



The Carloway Review

Report and Recommendations

17 November 2011

FOREWORD

The decision of the United Kingdom Supreme Court in *Cadder v HM Advocate* had a substantial and immediate impact on the criminal justice system. The Scottish Government felt obliged to introduce emergency legislation to correct the flaws identified in the system's framework. The Crown Office abandoned hundreds of prosecutions, some of which were for very serious crimes. Significant uncertainty remained concerning the meaning of the decision. Several consequent subsidiary objections to evidence were taken in cases throughout the country, causing disruption and delay to court processes. Appeals and references to the High Court followed. This prompted the Lord Advocate to refer a selected group of these appeals and references directly to the United Kingdom Supreme Court in order to obtain clarity on key issues.



Cadder and its consequences could be described simply as the necessary application of the law, deriving from the implied right of access to a lawyer identified by the European Court under Article 6 on the European Convention of Human Rights. As Lord Hope put it in his opinion:

“...there is no room ... for a decision that favours the status quo simply on grounds of expediency. The issue is one of law... It must be faced up to, whatever the consequences”.

However, the sudden over-ruling of previously well-established and accepted law is not the best way to bring about change in any criminal justice system. It leads to instant reactions rather than measured and thought-through plans for reform. It is

highly disruptive to the system generally and has the potential to cause injustices in existing cases while attempting to redress perceived miscarriages in others. *Cadder* was a serious shock to the system. There is an acute need to ensure that, as far as possible, the system is not vulnerable to further upheaval as a result of a single court judgment.

The underlying and long-lasting implication of *Cadder* is that the system must fully embrace and apply a human rights based approach. This is not to say that it must adhere to a standardised Convention compliant template and abandon all traditions that have developed over centuries. But in promoting further evolution of a system, which should remain specifically designed for Scottish society, a more conscious application of the express and implied rights of the Convention is required.

The understanding of human rights should not be the sole preserve of lawyers. It is important, if the law is to be accessible, that society does not develop a system that buries human rights deep within legal architecture. The ability to apply basic human rights should not require a tortuous exploration of Strasbourg jurisprudence or an encyclopaedic knowledge of legal texts. If it does, the system will end up with Dickens' vision in Bleak House of lawyers "mistily engaged in one of the ten thousand stages of an endless cause, tripping one another up on slippery precedents, groping knee-deep in technicalities, running their goat-hair and horse-hair warded heads against walls of words and making a pretence of equity with serious faces".

It is, of course, the state's role to ensure, as far as it is practicable to do so, that its citizens enjoy the protections to which they are entitled under the Convention. But

this does not entail that the state should be bound to provide its citizens with universal, free and limitless access to lawyers. Nevertheless the system for which it is responsible must respect, promote and protect human rights in an effective manner. As well as ensuring the proper treatment of those suspected of having committed a crime, it must protect the rights of all those affected or potentially affected by crime.

It is with these basic ideas in mind that the Review has addressed its task. That is why, as was promised in the consultation document, the opportunity has been taken to explore the possibility of introducing radical changes to some of the fundamental precepts and principles of the criminal justice system, rather than merely affirming or denying whether the emergency legislation was, and is, effective. A year-long review cannot address every issue in detail; but the Review has been able to cover much ground. In this context, I would like to thank the members of the Reference Group for their invaluable advice. In both the plenary sessions, and especially in the focused “mini-meetings”, the Review has been able to explore and test options for change in some detail. This has been a key part in the development of this report. I would also pay tribute to the efforts of the Review’s own small team in organising the process of review, considering the many papers involved in that task, assisting the research programmes and ultimately seeing that all of the Review’s ideas and conclusions are expressed in what is hopefully a readable and easily understood final report.

I would also like to thank the many people who have given the Review the benefit of their expertise in, and experience of, other jurisdictions. This applies particularly to those who assisted the Review in Dublin, London, Manchester, Birmingham and Oxford, and those from Europe and the Commonwealth with whom the Review was

able to meet over the course of the year. Their willingness to help and their generosity in the giving of their time and insights have been a real highlight of the process. I am extremely grateful for the many responses to the consultation which institutions, groups and individuals took time to prepare and contribute. The breadth and quality of these contributions show how much can be achieved when participants are focused and well motivated. This Review has not been engaged in a theoretical and academic debate but in proposing practical measures that directly affect suspects, victims, law enforcement agencies, the legal profession, the courts and Scottish society as a whole. Almost all of those who had something of value to contribute have done so willingly, promptly and conscientiously.

I am pleased to present my Report with its several recommendations. As with the consultation document, although I have been helped enormously by the many participants in the consultation and evidence gathering exercise, the final responsibility for its contents are mine alone. I hope and trust that it will make a significant contribution to the development of a modern, fair, effective and distinctly Scottish criminal justice system for the future.

A handwritten signature in black ink, appearing to be 'Lord Carloway', with a long horizontal line extending to the right.

LORD CARLOWAY

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LIST OF ABBREVIATIONS

1995 Act	The Criminal Procedure (Scotland) Act 1995
2010 Act	The Criminal Procedure (Legal Assistance, Detention and Appeals) (Scotland) Act 2010
AC	Appeal Cases Law Reports (England and Wales)
ACPOS	Association of Chief Police Officers in Scotland
ALR	Australian Law Reports
Ambrose	Ambrose v Harris 2011 SLT 1005
Cadder	Cadder v HM Advocate 2011 SC (UKSC) 13
CCRC	Criminal Cases Review Commission
CDS	Criminal Defence Services
Chalmers	Chalmers v HM Advocate 1954 JC 66
CJ	Chief Justice
CLR	Commonwealth Law Reports (Australia)
COM	European Commission
Convention	The European Convention on Human Rights and Fundamental Freedoms
COPFS	Crown Office and Procurator Fiscal Service
CPS	Crown Prosecution Service (England and Wales)
CR	Criminal Reports (Canada)
Cr App R	Criminal Appeal Reports (England and Wales)
DPP	Director of Public Prosecutions
DR	Decisions and Reports of the European Commission of Human Rights
DTI	Department for Trade and Industry
Dayanan	Dayanan v Turkey (no 7377/03), 13 October 2009
ECHR	European Convention on Human Rights
EHRR	European Human Rights Reports
Emergency legislation	The Criminal Procedure (Legal Assistance, Detention and Appeals) (Scotland) Act 2010
EWHC	England and Wales High Court
Gafgen	Gafgen v Germany (2011) EHRR 1

HCJAC	High Court of Justiciary, Appeal Court (Scotland)
HRA	Human Rights Act 1998
Hume	Hume: Commentaries on the Law of Scotland Respecting Crimes (Bell ed, 1844)
IECCA	Court of Criminal Appeal (Ireland)
IESC	Irish Supreme Court
ILRM	Irish Law Reports Monthly
IR	Irish Reports
JC	Justiciary Cases (Scotland)
LJ-C	Lord Justice-Clerk
LJG	Lord Justice General
Macdonald	Macdonald: Practical Treaties on the Criminal Law (5 th ed, 1948)
McLean	HM Advocate v McLean 2010 SCCR 59
MLR	Modern Law Review
Moorov	Moorov v HM Advocate 1930 JC 68
NSWLR	New South Wales Law Reports
NT CCA	Northern Territories Court of Criminal Appeal (Australia)
NZSC	New Zealand Supreme Court
PACE	Police and Criminal Evidence Act 1984 (England and Wales)
PF	Procurator Fiscal
QB	Queen's Bench Law Reports (England)
Salduz	Salduz v Turkey [2008] 49 EHRR 19
SASR	South Australian State Reports
Section 14 detention	Detention under section 14 of the Criminal Procedure (Scotland) Act 1995
SC	Session Cases
SC (PC)	Session Cases (Privy Council)
SCC	Supreme Court of Canada
SCCR	Scottish Criminal Case Reports
SCCRC	Scottish Criminal Cases Review Commission
SCR	Supreme Court Reports (Canada)
SLAB	Scottish Legal Aid Board

SLT	Scots Law Times
SSI	Scottish Statutory Instruments
Thomson Committee	The Thomson Committee on Criminal Procedure in Scotland, relative to its second report (Cmnd 6218/1975)
WLR	Weekly Law Reports

1.0 INTRODUCTION

Background

1.0.1 In October 2010 the Cabinet Secretary for Justice, Kenny MacAskill MSP, decided that it was necessary to review key elements of Scottish criminal law and practice in the light of the decision of the United Kingdom Supreme Court in *Cadder*¹. Mr MacAskill determined that such a review should be conducted expeditiously, to give the Parliament the opportunity to consider any necessary further legislation during the forthcoming new parliamentary session. He also decided that it should be conducted independently of Scottish Ministers. To these ends, he asked the Lord President to nominate a single High Court judge who would lead the Review full time, with the support of a full-time team and the assistance of an expert Reference Group, and would report within twelve months. The Lord President's nominee, Lord Carloway, commenced this Review in November 2010, following a parliamentary debate on these issues during the passage of the emergency legislation contained in The Criminal Procedure (Legal Assistance, Detention and Appeals)(Scotland) Act 2010.

