to be brought by virtue of the Act itself.

121. Far from being an obsolete procedure the decision in *Beck* has of necessity revived the *nobile officium* as the only means of proceeding where the court has acted unlawfully. To seek to restrict its use in the way suggested would be to undermine in a wholly unacceptable way the assertion of Convention rights under the 1998 Act.

122. With respect to suspension and advocation, there was in our view no need to introduce time limits under the 2010 Act. The plea of acquiescence was already available in cases where there had been excessive delay in bringing forward the relevant bill. The time limits which were introduced are in some instances unworkable. This is particularly so in the case of bills of suspension which have to be used to challenge warrants. These challenges may not be possible for several months after the warrant was granted.

123. Both modes of appeal have a continuing value but it is accepted that there is scope for clarification and rationalisation of the uses to which the modes of appeal are directed. In our view the time limits imposed by the 2010 Act should be removed, pending a more focussed review of the appeals structure.

THE SCCRC

33. Should the factors which bear upon the test of the 'interests of justice' to be applied by the SCCRC be set out in legislation?

124. 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.

125. The Scottish Criminal Cases Review Commission was set up shortly after as a result of the concerning miscarriage cases in England. The Sutherland Committee[106] reviewed the position in Scotland and recommended a Commission for Scotland that would operate with very broad and flexible criteria. As the submission of the Glasgow Bar Association on the emergency legislation observes:[107]

> [The Commission] is detached from the legal system which can take a different, less formal and broader approach, to alleged miscarriages of justice. In deserving cases, such a body can put a case back into the legal

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

[107] Available at http://www.glasgowbarassociation.co.uk/media/20928/gba%20briefing%20on%20emergency%20cadder%20bill-1.pdf

system and ask the court to look at it again. Hence the composition of the Commission, with the balance weighted toward non-legal participants; hence the absence of formal procedures in the statutory framework; and hence also the focus of the Commission on the reliability of information as opposed to legal or formal rules regarding same.

126. The Commission was 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 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. It was recognised in *Cadder* that the Commission should review the cases before it as to whether miscarriages of justice could be seen to have arisen as a result of the failure to afford legal access.[108]

127. 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 set out in section 7 of the 2010 Act can only be seen as limiting the ability of the Commission to consider all cases before it thoroughly.

34. Should the High Court have the power to refuse to consider a reference from the SCCRC on the basis that it is not in the interests of justice?

128. 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 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.

129. The High Court should not have the power to refuse to entertain appeals in cases referred by the SCCRC for the reasons summarised in paragraph 11 of the Consultation Document. Hitherto, the High Court had to accept a case from the Commission. Now, 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. 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.*

[108] Per Lord Hope at para 62 and Lord Rodger at para 103.

130. In our view section 7 of the 2010 Act should be repealed.

JUSTICE
June 2011

Annex 1

The Right to Silence across Common Law Jurisdictions

England and Wales

Before the suspect is interviewed he is warned that the information obtained may be used against him in a future trial. The wording of the warning is, in general, as follows: "You do not have to say anything, but it may harm your defence if you fail to mention when questioned anything you later rely on in court. Anything you do say may be given in evidence".

Ss34-38 of the Criminal Justice and Public Order Act 1994 (CJPO), specify the circumstances in which adverse inferences may be drawn from the exercise of the right to silence. Where the statutory scheme does not apply, the common law rule still remains (*McGarry*[109]; *Norton*[110] where it was accepted that the silence of the accused 'on an occasion that demanded an answer might be conduct from which an inference of acknowledgement might be drawn'). In *Condron v UK*[111] the ECtHR accepted that, in cases which clearly call for an explanation by him, the right could not of itself prevent the accused's silence being taken into account in assessing the persuasiveness of the prosecution evidence. But the Court also stressed that a fair procedure (under article 6) required 'particular caution' on the part of a domestic court before invoking the accused's silence against him."