1.0.2 *Cadder* sought to apply to a Scottish case the principles set out in the judgment of the Grand Chamber of the European Court of Human Rights in *Salduz*². It was held in *Salduz* that the right to a fair trial, recognised in Article 6 of the European Convention on Human Rights, would be infringed if a prosecutor made use of admissions, obtained during the interview of a suspect

¹ *Cadder v HMA* 2011 SC(UKSC) 13

² *Salduz v Turkey* [2008] 49 EHRR 19

in police custody, before that suspect had the opportunity to obtain access to a lawyer (except in special circumstances).

1.0.3 In taking this approach, the United Kingdom Supreme Court made it clear that the current law and practice in Scotland, whereby a suspect could be detained for a period of up to six hours and questioned during that period without the opportunity of access to a lawyer, could not continue. This decision overturned the previous approach taken by the Scottish courts, most evidently the Full Bench³ High Court decision in *McLean*⁴, that, despite the lack of a right of access to a lawyer prior to questioning, the right to a fair trial was safeguarded by other rules of criminal evidence and procedure. These safeguards included the comparatively short maximum period for detention, the overall fairness test for admissibility of statements by a suspect and the requirement for corroboration.

1.0.4 *Cadder* raised questions not only about how the law should be changed to secure legal advice for suspects at the appropriate time, but also about the utility of current checks and balances in the criminal justice system which had, until *Cadder*, been thought sufficient to guarantee fairness in the trial process.

1.0.5 In response to *Cadder*, the Scottish Government introduced, and the Parliament passed, the 2010 Act which was intended to address immediately some of the issues and uncertainties which had arisen. In particular, the 2010 Act provided for the right of a detained suspect to “a private consultation with

³ seven judges

⁴ *HM Advocate v McLean* 2010 SCCR 59

a solicitor” prior to, and at any time during, questioning at a police station. The 2010 Act also extended the period of detention in police custody from six to twelve hours, with a possible extension of a further twelve hours, and made consequential adjustments to the statutory legal aid scheme. In light of the comments in *Cadder* about its effects on concluded cases, the 2010 Act altered the procedures for appeal, including the arrangements for references of cases by the Scottish Criminal Case Review Commission (SCCRC).

- 1.0.6 The 2010 Act was not intended to be a final and comprehensive response to the issues raised by *Cadder*. Indeed, during the Parliamentary debate on the Bill, Mr MacAskill said that:

“... For those members who are conscious of the adage of legislating at haste and repenting at leisure, I offer the reassurance that, ... all these matters will be subject to further consideration in Lord Carloway's review of law and practice...”⁵.

- 1.0.7 This arose from the view that there would be areas of the emergency legislation that needed to be re-examined and that *Cadder* raised wider issues regarding criminal law and practice. The Cabinet Secretary therefore agreed with Lord Carloway the following Terms of Reference for his Review:

Carloway Review: Terms of Reference

- (a) To review the law and practice of questioning suspects in a criminal investigation in Scotland in light of recent decisions by the United Kingdom Supreme Court and the European Court of Human Rights, and with reference to law and practice in other jurisdictions;

⁵ Scottish Parliament Official Report, 27 October, col 29554

(b) To consider the implications of the recent decisions, in particular the legal advice prior to and during police questioning, and other developments in the operation of detention of suspects since it was introduced in Scotland in 1980 on the effective investigation and prosecution of crime;

(c) To consider the criminal law of evidence, insofar as there are implications arising from (b) above, in particular the requirement for corroboration and the suspect's right to silence;

(d) To consider the extent to which issues raised during the passage of The Criminal Procedure (Legal Assistance, Detention and Appeals)(Scotland) Act 2010 may need further consideration and the extent to which the provisions of the Act may need amendment or replacement; and

(e) To make recommendations for further changes to the law and to identify where further guidance is needed, recognising the rights of the suspect, the rights of victims and witnesses and the wider interests of justice while maintaining an efficient and effective system for the investigation and prosecution of crime.

How the Review was carried out

Review Team

1.0.8 The Review Team was established in December 2010. It consisted of: a Secretary to the Review; a lawyer on secondment from the Scottish Government; a procurator fiscal loaned by the Crown Office; a Project Manager; and a Project Officer. The team was also greatly assisted by a Chief Superintendent of police acting as a consultant.

Reference Group

1.0.9 The Review was supported by an expert Reference Group consisting of leading practitioners and representatives in relevant fields. A full list of the members of the Group, and the Review Team, is provided in Annex D. The

role of the Group was to provide the Review with advice, as it developed its ideas on the range of issues to be addressed, and to act as a sounding board, offering insights, criticisms and comments in the development of the Review's work. The Group was not required to reach a consensus view on any issue or to endorse the report and its recommendations. After a number of individual meetings with the Team, the Reference Group met in plenary session for the first time on 20 December. There were four meetings of the full Group in the course of the Review and many other meetings on a smaller sub-group or individual basis to test possible options and ideas.

- 1.0.10 All papers and minutes from each of the Reference Group meetings, along with notes of the more focused meetings, are published on the Review website at www.carlowayreview.org.

Public Consultation

- 1.0.11 It was essential that the recommendations were developed with the widest possible consultation to ensure that all relevant aspects were considered and, in particular, that the proposals were grounded in practical experience and understanding. The Review accordingly launched a consultation document on 8th April 2011. This put the scope of the issues for consideration into the public domain and was a key stage in the development of the proposals that ultimately formed the Review's recommendations. The consultation document addressed four main themes: Key elements of Custody; Key stages of Custody; Evidence; and Appeals. It identified 34 questions which would provide the principal (although not exclusive) focus of the Review.

1.0.12 The formal consultation period lasted for 8 weeks, officially closing on 3 June.

The Review received 50 responses from various bodies and organisations within the criminal justice system. The list of those who responded is at Annex F.

Roadshows

1.0.13 As part of the consultation process the Review held four “roadshows” in Aberdeen, Edinburgh, Glasgow and Inverness. These were aimed at attracting a wide range of those with an interest in the content of the consultation document, with discussions centred on four main topics: Police Custody, the Form of Legal Advice, Corroboration and Adverse Inference. The Review also hosted an additional roadshow in Edinburgh which explored issues around Appeals and the provisions of the 2010 Act relating to the Scottish Criminal Cases Review Commission.

1.0.14 There were approximately 220 people in attendance over the Review’s five ‘roadshow’ events. These included: a large number of defence lawyers from practices based across Scotland; representatives from all of Scotland’s 8 police forces as well as number of other national police organisations; Crown Office and Procurator Fiscal Service fiscals and staff from offices across the country; representatives from university law schools; sheriffs; Justices of the Peace, Commissioners from the SCCRC; a wide representation from the various victims groups; and officials from various public bodies and specialist reporting agencies with an interest in the topics covered by the Review. Notes

of the points made at each of these roadshows were published on the Review website.

Research

1.0.15 In addition to the consultation process, the Review sought to explore the law and practice in a number of other jurisdictions and the resultant jurisprudence flowing from the applicability of the European Convention. This involved a combination of desk research and discussions with practitioners and academic experts in those areas. A list of those with whom these issues were discussed is set out at Annex E. It is, however, worth describing the principal discussions that the Review undertook. The Review visited Manchester and London in order to have a greater understanding of PACE and the different test for sufficiency of evidence in England and Wales. It had a series of meetings with defence counsel and solicitors, the police, and the Crown Prosecution Service. In Manchester it visited the Crown Court and discussed the issues with the judges there. In London it went to the Criminal Appeal Court with a view to seeing how the appeal system operated in relation to both procedure and the substantive merits of cases. It also sought to ascertain how the Court interacted with the Criminal Cases Review Commission in England and Wales. It visited Birmingham in order to seek the CCRC view on the same and other topics. The Review visited Dublin to see how Ireland was approaching the central issues of custody and access to legal advice and to understand its appeal system, including appeals to Ireland's Supreme Court. There it also met with defence counsel and solicitors, the Director of Public Prosecutions and police as well as the judges. At various points, the Review

was able to interview experts in other legal systems, notably those in the Commonwealth and continental Europe.

1.0.16 The research was undertaken primarily to illuminate the specific areas that the Review was investigating. It was not intended to provide a comprehensive and detailed overview of all aspects of criminal procedure in all comparable common law or European jurisdictions. In most of the substantive chapters of this report, there is a section which discusses how the relevant issues are dealt with in some other countries. These sections are intended to be illustrative only rather than exhaustive.

1.0.17 On a more local basis, the Review spent some time at London Road police station in Glasgow to see at first hand how the arrest and detention system operated. It continued to follow the process, on a separate occasion, through the marking of papers at the Procurator Fiscal's office in Ballater Street and onto the cells at the Sheriff Court and the ultimate remand or release of the prisoners in the custody court.

1.0.18 The Review was particularly grateful for access to detention data gathered by ACPOS, which is now in the public domain. Finally, the Review commissioned research, with the help of the Crown Office, to analyse a cohort of cases which were not prosecuted, in the context of considering the impact of the requirement for corroboration. This research is referred to in Chapter 7.2 and further detail is in Annex A.

Topics outwith the scope of the Review

1.0.19 It is the nature of this subject that an exploration of one topic may lead to a consideration of a network of related issues. Given the specific Terms of Reference of the Review, and the limited period in which it has been carried out, it was not possible to investigate every connected topic or issue. The Review has, however, identified a number of those topics which would bear further investigation. It is a preliminary recommendation of this Review that the Scottish Government consider the implications of this Review's proposals in the following areas:

- Police powers (taking of samples, ID Parade, home and vehicle searches)
- Cross Border Powers
- Sentencing discounts, where no admission is made during police interview
- Specialist Reporting Agencies
- The practical implications of Saturday or Sunday courts
- Use of video links between courts, police stations, offices of procurator fiscals and defence agents
- The restriction on sheriffs working only within their own sheriffdoms⁶
- COPFS paperwork, notably the complexity of the Standard Prosecution Report in summary cases
- The wider law of hearsay

1.0.20 The Review has not ignored specific comments made about altering the level of the majority verdict in jury trials from the current eight in favour of guilty before a conviction can follow. It has not considered that to be specifically within its remit and did not, in any event, regard such an alteration as either

⁶ Sheriff Courts (Scotland) Act 1971 s 7(1)

necessary or desirable. It did not consider that the system of majority verdicts was directly comparable with those in common law countries where unanimity, or near unanimity, is required for either a “guilty” or a “not guilty” verdict. Thus in these countries, failure to have a majority in favour of guilty does not lead automatically to acquittal, as it does in Scotland. Rather the elaborate process of a retrial may follow with all the implications that such a process might have on accused, witnesses and victims. Furthermore, if the issue of majority verdicts were to be examined, a review of the three verdict system (i.e. ‘not proven’) would have to follow. The Review has been presented with no material to suggest that the majority verdict presents a problem or indeed that it results in a greater conviction rate than in other common law jury systems.

- 1.0.21 The Review noted that some contributors took the view that the issues covered in this report ought to have been remitted to a Royal Commission to investigate. The Review makes no comment on that other than to say that it carried out the task to which it was entrusted by the Government. It was satisfied that it had sufficient information, time and resources in which to do so. Where the Review felt that it lacked the expertise or the information upon which to make a recommendation, it has said so.

The Report and Recommendations

- 1.0.22 The Report that follows: sets out the historical background to the central issue of police questioning in custody; identifies the key issues arising from the

Convention, describes the overall vision of the system that it is recommended be implemented; and then, in four sections, each containing a number of chapters, deals with the specific topics of: Custody; Investigation; Evidence; and Appeals. Recommendations are highlighted in bold at the end of each chapter.

2.0 HISTORICAL BACKGROUND

Introduction

2.0.1 Over the last century, Scots law has looked upon the issue of the admissibility of statements made by suspects in custody from the perspective of whether they were, in the eyes of the court, fairly obtained. By this is meant that, to be admitted in evidence at a trial, any statement had to be spontaneous, as distinct from being brought about by inducements or pressure from the police or others. Traditionally, once a person had been arrested he/she fell into a distinct category. As a person in custody, he/she was entitled to certain statutory protections, notably “immediate” intimation to his/her solicitor and a private interview with a solicitor before appearing in court¹. As a generality, and although there is no statutory provision to this effect, a person arrested² could not be questioned and any answers to questions, however fairly put, would be regarded as inadmissible. How did the law arrive in that state?

2.0.2 The essential starting point is that, originally, although the task of arresting a suspect would be carried out by the police, investigation was the province of the sheriff and later, in practice, his/her procurator fiscal. The arrest by the police was solely with a view to bringing the suspect before a court for examination. Evidence of a confession to the police prior to a suspect’s appearance in court was regarded with extreme suspicion and often held to be incompetent. Thus, in the mid 19th century, the newly appointed Lord

¹ currently s 17 of the Criminal Procedure (Scotland) Act 1995 (originally Criminal Procedure (Scotland) Act 1887 s 17)

² but cf *Johnstone v HM Advocate* 1993 SCCR 693

Justice-Clerk (Inglis) stated to a police officer giving evidence that “when a person is under suspicion of a crime, it is not proper to put questions, and receive answers, except before a magistrate”³. The roles changed over time and that of the police became much more investigative. In that setting, the courts began to admit evidence of confessions to the police if they had been fairly obtained. But in the first half of the 20th century, some (probably most) judges⁴ remained of the view that, once a suspect had been arrested and certainly if he/she had been charged, he/she could not be questioned by the police, and if he/she was, any consequent incriminatory statements would be inadmissible.

2.0.3 Mill⁵ usefully describes a setting whereby an arrest would be carried out by one police officer, who would take the suspect to a police station. There, the duty officer would apply himself to the evidence and decide whether there was sufficient to charge, and thus to detain, the suspect. There could be some logistical delay between arrival at the police station and the charge, depending upon further police enquiries and possible consultation with the procurator fiscal. However, if the duty officer considered that the suspect should be detained, he was obliged to caution and charge him. The prisoner would then be removed from the presence of the arresting officer and placed in a cell

³ *HM Advocate v Hay* (1858) 3 Irv 181 at 184

⁴ notably Lord Moncrieff in *Stark and Smith v HM Advocate* 1938 JC 170 at 175 and *Morrison v Burrell* 1947 JC 43 at 49

⁵ *The Scottish Police: Powers and Duties* (1944) p 88 et seq. Mr Mill was the Edinburgh city prosecutor

under the care of a “disinterested turnkey”⁶. Such a prisoner required to “be kept free from further interrogation by the investigating officers”⁷.

Chalmers

2.0.4 The judicial high point approving this form of protective system was the Full Bench⁸ decision of *Chalmers*⁹ in 1954. At least until the introduction of the process of detention in 1980, this was the leading case on the interrogation of suspects, even if subsequent decisions had significantly eroded its practical effect long before then. There had at the time of *Chalmers* been a number of previous cases suggesting that a person might fall into one of three categories¹⁰. At one end of the spectrum, there was the person against whom there was no case meriting detention or charge and who was being questioned merely as a witness. The second, at the other end, was an arrested person who was in custody awaiting appearance in court, having been cautioned and charged. He/she could not be questioned. In a third, intermediate, group was someone who had been “detained on suspicion” of committing a crime. In the case of the latter category, fairness was thought to be the test for the admissibility of any incriminatory answers to questions¹¹. However, *Chalmers* made it clear that there was no intermediate condition between

⁶ p 89

⁷ p 90

⁸ five judges

⁹ *Chalmers v HM Advocate* 1954 JC 66

¹⁰ *Bell v HM Advocate* 1945 JC 61, LJG (Cooper) at 66; Macdonald: Criminal Law (5th ed) (1948) pp 312-313

¹¹ *HM Advocate v Aitken* 1926 JC 83, Lord Anderson (the trial judge) at 86

arrest and liberty. There was nothing in between, whereby a suspect could be detained on “suspicion” and questioned prior to charge¹².

2.0.5 The remarkable circumstances in *Chalmers* were that, once suspicion had fallen upon the appellant, he had been “taken” to a police station and cautioned. He was not formally arrested. Within five minutes of the start of questioning, he had effectively broken down and had ultimately taken the police to where the deceased’s purse could be found. This incriminated him in the deceased’s murder. The Lord Justice General (Cooper) regarded all of the evidence concerning the police’s dealings with the appellant to be inadmissible, as he had essentially been *the* suspect and thus, it was reasoned, in the same category as someone who had been arrested and ought therefore to have been charged. He could not legitimately be questioned. The Lord Justice General expressly stated that, whilst he had sympathy with the police in the difficult position in which they were often placed, it was not the function of the police to “direct their endeavours to obtaining a confession from the suspect to be used as evidence against him at the trial”. Only “spontaneous” voluntary statements were admissible. Thus, at the initial stage of an investigation, the police were free to question anyone with a view to acquiring information which may lead to the detection of the criminal. However, when the stage of suspicion was reached (in the sense of the person being regarded as the likely perpetrator of the crime) further interrogation of that person became “very dangerous” and would essentially render any responses inadmissible. It was in this celebrated part of his Opinion that the

¹² see *Swankie v Milne* 1973 JC 1, Lord Cameron at 123

Lord Justice General referred to the ordinary citizen regarding the venue of a police station as “sinister”, where the dice were loaded against the suspect¹³.