The test for the drawing of adverse inferences under s34(1) CJPO on being questioned by the police is whether in the circumstances existing at the time the accused could reasonably have been expected to mention the fact subsequently relied upon. Any explanation given for silence should be explored before a decision is made to direct a jury that an inference may be drawn (*T v DPP* (2007) 171 JP 605).

Failure of the interviewer to disclose relevant information can also have a bearing on whether inferences ought to be drawn (*Roble*[112]). Accordingly, silence does not constitute an acknowledgment of guilt if the circumstances are such that a reasonable person would not be expected to counter the allegation.[113]

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[109] [1999] 1 WLR 1500

[110] *Norton* [1910] 2 KB 496.

[111] (2001) 31 EHRR 1

[112] [1997] Crim LR 449

[113] See generally The Rt Honourable Hooper LJ and D Ormerod (eds,) Blackstone's Criminal Practice (OUP, 2011), F19.1- F19.18.

United States of America

The right to remain silent during pre-trial detention is constitutionally protected under the Fifth Amendment.

The leading case on pre-trial detention rights is *Miranda v Arizona*[114] in which the Supreme Court was called upon to consider the constitutionality of a number of instances in which defendants were questioned 'while in custody or otherwise deprived of [their] freedom in any significant way.' In all of the cases, suspects were questioned by police officers, detectives, or prosecuting attorneys without being told of their rights at the outset of their interrogation.

By 5 votes to 4 the Court held that prosecutors could not use statements stemming from custodial interrogation of defendants unless they demonstrated the use of procedural safeguards 'effective to secure the privilege against self- incrimination.' The Court specifically outlined the necessary aspects of police warnings to suspects, including warnings of the right to remain silent and the right to have counsel present during interrogations.

A suspect may waive his Miranda rights, but the State bears the heavy burden of proving that the waiver was knowing and intelligent, and that it was the product of a free and deliberate choice, rather than intimidation, coercion or deception (*Fare v Michael*[115]*).*

The right to silence is absolute and no inferences can be drawn from the silence of the suspect after arrest (*Griffin v. California*[116]). However, inferences can be drawn from the suspect's failure to make any comments before the arrest – i.e. to turn himself in and offer an explanation (*Jenkins v. Anderson*[117]). Following the Supreme Court decision in *Berghuis v. Thompkins*[118] suspects that have waived their right to silence prior to interrogation must explicitly invoke their right to silence if they subsequently refuse to answer questions at the interview stage.

Canada

A constitutional right to silence has been inferred from section 7 of the Canadian Charter of Rights and Freedoms.[119] The fact that a detainee chooses to exercise their right to remain

[114] Miranda v Arizona 384 U.S. 436.

[115] *Fare v Michael*, 442 U.S. 707.

[116] *Griffin v. California*, 380 U.S. 609 (1965).

[117] *Jenkins v. Anderson*, 447 U.S. 231 (1980).

[118] *Berghuis v. Thompkins* 560 US __ 2010

[119] *R. v. Hebert* [1990] 2 S.C.R. 151.

silent cannot be used against them at a subsequent trial on a charge arising out of the investigation and no inference is to be drawn against an accused because he or she exercised the right.[120] In contrast to the position in the United States police are not obliged to refrain from questioning a detainee who wishes to remain silent. However, any subsequently obtained statements must be the product of free will.[121]

The right to pre-trial silence, however, like other Charter rights, is not absolute. Application of Charter values must take into account other interests and in particular other Charter values which may conflict with their unrestricted and literal enforcement.

Australia

Statutory provisions providing for the right to silence exist at State level. In New South Wales s89(1)(a) of the Evidence Act 1995 prevents adverse inferences being drawn against accused persons by reason of their failure or refusal to answer one or more questions put or made to them 'in the course of official questioning'. The provision is worded more narrowly than the common law right (below). See *Sanchez v. R*[122] and *Jones v R*.[123] In Victoria and the Northern Territory neither prosecutor nor judge may comment on an exercise of the right to silence at trial.[124] In Queensland s92 of the Police Powers & Responsibilities Act 1998 confirms the general common law right to silence of an accused.