There followed this passage, in which he outlined what he viewed to have been the law for over almost a century¹⁴:

“The accused cannot be compelled to give evidence at his trial and to submit to cross examination. If it were competent for the police at their own hand to subject the accused to interrogation and cross examination and to adduce evidence of what he said, the prosecution would in effect be making the accused a compellable witness, and laying before the jury, at second hand, evidence which could not be adduced at first hand, even subject to all the precautions which are available for the protection of the accused at a criminal trial”.

2.0.6 Contrary to what the Thomson Committee subsequently considered to be the true position¹⁵, this was thus advanced as the legal basis in pre-Convention Scots criminal law for the exclusion of evidence of confessions not spontaneously given. Logically, it was reasoned, because an accused person could not be forced to give evidence, he/she could not be forced to answer questions at an earlier stage either. As will be seen, this view was later adopted by Lord Rodger, when he was Lord Justice General¹⁶.

2.0.7 Whether this analysis of principle is correct is debatable, but the analogy is not quite right. If an accused person elects to give evidence in court, he/she cannot do so by answering only some questions on the grounds that the answers to others might incriminate him/her. Once he/she starts to testify, he/she must answer every question posed relative to the crime charged. If

¹³ His opinion found favour with the Supreme Court of the United States in *Miranda v Arizona* (1966) 384 US 436, Warren CJ at 478

¹⁴ at 79

¹⁵ at para 7.02

¹⁶ *Brown v Stott* 2000 JC 328 at 346

he/she does not do so, he/she risks being found in contempt of court. That is different from an interview of a suspect at a police station, where the suspect can answer some questions and not others, as he/she pleases without risk of sanction.

Thomson Committee

2.0.8 In any event, over the next quarter century there was a significant retreat from the general, and many argued laudable, principles enunciated in *Chalmers*¹⁷. This was undoubtedly because the courts did not regard them as achieving the correct balance between the interests of the public and those of the suspect. Thus, in *Miln v Cullen*¹⁸ Lord Wheatley, in reaffirming fairness as the only test, stressed that¹⁹:

“While the law of Scotland has always very properly regarded fairness to an accused person as being an integral part of the administration of justice fairness is not a unilateral consideration. Fairness to the public is also a legitimate consideration, and in so far as police officers in the exercise of their duties are prosecuting and protecting the public interest, it is the function of the Court to seek to provide a proper balance to secure that the rights of individuals are properly preserved, while not hamstringing the police in their investigations of crime with a series of academic vetoes which ignore the realities and practicalities of the situation and discount completely the public interest”.

¹⁷ the low ebb of its influence can be seen in *Hartley v HM Advocate* 1979 SLT 26, which can be compared with *Rigg v HM Advocate* 1946 JC 1; see also Gordon’s “disembodied ghost” in “the Admissibility of Answers to Police Questions in Scotland” in Glazebrook (ed): *Reshaping the Criminal Law* at 332

¹⁸ 1967 JC 21

¹⁹ at 29

2.0.9 The retreat from *Chalmers* was never formally acknowledged by the court. But matters culminated in the Second Report of the Thomson Committee in 1975. The Committee had been appointed in 1970²⁰:

“to examine trial and pretrial procedures in Scotland ...for the prosecution of persons accused of crimes and offences and to report whether, having regard to the prevention of crime on the one hand and to the need for fairness on the other, any changes in law or practice are required.”

2.0.10 In its Second Report, the Committee identified what it regarded as the general problem. This it described as the conflict between the public interest in the detection and suppression of crime on the one hand and the interest of the individual citizen in freedom from interference by the police on the other. It quoted the Lord Justice General (Cooper) in *Lawrie v Milne*²¹ where, instead of looking at admissibility as one of principle as he later did in *Chalmers*, he stressed the need for the law to²²:

“strive to reconcile two highly important interests which are liable to come into conflict – (a) the interest of the citizen to be protected from illegal or irregular invasions of his liberties by the authorities, and (b) the interest of the state to secure that evidence bearing upon the commission of crime and necessary to enable justice to be done shall not be withheld from courts of law on any merely formal or technical ground”.

2.0.11 At the time of the Report, the courts were still looking at the admissibility of statements by suspects, as distinct from those from persons formally arrested and charged, from the perspective of “fairness”; that is to say, if the statements were regarded as “fairly obtained”, then it was admissible. Fairness came to

²⁰ at para 1.01

²¹ 1950 JC 19

²² at p 26

be a matter of fact to be determined, in solemn cases, by the jury and not, as advocated in *Chalmers*, after a “trial within a trial”. That was an interesting idea since, at least theoretically, it let members of the public, and not judges, set the parameters of legitimate police activity in the interrogation of suspects. There may be something to be said for this approach in terms of democracy, as indeed there is for the idea of balancing individual and societal rights²³. But the problem which required to be faced ultimately was whether this balancing exercise was compliant with the Convention which contains rights, some of which may be regarded as absolute, or at least not susceptible to modification on the ground of public expediency in an individual case.

2.0.12 By 1980, the situation had certainly become unsatisfactory on one level, as the Thomson Committee recognised. There was, in terms of *Chalmers*, arrest or liberty. Yet what was happening in practice was that suspects were continuing to be effectively held in custody without charge and described somewhat euphemistically as “helping the police with their enquiries”. This was an alternative description of the intermediate stage which was expressly not recognised by the law as set out in *Chalmers*. It was this problem that the Committee set out to remedy.

2.0.13 At the core of the recommendations of the Thomson Committee report was that²⁴:

²³ an approach favoured by Gordon (*supra*) p 342

²⁴ at paras 2.03 and 2.04

“...Society must make up its mind whether or not such things as detaining and questioning suspects are acceptable, and either prohibit them, or legalise them under suitable safeguards.

The extent of the protection afforded to accused persons by the rules of criminal procedure is an index of the social conscience and stability of a society and of its respect for human rights...”.

2.0.14 The Committee stressed that Scots law on police questioning was not grounded so much upon a constitutional or philosophic basis, such as the privilege against self incrimination²⁵, but on a conception of fairness and the need for the courts to control police activity. The approach of the Committee to “interrogation” was stated simply²⁶:

a. Subject to statutory exceptions no one should be under a legal obligation to give information to the police.

b. The police should not exert any pressure on any person to make him give information to them. In particular they should not offer inducements, threaten, bully, or deprive of rest or food.

c. It is reasonable and necessary for the police to ask questions in the course of a criminal investigation.

d. It is unreasonable and unrealistic to expect the police not to ask questions of a person whom they suspect of an offence.

e. Once the police have reached the stage where the person concerned should be arrested and charged, any further answers to their questions should be inadmissible as evidence.

f. There should be a reliable record of police interrogation”.

2.0.15 The Committee had considered that it was “only reasonable” for an investigator (i.e. the police) to ask questions of those concerned in an investigation. The more the police suspected a person, the more they would

²⁵ cf the LJG in *Chalmers* (*supra*)

²⁶ para 7.03

question the suspect until he/she became a person to be charged or he/she had been cleared of suspicion. In that context, the Committee did not recommend that there should be any compulsion to reply to questioning or that any adverse inferences might be drawn from silence. Any answers still had to be fairly obtained and following upon a suitable caution.

2.0.16 In a paragraph dealing specifically with the presence of a solicitor at interview, the Committee concluded²⁷:

“Although a person who has been charged with an offence is entitled to an interview with a solicitor, we recommend that a solicitor should not be permitted to intervene in police investigations before charge. The purpose of the interrogation is to obtain from the suspect such information as he may possess regarding the offence, and this purpose might be defeated by the participation of his solicitor. It is for that reason that we recommend...that it will be a matter of police discretion whether to allow the detainee an interview with his solicitor”.

2.0.17 In this passage can be seen the general approach of an adversarial trial system.

The trial, in the sense of there being proceedings against an accused, does not start until at least the stage of arrest and charge. Until then, the suspect does not have the rights, such as of access to a lawyer, which do become available once a charge is proffered and the suspect comes under the protection, not so much of a system of rights, but of the courts, whose task it is to ensure fairness, in a balanced way. As will be seen, such a system is not sustainable if it is recognised that the trial begins at an earlier stage in the police’s dealings with the suspect.

²⁷ at para 7.16

2.0.18 The recommendations of the Thomson Committee were given effect in the Criminal Justice (Scotland) Act 1980. In its section entitled “Police Powers”, the Act provided for an intermediate stage of “detention” between liberty and arrest, during which a suspect could be taken to, and held at, a police station and there be questioned. The purpose of exercising the power to detain and question was for “facilitating the carrying out of investigations (a) into the offence; and (b) as to whether criminal proceedings should be instigated ...”²⁸. Detention could last up to six hours only, at which point the police would either have to release the detainee or arrest and charge him/her. Updated versions of these provisions were incorporated into the Criminal Procedure (Scotland) Act 1995, with the power to detain contained in section 14 of that Act. The practice became known as “section 14 detention”. It is a statutory process quite distinct from arrest and charge at common law.

2.0.19 There were some very important elements in the 1980 Act which were lost over a remarkably short period of time, for reasons not immediately apparent now. First, the provision specifying that the purpose of detention was “for facilitating the carrying out of investigations” was meant, in part, to signify that the resultant questioning was not for the purposes of extracting a confession; a principle expressly repeated by the Committee²⁹. Suggestions³⁰ that the absence of a solicitor during a detention interview was a feature designed by the Thomson Committee to make it more likely that a person would incriminate himself/herself do not accord with the tenor of the

²⁸ s 2

²⁹ para 7.13 (a)

³⁰ e.g. Lord Rodger in *Cadder* at para 91. These criticisms have been repeated as fact by a number of lawyers in the media post *Cadder*

Committee's report when read as a whole. Unless the integrity of the Committee members were to be impugned, it must be accepted that the purpose of detention, as the members conceived it, was that stated by them to be justified. That purpose was to further investigations and not primarily as an instrument to prise admissions from those to be charged in any event.

2.0.20 Secondly, the Act specifically provided that the permission to question did not affect the law on admissibility of evidence³¹. Thus, answers to questions could still be regarded as inadmissible even if the questioning had been part of a valid six hour detention process. One particular aspect of this was, as the legal annotators³² of the Act declared, that detention was not, in terms of the structure of the Act, to be regarded as a means of delaying arrest and charge. If there were sufficient evidence to arrest and charge, it was the intention of the Committee³³, albeit not later expressly stated in the legislation, that the detention should end.

2.0.21 Thirdly, in the vast majority of cases, the police did not in reality exercise any discretion in deciding whether to allow a suspect a consultation with a solicitor. At least in cases where a suspect was detained at or about the time of the offence, in very few interviews of an adult suspect in detention was a solicitor ever permitted to be present. That is not to say that the police would not have allowed such presence, were the solicitor to have appeared in time at the police office. However, because of the prevalence of crime occurring at night and the restriction imposed by the limited six hour period, detention interviews

³¹ s 2(5) proviso; this is still the law, see 1995 Act s14 (7)

³² Scottish Current Law Statutes

³³ para 7.03(e)

would often have to take place outwith normal office hours. Furthermore, even for interviews during these hours, the legal aid structure, notably the advice and assistance scheme³⁴, did not cover the presence of a solicitor during interview. The duty agent scheme did not provide for attendance at such interviews. No doubt, therefore, even if a suspect had elected to contact his solicitor, it would have been unlikely (although by no means impossible) that a solicitor would have attended prior to the detention interview, at least where the client did not have adequate private means to fund such attendance. The idea of a telephone consultation does not seem to have been considered.

The Incorporation of the Convention

2.0.22 The development of law in this area experienced rapid change following the incorporation of the European Convention into Scots law. This was effected through two pieces of legislation passed in the same year. First, there was the Scotland Act 1998, coming into force in July 1999. Secondly there was the Human Rights Act 1998, which came into force in October 2000. Under the terms of the Scotland Act, notably section 57(2), a member of the Scottish Executive (i.e. a Scottish Minister):

“...has no power to make any subordinate legislation, *or to do any other act*, so far as the legislation or act is incompatible with any of the Convention rights” (*emphasis added*).

2.0.23 Where any act of a Scottish Minister is contended to be incompatible with the Convention, it can be challenged by raising a “devolution issue”. As the

³⁴ see Chapter 6.1 – Legal Advice

ultimate arbiter of constitutionality within the United Kingdom devolution settlement, the United Kingdom Supreme Court (previously the Judicial Committee of the Privy Council) was given an appellate jurisdiction to hear cases where it was alleged that an act of a Scottish Minister was incompatible with the Convention, thereby breaching the requirement in section 57(2) and rendering it *ultra vires* and thus illegal.

2.0.24 The definition of “Scottish Ministers” includes the Lord Advocate. This is particularly significant. It has been interpreted in such a way as to mean that any criminal prosecution undertaken by the Crown, such as a decision of a procurator fiscal depute in a summary trial in the Sheriff Court, is an act of a Scottish Minister and thus directly subject to the requirement of Convention compatibility. With the incorporation of the Article 6 right to a fair trial, and the interpretation of “trial” as starting from the point at which a person becomes suspected of an offence, any “unfairness” by the Crown in pursuing any prosecution, including the leading of evidence obtained unfairly in the pre trial period, became challengeable by means of a “devolution minute” lodged in the trial process and thus susceptible to United Kingdom Supreme Court review. This was the reasoning of the Privy Council in *Montgomery*³⁵, a decision which proceeded upon a concession by the Lord Advocate³⁶, even though it is clear that this was not the thinking of either the Government or the Parliament at the time when the legislation was formulated and enacted.

³⁵ *Montgomery v HM Advocate* 2001 SC (PC) 1 at 21

³⁶ see Lord Hope at 11; Leave had been granted to appeal to the Privy Council by the High Court chaired by the LJG (Rodger)

2.0.25 The common law concept of fairness, which governs the admissibility of evidence became, and is now, overlain by the requirement of Article 6 fairness. Scottish courts must therefore consider how best to apply both the common law test and the Article 6 right in assessing the legality of pre trial and trial procedures and, in particular, the admissibility of answers given by suspects during police interviews.

2.0.26 The application of Article 6 fairness was not regarded by the Scottish courts as involving a fixed set of absolute rights. It was understood that the fairness of a trial in Article 6 terms was to be assessed by looking at the trial process as a whole and not just at what might have occurred in the police station. In this area, however, the Convention jurisprudence evolved significantly. It is an understanding of that jurisprudence and thus what rights under Article 6 are absolute, as distinct from implied but not necessarily applicable in all circumstances, that lies at the core of *Cadder* and the European Court decision that prompted it.

Salduz

2.0.27 The starting point in the post Devolution era for looking at the absolute or qualified nature of Article 6 rights is the decision of the European Court in *Salduz* in 2008. *Salduz* involved a 17 year old arrested at 10.15 pm by the anti-terrorism branch of the Izmir Security Directorate on suspicion of taking part in a demonstration in favour of the illegal PKK (Kurdish pro independence party) and hanging an illegal banner from a bridge. Mr Salduz

was cautioned, but not told that he could have a lawyer informed of his arrest. He was then interviewed from about 1 am. There is no mention of his interview being recorded. When brought before the court the next day, he attempted to retract his statement and complained of duress. At subsequent stages in the proceedings, he again tried to retract. He was, however, tried on indictment before the state security court, convicted and sentenced to 2½ years imprisonment.

2.0.28 When this case came before the European Court, it held unanimously that there had been a breach of the suspect's rights under Article 6, because he had not had access to a lawyer while in police custody. The Court, in line with what it had said previously, reiterated that³⁷:

“...although not absolute, the right of everyone charged with a criminal offence to be effectively defended by a lawyer, assigned officially if need be, is one of the fundamental features of fair trial. Nevertheless, article 6(3)(c) does not specify the manner of exercising this right. It thus leaves to the contracting states the choice of the means of ensuring that it is secured in their judicial systems, the Court's task being only to ascertain whether the method they have chosen is consistent with the requirements of a fair trial”.

2.0.29 The significant point to note is that the Court is recognising that a suspect's fair trial right of access to a lawyer begins, not with the commencement of a trial or even a prosecution, but as soon as the suspect is in custody and being questioned. Put in a different way, the trial, in Convention terms, has started before the interview of the suspect.

³⁷ at para 51

McLean

2.0.30 The applicability of *Salduz* to Scottish procedure came under scrutiny by way of an objection to evidence of a police interview in *McLean*³⁸ in 2009. Mr McLean was aged 19. He had been detained under section 14 in relation to his involvement in the theft of a car and fire-raising. He had requested that the fact and location of his detention be intimated to a solicitor, but he was not given the chance to speak to a solicitor prior to questioning or to have a solicitor present during his interview. He subsequently made admissions at interview that the Crown intended to rely on at trial and an objection to this was taken as a preliminary issue prior to that trial.

2.0.31 Challenges to the admissibility of answers to questions in similar circumstances had been considered in two earlier Scottish cases: *Paton v Ritchie*³⁹ and *Dickson*⁴⁰. In both it had been held that the safeguards in the Scottish system were sufficient to ensure that, as a generality, the absence of a solicitor from the interview process, where a suspect had only been detained under section 14, did not of itself result in an unfair trial. That was to be the same result as was subsequently reached by the Full Bench⁴¹ in *McLean*.