The common law right to silence was addressed by the High Court of Australia in the case of *Petty & Maiden v R*:

> "A person who believes on reasonable grounds that he or she is suspected of having been a party to an offence is entitled to remain silent when questioned or asked to supply information by any person in authority about the occurrence of an offence, the identity of the participants and the roles which they played. […] An incident of that right of silence is that no adverse inference can be drawn against an accused person by reason of his or her failure to answer such

[120] *R. v. Crawford* [1995] 1 S.C.R. 858.

[121] *R. v. Singh* [2007] 3 S.C.R. 405.

[122] *Sanchez v. R* [2009] NSWCCA 171 at para. 71.

[123] *Jones v R* [2005] NSWCCA 443.

[124] See: s464J of the Crimes Act 1958 (Victoria) and B Hocking and L Manville, *What of the Right to Silence: Still supporting the Presumption of Innocence, or a Growing Legal Fiction?* [2001] MqLJ 3, available at: http://www.austlii.edu.au/au/journals/MqLJ/2001/3.html#fn162.

> questions or to provide such information. To draw such an adverse inference would be to erode the right of silence or to render it valueless."[125]
>
> "That incident of the right of silence means that, in a criminal trial, it should not be suggested, either by evidence led by the Crown or by questions asked or comments made by the trial judge or the Crown Prosecutor, that an accused's exercise of the right of silence may provide a basis for inferring a consciousness of guilt. Thus, to take an example, the Crown should not lead evidence that, when charged, the accused made no reply. Nor should it be suggested that previous silence about a defence raised at the trial provides a basis for inferring that the defence is a new invention or is rendered suspect or unacceptable.[126]"

Similarly, in the Australian High Court case of *Glennon v R*[127] the trial judge told the jury that "in testing the veracity of that defence brought before you in this Court you are entitled to have regard to the fact that it was not revealed to the police and you are entitled to ask yourselves, if this explanation is true, surely the sensible thing was to tell the police about it as soon as possible." This direction was held to impugn the accused's right to remain silent and a retrial was ordered.

There is some jurisprudential support for this principle at State level. In *R v Coyne*[128] the Queensland Court of Appeal followed the reasoning of the Australian High Court in the above cases. The majority were of the opinion that, while evidence of an accused person's refusal to answer questions put to him or her by a police officer is admissible in court, a judge should direct the jury that no adverse inference may be drawn against an accused because of his or her refusal. See also *Sanchez v R*.[129]

In the case of *Weissensteiner v The Queen*[130] the Australian High Court took a narrow approach in relation to a defendant's silence at trial (as opposed to pre-trial silence). It held that an inference of guilt could not be drawn from silence, but that, if an inference of guilt was otherwise available on the evidence, that inference could more safely be drawn where the accused failed to provide an innocent explanation.

New Zealand

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[125] *Petty & Maiden v R* [1991] HCA 34; (1991) 173 CLR 95 (5 September 1991), para. 2.

[126] *Ibid*, para. 3.

[127] *Glennon v R* [1994] HCA 7.

[128] *R v Coyne* [1996] 1 Qd R 512

[129] *Sanchez v R* [2009] NSWCCA 171, Paras. [52]-[54].

[130] *Weissensteiner v The Queen* (1993) 178 CLR 217,

Section 23(4) of the Bill of Rights Act protects the right of persons who are arrested or detained under any enactment to not make any statement. In addition, the Act requires the relevant authority to inform the detainee of their right to remain silent. The nature and quality of the right, as currently applied in New Zealand, is set out in *Smith* v *Director of Serious Fraud Office*.[131]

The Search and Surveillance Bill, currently passing through Parliament[132] could have a big impact on the right to silence. Previously, the Serious Fraud Office could require people to answer questions relating to serious business fraud. The Bill will extend this power to the Police for all serious crime through a series of examination orders. These orders apply not only to the suspect but also to anyone who might have information relating to the offence. Failure to comply may result in up to a year's imprisonment.