2.0.32 The High Court in *McLean* took into account the Convention jurisprudence which indicated that whether a person will have, or has had, a fair trial depended not on an application of inflexible exclusionary rules but on looking

³⁸ *HM Advocate v McLean* 2010 SCCR 59

³⁹ *Paton v Ritchie* 2000 JC 271

⁴⁰ *Dickson v HM Advocate* 2001 JC 203

⁴¹ seven judges

at the whole circumstances of the case. As recently as 2007, a decision of the Privy Council to this effect had been endorsed by the European Court in a case⁴² involving the requirement upon a registered keeper in England to disclose the name of the driver of his car under the Road Traffic legislation. This had followed an identical Privy Council decision on the same requirement in Scotland⁴³. The European Court rejected the submission that the right to remain silent and the privilege not to incriminate oneself were absolute rights. It said⁴⁴:

“... While the right to a fair trial under Article 6 is an unqualified right, what constitutes a fair trial cannot be the subject of a single unvarying rule but must depend on the circumstances of the particular case. This was confirmed in the specific context of the right to remain silent in the case of *Heaney and McGuinness*⁴⁵ and, more recently, in the Court's *Jalloh* judgment⁴⁶, in which the Court identified the factors to which it would have regard in determining whether the applicant's privilege against self-incrimination had been violated.

In the light of the principles contained in its *Jalloh* judgment, and in order to determine whether the essence of the applicants' right to remain silent and privilege against self-incrimination was infringed, the Court will focus on the nature and degree of compulsion used to obtain the evidence, the existence of any relevant safeguards in the procedure, and the use to which any material so obtained was put”.

2.0.33 The Lord Justice General (Hamilton) relied upon this *dicta* in his opinion in

McLean and went on to say⁴⁷:

⁴² *O'Halloran and Francis v United Kingdom* (2008) 46 EHRR 21

⁴³ i.e. in *Brown v Stott* 2001 SC (PC) 43, on which Lord Hope sat, reversing the High Court chaired by the LJG (Rodger) 2000 JC 328

⁴⁴ see *O'Halloran (supra)* at paras 53 and 55

⁴⁵ *Heaney and McGuinness v Ireland* (2001) 33 EHRR 12

⁴⁶ *Jalloh v Germany* (2007) 44 EHRR 32

⁴⁷ para 26

“Accordingly, provided that we are satisfied that the guarantees otherwise available under the Scottish system are sufficient to secure a fair trial for a person who, while detained, is interviewed by police officers without access to a lawyer and at whose trial his responses are relied on by the prosecution, a negative answer to the modified additional question [of whether the Lord Advocate would be acting in breach of the accused’s Article 6 rights] would not conflict with the decision and reasoning of the court in *Salduz*. We are so satisfied”.

2.0.34 The safeguards were then detailed as follows⁴⁸:

- (1) a suspect is cautioned and told what the nature of the crime is;
- (2) a person arrested and charged has the right to have a solicitor informed of what has happened and to a subsequent interview with him before his appearance in court. He cannot thereafter be questioned by the police;
- (3) a detainee is also cautioned;
- (4) an interview with a detainee is audio, and often video, recorded;
- (5) a detainee may be questioned persistently and robustly but cannot be coerced or otherwise treated unfairly;
- (6) such unfairness will render any incriminating answers inadmissible;
- (7) fairness can be determined in advance of trial, or at a trial, by the “trial within a trial” procedure in which the onus is on the crown;
- (8) if admitted, a jury in solemn cases can take into account the circumstances in assessing the weight to be given to the answers;
- (9) a suspect is entitled to decline to answer any of the questions (other than the formal questions) put by the police;
- (10) the jury is directed that they may not draw any adverse inferences from an accused’s silence;
- (11) a person cannot be convicted on the basis of his admission alone, there requires to be corroboration;
- (12) a person may not be detained for more than six hours;
- (13) although a detainee has no right to have access to a lawyer before being questioned, he is entitled to have the fact of his detention and of the place where he is detained intimated without unreasonable delay to a solicitor and to one other person reasonably named by him;
- (14) the police may, if they think fit, allow a lawyer or other person to be present during the detention; and
- (15) this discretion is likely to be exercised where the detainee is perceived to be a vulnerable person.

⁴⁸ at para 27

Cadder

2.0.35 Mr Cadder was aged 16 and was detained at 2.30 pm by the police investigating an assault to severe injury which had occurred the night before. He was cautioned. He declined to have a solicitor contacted. He was interviewed on tape for about 30 minutes until arrested and charged at 3.30 pm. At no point did he make any complaint of unfair treatment. He was convicted by a jury at Glasgow Sheriff Court. He sought leave to appeal. He was refused leave to appeal first by one High Court judge and then by the court itself, sitting with a quorum of three. The ground of his appeal was Article 6 unfairness on the basis that the Crown had relied on admissions he had made at police interview, without his having had the opportunity of access to a lawyer.

2.0.36 Lord Hope identified sufficient similarities between this case and *McLean* to opine that *Cadder* was in effect an appeal against the High Court's decision in the earlier case⁴⁹. In other words, *Cadder* became a re-examination and, in the result, a reversal of the *ratio* in *McLean* that the totality of the safeguards in Scottish criminal procedure was sufficient to render the overall process fair, despite there being no right of access to a lawyer prior to questioning during the short statutory detention period.

2.0.37 At the outset of a consideration of the effect of *Cadder* and its interpretation of Article 6 rights, it is worth remarking that the merits of the contention in

⁴⁹ in fact Mr McLean subsequently pleaded guilty and his subsequent appeal failed [2011] HCJAC 67

Cadder had never been the subject of any decision of the High Court at all. As noted above, leave to appeal to that court had been refused at first and second siftings. The United Kingdom Supreme Court had granted special leave to appeal from the decision to refuse leave to appeal on the basis that the refusal in itself amounted to the determination of a devolution issue, i.e. on whether the Lord Advocate had contravened Article 6 by leading evidence of the appellant's interview whilst in detention.

2.0.38 The United Kingdom Supreme Court did not doubt that *McLean* had been decided in line with previous Scots law. The sole issue was whether it could survive the European Court's decision in *Salduz*. The judges in *Cadder*, notably Lords Hope and Rodger, who had expressed opposite views in *Brown v Stott*, were clear that the *McLean* safeguards did not compensate for the absence of a right of access to a lawyer and that therefore the procedures were indeed a violation of the Article 6 right to a fair trial. The decision quoted the European Court in *Salduz* as follows⁵⁰:

“...the Court finds that in order for the right to a fair trial to remain sufficiently ‘practical and effective’ article 6(1) requires that, as a rule, access to a lawyer should be provided as from the first interrogation of a suspect by the police, unless it is demonstrated in the light of the particular circumstances of each case that there are compelling reasons to restrict this right...The rights of the defence will in principle be irretrievably prejudiced when incriminating statements made during police interrogation without access to a lawyer are used for a conviction”.

⁵⁰ Lord Hope at para 35

2.0.39 Compelling reasons would have to be special to the case⁵¹ and they did not arise in *Cadder*. It is important to bear in mind that the United Kingdom Supreme Court thought that the English judge in *Salduz*, Judge Bratza, had considered that the Court had not gone far enough and that access ought to be given from the point of the suspect being taken into police custody. This was regarded by the United Kingdom Supreme Court as unrealistic⁵².

2.0.40 There is an odd juxtaposition in the United Kingdom Supreme Court's interpretation of *Salduz*. It recognises, as is indeed the case, that the European Court has tended to leave it to the contracting states to secure how a fair trial is to be achieved. The European Court affords countries a "margin of appreciation" in how to ensure the effective protection of rights because "by reason of their direct and continuous contact with the vital forces of their countries, the national authorities are in principle better placed to evaluate local needs and conditions than an international court"⁵³. Thus⁵⁴:

"...the court has recognised that the Convention, as a living system, does not need to be applied uniformly by all states but may vary in its application according to local needs and conditions".

2.0.41 Yet at the same time the United Kingdom Supreme Court stated that the European Court's approach is⁵⁵:

⁵¹ such as to avoid alerting others concerned in the offence, see *Brennan v United Kingdom* (2002) 34 EHRR 18 at para 46

⁵² Lord Hope at para 37

⁵³ *R v DPP, ex parte Kebilene* [2000] 2 AC 326, Lord Hope at 380 under reference to *Buckley v United Kingdom* (1996) 23 EHRR 101 and *Handyside v United Kingdom* (1976) 1 EHRR 737; *Marcic v Thames Water Utilities* [2004] 2 AC 42, Lord Hope at 70 under reference to *Hatton v United Kingdom* (2002) 34 EHRR 1, (2003) 37 EHRR 28 and *James v United Kingdom* (1986) 8 EHRR 123

⁵⁴ *Ibid* Lord Hope at 380

⁵⁵ Lord Hope at para 40

“to provide principled solutions that are universally applicable in all the contracting states. It aims to achieve a harmonious application of standards of protection throughout the Council of Europe area, not one dictated by national choices and preferences. There is no room in its jurisprudence for, as it were, one rule for the countries in Eastern Europe such as Turkey on the one hand and those on its Western fringes such as Scotland on the other”.

2.0.42 The final phrase is perhaps an unfortunate description of Scotland’s place in Europe. Be that as it may, the statement does not seem to fit with the European Court’s previous statements concerning compliance with the Convention⁵⁶. There is also the oddity that the effect of the United Kingdom Supreme Court’s decision was that *Cadder* could not be the subject of deliberation before the European Court itself⁵⁷. But the law in terms of *Cadder* is that, “as a rule”, access to a lawyer must be provided as from the “first interrogation” of a suspect by the police⁵⁸.

Lord Advocate’s Guidelines and the 2010 Act

2.0.43 In anticipation of the decision in *Cadder*, the Lord Advocate issued “Interim Guidelines on Access to a Solicitor” in June 2010. These set out instructions to the police, and in particular Senior Investigating Officers, requiring them to facilitate access to a solicitor in: “all cases where individuals are interviewed as suspects in police stations whether: during detention under Section 14; during voluntary attendance for interview or under common law between arrest and charge”.

⁵⁶ for a fuller critique of the decision see Lord McCluskey : “Supreme Error” (2011) Edinburgh Law Review 276; cf Leverick: The Supreme Court Strikes Back (2011) Edinburgh Law Review 287

⁵⁷ the Lord Advocate is not a victim who can apply to that Court

⁵⁸ *Cadder*, Lord Hope at para 41

2.0.44 These guidelines were superseded in the immediate aftermath of *Cadder* by the passing of the Criminal Procedure (Legal Assistance, Detention and Appeals) (Scotland) Act 2010 through emergency legislative procedures in October 2010. The 2010 Act provided a statutory right of access to a lawyer for all suspects being interviewed at a police station; extended the period of section 14 detention from six to twelve hours, with a possible further extension to twenty-four hours. This then is the regime which is currently in operation.

2.0.45 One of the significant problems which *Cadder* created was the uncertainty generated by the United Kingdom Supreme Court's failure to define, with any real precision, exactly when the right of access to a lawyer commenced. Simply quoting from *Salduz* meant that it was from the "first interrogation" of a suspect by the police. But this raised questions of when that "first interrogation" occurs. On the one hand, it could be, and was, argued that the Court was referring only to the point at which a suspect, who had already been formally arrested or detained under section 14, was interviewed at the police station under tape recorded conditions. That was, after all, the position in *Cadder* and the suspect in *Salduz* too had at least been formally detained. On the other hand, taken literally, it could be, and again was, argued that it meant any point at which a suspect was questioned by the police. Thus the suspect at the locus of an incident could not give admissible answers to questions without having been afforded access to a lawyer. The same might apply to the suspect whom the police elected to speak to at his house. Lord Rodger⁵⁹ had,

⁵⁹ *Cadder*, at para 93

for example, referred to there not being the “remotest chance” that the European Court would consider it compatible with Article 6 for “suspects to be routinely questioned without having the right to consult a lawyer first”, without qualifying that by reference to any need for the suspect to have been in detention. Not surprisingly, the uncertainty so created spawned a large number of objections to evidence of incriminatory remarks made in the many different circumstances which can arise before a suspect is either arrested or made the subject to section 14 detention. Several appeals followed hearings in the Sheriff and High Courts, it being made clear by some of the sheriffs and judges that they had difficulty in determining how to apply the *Cadder dicta*. This process culminated in the Lord Advocate referring four cases direct to the United Kingdom Supreme Court in order to achieve rapid clarity on the point of when exactly the right of access to a lawyer arises.

Ambrose

2.0.46 In *Ambrose v Harris*⁶⁰ and its sister cases⁶¹, the United Kingdom Supreme Court⁶² did provide some, albeit still limited, clarity on what is an issue of considerable importance in the practical operation of police investigations and public prosecutions in court. The Court held that, following especially *Zaichenko v Russia*⁶³, the right of access to a lawyer does not arise in all situations where a suspect is to be questioned by the police. In order, for the general Article 6 right to a fair trial to have arisen, the situation of the suspect

⁶⁰ [2011] UKSC 43

⁶¹ *HM Advocate v G* and *HM Advocate v M*; and *HM Advocate v P* [2011] UKSC 44

⁶² by a 4-1 majority

⁶³ 18 February 2010 (no 39660/02)

first required to have been “substantially affected” by the investigation⁶⁴. This occurred if “the suspicion against him is being seriously investigated *and the prosecution case compiled*”⁶⁵. *Salduz* had not stated that a person who had not been taken into custody had a right of access to a lawyer. In cases where the police were merely asking preliminary questions “in order to decide what action to take”, it was unlikely that the right would arise until it could be said that the police had reason to think that an incriminating answer “may well” have been elicited⁶⁶. However, if the suspect had been restrained in some way and “there was a significant curtailment of his freedom of action”, he had to be regarded as if he were in police custody and required to be afforded the right of access to a lawyer⁶⁷. The circumstances had to be “sufficiently coercive” for any incriminatory answers to be regarded as inadmissible. Put in a different manner, a “proper understanding” of the jurisprudence in this area from the European and other courts was that “the right to have access to a lawyer emerges at the point when the suspect is deprived of his liberty of movement, to any material extent, by the investigating authorities and is to be questioned by them”⁶⁸. The approach of the United Kingdom Supreme Court is such that it is likely that there will now be cases which raise the issue of exactly when a person has been put in a “sufficiently coercive” position or “deprived of his liberty of movement” short of arrest or detention. There, however, for the moment, the law rests.

⁶⁴ Lord Hope, with whom Lords Brown and Dyson agreed, at para 62, following *Deweere v Belgium* (1980) 2 EHRR 439 at para 46 and *Eckle v Germany* (1982) 5 EHRR 1 at para 73

⁶⁵ Emphasis added, Lord Hope at para 62 following *Shabelnick v Ukraine* 19 February 2009 (no 16404/03) and *Corigliano v Italy* (1982) 5 EHRR 334 at para 34

⁶⁶ Lord Hope at paras 64, 65 and 70

⁶⁷ Lord Hope at para 71

⁶⁸ Lord Clarke at para 115, quoting from *Miranda v State of Arizona* (1966) 384 US 436

3.0 CONVENTION CONSIDERATIONS

Introduction

3.0.1 With the 2010 Act in place as a temporary solution, the Review's task has been to carry out a more thoroughgoing examination of the issues raised by *Cadder* and now *Ambrose*. One of the criticisms that could be drawn from the opinions in *Cadder* was that Scotland had in some sense failed to keep up with modern thinking and practice in relation to the protection of suspects¹. This Review recognises that Scots law has, for well over a century, had a unique system that guarded against the unnecessary deprivation of a person's liberty and enshrined, in its own way, the concept of a right to a fair trial. This system, in large measure, had been highly protective of the individual. But criminal justice continues to evolve. The context within which the police and courts operate has changed significantly since the Thomson Committee and the legislation that followed its report. It is the Review's responsibility to point the way forward to a new system that will not only be able to meet the requirements of modern society, but will also provide as much resilience as possible against unexpected future developments in the Convention jurisprudence. It acknowledges, of course, that there can never be any guarantee in that regard.

3.0.2 The most obvious change in the legal environment within which the criminal justice system must operate has been the incorporation of the Convention.

¹ e.g. Lord Hope at para 4 "It is remarkable that, until quite recently, nobody thought that there was anything wrong..." and at para 51 his comments on the Thomson Committee and subsequent legislation

The long term implication of this, which was highlighted in *Cadder*, is that there is a need to develop a system of criminal justice based on the protection of human rights; in particular those contained in Articles 3, 5, 6 and 8 of the Convention. This has been the key consideration informing the Review.

3.0.3 The Review's task has been to identify the fundamental principles that must apply in a modern, fair and effective system for the investigation and prosecution of crime and to assess the extent to which existing law and practice needs to be developed, adjusted or even overhauled in order to comply with those principles. It is clear that many of the formulations of those principles must now be derived mainly, and sometimes perhaps exclusively, from the Convention. In addressing this dimension, the Review has been conscious that there has to be developed a system which is Convention compliant overall and not just one containing an accumulation of individually compliant but unrelated constituent parts.

3.0.4 The Convention itself is a concise and relatively clear text. As drafted, it is a readily understandable code of human rights, each of which is manifest from the express terms of the individual articles and sub-articles. But the rights have been interpreted by the European Court in a manner which is appropriate to the particular circumstances of individual cases. There has developed an extensive jurisprudence of implied, subsidiary or supplementary rights which, although not explicitly recognised in the Convention, are taken by the Court to form part of the protections that it provides. In the context of the Article 6 right to a fair trial, for example, there exists an implied right to silence, the

privilege against self-incrimination and, post *Salduz*, the right of access to a lawyer prior to police questioning in detention. Adding to the complexity, other rights may be express, such as the right under Article 5 to be brought “promptly” before a court, but those have been interpreted by the Court in a highly flexible fashion.

Article 5 – The Right to Liberty

3.0.5 Article 5 states:

“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:

...