South Africa

Section 35(1)(a)-(b) of the 1996 Constitution grants all arrested persons the right to remain silent, to be promptly informed of their right to remain silent and of the consequences of not remaining silent.

In *S v Boesak*[133] Langa DP, speaking for the Court, pointed out that the right to remain silent has different applications at different stages of a criminal prosecution. For example: in the case of *S v Tandwa*[134] the Court held that the detainee's decision to exercise his right to silence at trial did not "suspend the operation of ordinary rational processes. The choice to remain silent in the face of evidence suggestive of complicity must in an appropriate case lead to an inference of guilt."[135]

This contrasts with the case of *S v Thebus and Another*[136] in which the appellant disclosed his alibi defence for the first time at trial. The Constitutional Court of South Africa was asked to consider whether the Supreme Court of Appeal's decision to draw negative inferences from this late disclosure constituted an infringement of the appellant's constitutional right to silence. The Court stressed that "it is impermissible for a court to draw any inference of guilt from the pre-trial silence of an accused person. Such an inference would undermine the rights to remain silent and to be presumed innocent. Thus, an obligation on an accused to break his or

[131] [1992] 3 All ER 456.

[132] http://www.parliament.nz/en-NZ/PB/Legislation/Bills/8/9/a/00DBHOH_BILL9281_1-Search-and-Surveillance-Bill.htm

[133] *S v Boesak* [2000] ZACC 25

[134] *S v Tandwa* 2008 (1) SACR 613 (SCA).

[135] *Ibid*. 615.

[136] *S v Thebus and Another* [2003] ZACC 12; 2003 (6) SA 505 (CC)

her silence or to disclose a defence before trial would be invasive of the constitutional right to silence.[137]" With regards to the credibility of the appellant's alibi however, the Court were of the opinion that: "[t]he failure to disclose an alibi timeously is […] not a neutral factor. It may have consequences and can legitimately be taken into account in evaluating the evidence as a whole.[138]"

Ireland

Save for the statutory exceptions consolidated under Part 4 of the Criminal Justice Act 2007 a detained person is entitled to maintain silence on the basis that such silence will not be admissible against him or her as part of the prosecution case, see article 38(1) of the Constitution and the case of *Heaney v. Ireland* [1994] 2 ILRM 420.

The 2007 Act permits courts to draw adverse inferences in the case of all arrestable offences (i.e. ones having a penalty of 5 years imprisonment or more) where an accused person fails to account for certain facts or objects or fails to mention while being questioned anything he or she later seeks to rely on in his or her defence. In arriving at its decision, the court may also take into consideration when the account was first given by the accused.

The Act sets out a range of safeguards which largely replicate the Criminal Justice and Public Order Act 1994 in England and Wales and must be observed before an inference may be drawn:

- the account required from the accused person must be one that is 'clearly' called for by the circumstances involved;
- the person must first be cautioned in clear language and must be given a reasonable opportunity to consult with a solicitor before deciding whether to answer the questions from the Gardaí;
- the interview must be video recorded (unless the person declined to have it recorded); and
- a person may not be convicted 'solely or mainly' on an inference alone, corroboration from other evidence is required.

In other circumstances a suspect may be required by statute to give an account in respect of relevant circumstances, but such answers are rendered constitutionally inadmissible in a criminal trial.[139]

[137] Para 58.

[138] Para. 68.

[139] *Re National Irish Bank Ltd* [1999] 1 IR 145.

The effect of the Supreme Court's decision in *The People v Finnerty*[140] is to preclude the prosecution cross-examining the accused as to why he remained silent during questioning while in Garda custody unless the aforementioned statutory exceptions apply. In practice, the Finnerty ruling has also discouraged trial judges from commenting on the accused's failure to give evidence at the interview stage unless the statutory exceptions are applicable.

[140] *The People v Finnerty* [1999] 4 IR 364.