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...;

Everyone who is arrested shall be informed promptly, in a language which he understands, of the reasons for his arrest and of any charge against him.

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”.

3.0.6 The unnecessary or disproportionate deprivation of a person’s liberty is a serious infringement of his/her human rights. The circumstances in which any arrest or detention can be tolerated as legitimate must be tightly constrained. It is a fact, however, that any criminal justice system must be able to deprive a person of his/her liberty as part of the lawful protection of the rights of others

and of society as a whole. The purpose of Article 5 is accordingly not only to assert the fundamental right to liberty, but also to set out the limited conditions under which interferences with this right can be made.

3.0.7 The Convention uses both the words “arrest” and “detention”. It seems that “arrest” refers to the act of immediate deprivation of liberty and “detention” to the period thereafter when the prisoner is kept in custody (usually at a police station). The test for the legitimacy of both is the same. A person may be arrested or detained “on reasonable suspicion of having committed an offence”. Just what “reasonable suspicion” is varies according to circumstances. It exists when there is information which would satisfy an objective observer that the suspect concerned may have committed the offence². There is no express obligation upon the police under this Article³ to charge a suspect at the point of arrest or at the stage of his detention at the police station, although the suspect must be told of the reason for his/her arrest and subsequent, if any, detention.

3.0.8 It is clear from Article 5 that the only legitimate purpose of arrest and detention is to bring the suspect before “the competent legal authority”. The Review takes this to mean a court or judge in some form⁴, i.e. an independent judicial authority. If the motive for an arrest and/or detention were simply that the suspect could be questioned, the subsequent custody for that purpose could, it might readily have been argued, have amounted to a violation of that

² *Fox v United Kingdom* (1991) 13 EHRR 157 at para 32

³ Article 6 (*infra*) of course also has to be considered

⁴ *Schiesser v Switzerland*, (1979) 2 EHRR 417 at para 29

suspect's right to liberty. However, in two cases against the United Kingdom⁵ dealing with the arrest of terrorist suspects, the Court adopted an interesting approach to the situation where suspects had been arrested, questioned and released without charge. This was essentially that the process adopted, which had questioning as a principal purpose, was still to bring the suspect before the court, depending upon the result of the interrogation. The interrogation was properly seen as incidental to that process. The approach taken in the first of these cases suggests that, as long as what is envisaged by the police is intended, if successful, to end in a court appearance, arrest and detention, which also have in mind the questioning of the suspect meantime, are Convention compliant.

3.0.9 Subject to a suspect being advised of his/her rights and these rights being, where required, complied with, there is no express bar on questioning or any apparent limit to the nature and extent of that questioning. This follows from the purpose of Article 5, which is intended to guard against the ill treatment of persons in custody (as well as arbitrary arrest) rather than to prompt the fairness of trials. This carries with it the implication that the right to be brought before the court “promptly” only arises in the event of continued detention and not, therefore, where arrest and/or detention are followed by prompt release⁶.

3.0.10 All of this seems to confirm that the European Court is content with a situation where the suspect arrested and detained is questioned about the subject matter

⁵ *Brogan v United Kingdom* (1989) 11 EHRR 117 and *Murray v United Kingdom* (1994) 19 EHRR 193

⁶ *Murray v United Kingdom* (*supra*) paras 67-69

giving rise to the reasonable suspicion in advance of any court appearance. It appears to suggest contentment also, so far as Article 5 goes, with questioning designed to “confirm” the suspicions (i.e. to see whether an admission is to be forthcoming). The suspect will, depending upon the results of the questioning, either be brought before a court or released.

Article 6 – the Right to a Fair Trial

Primary rights

3.0.11 Although Article 6 is headed “Right to a fair trial”, the actual terms of the article do not mention “fair trial” at all but, in Article 6.1, a “fair and public hearing”. Article 6.2 provides that everyone is presumed innocent until proved guilty. Article 6.3 provides certain minimum rights, including those: “To be informed promptly and in detail of the nature and cause of the accusation against him” and “To defend himself in person or through legal assistance”.

3.0.12 It is important to understand that a “trial” or “hearing” in Convention terms has a far broader meaning than that of the court hearing at which a final verdict is reached. Its scope has been described thus⁷:

“Article 6 applies to all procedural steps which are directly relevant to the decision as to the guilt or innocence of the accused... It begins with the police inquiry and continues until the exhaustion of all domestic appeals, including those to the constitutional court”.

⁷ Trechsel: Human Rights in Criminal Proceedings (2005) p32

3.0.13 The protections afforded by Article 6 apply to anyone who has been “charged” with an offence. “Charge” has an “autonomous” meaning. It does not necessarily mean the laying of a formal accusation, rather⁸:

“According to the Court’s constant case-law, a person has been found subject to a “charge” *inter alia* when a preliminary investigation has been opened in his case and, although not under arrest, the applicant has officially learned of the investigation or has begun to be affected by it”.

Thus, the Article 6 “fair trial” protection can apply, in the event of a subsequent prosecution, at least from the point of arrest and detention on suspicion of having committed a crime⁹.

Subsidiary rights

3.0.14 Although Article 6 expressly sets out a number of “minimum rights”, there are some further implied rights which have been held necessary to the conduct of a fair trial. These include the right of silence and the privilege against self-incrimination¹⁰. For the reasons explored above, these rights have been held to arise not only at the final diet of trial but also at least from the point when a detained suspect is to be questioned by the police. Following *Salduz*, the right of access to a lawyer before questioning is either an implied right in terms of Article 6.1 or is an element of the right to legal assistance under Article 6.3. The European Court tends to regard it in the context of both the general and specific provisions.

⁸ *Kangasluoma v Finland* no (48339/99), 20 Jan 2004, referring to *Corigliano v Italy* (1983) 5 EHRR 334

⁹ see now *Ambrose v Harris* [2011] UKSC 43, Lord Hope at para 44 under reference to *Eckle v Germany* (1982) 5 EHRR 1 and *Deweert v Belgium* (1980) 2 EHRR 439

¹⁰ see generally Ashworth: Self Incrimination in European Human Rights Law – A Pregnant Pragmatism (2008) 30 Cardozo LR 751 tracing the history from *Funke v France* (1993) 16 EHRR 297

3.0.15 The right of silence and the privilege against self incrimination have been said by the European Court to be¹¹:

“generally recognised international standards which lie at the heart of the notion of a fair procedure under article 6. Their rationale lies, inter alia, in the protection of the accused against improper compulsion by the authorities thereby contributing to the avoidance of miscarriages of justice and to the fulfilment of the aims of article 6... The right not to incriminate oneself, in particular, presupposes that the prosecution in a criminal case seek to prove their case against the accused without resort to evidence obtained through methods of coercion or oppression in defiance of the will of the accused”.

It is interesting to note, therefore, that the Court sees, or at least saw¹², the issue in terms of preventing miscarriages of justice, presumably because of the risk of false confessions brought about by coercion or oppression.

3.0.16 There has been some consideration of whether these subsidiary or implied rights are absolute or can be modified accordingly to the circumstances of the individual case. It is made explicit in *Salduz* that the right of access to a lawyer is not absolute¹³, but the Court has been less clear on this subject in respect of the right to silence. In looking at whether the use of statements obtained from a suspect violated Article 6, the Court has said that¹⁴:

“This question must be examined by the Court in the light of all the circumstances of the case. In particular, it must be determined whether the applicant has been subject to compulsion to give evidence and whether the use made of the resulting testimony at his trial

¹¹ *Saunders v United Kingdom* (1996) 23 EHRR 313, para 68, see also *Murray v United Kingdom* (1996) 26 EHRR 29

¹² see now *Dayanan v Turkey*, 13 October 2009 (no 7377/03)

¹³ *Salduz* at para 51 et seq

¹⁴ *Saunders* at para 69

offended the basic principles of a fair procedure inherent in Article 6(1) of which the right not to incriminate oneself is a constituent part”.

The context was a procedure which compelled a person to answer questions¹⁵. However, the Court appeared to be saying that there were no fixed rules on the subject. Each case had to be looked at on its own facts to see if there had been an infringement of the general right to a fair trial. The Court has not, however, normally recognised any circumstances in which this fundamental right can be overridden by, for example, arguing that forcing persons to answer questions is a proportionate response when dealing with terrorist suspects¹⁶. Yet in *Gafgen v Germany*¹⁷ the Court has recently stated that Article 6 does not enshrine any absolute right.

Article 3 – Prohibition of Torture

3.0.17 Article 3, which proscribes “inhuman or degrading treatment or punishment”, was drafted partly as a protection against any oppressive practices in the criminal justice systems of Convention countries.

3.0.18 The Review did not receive any representations expressing significant concerns about the systemic ill treatment of suspects which might infringe Article 3. Although this report comments on the Spartan conditions in which suspects are detained, the Review did not gain the impression that there was a feeling that such ill treatment was prevalent or common. However,

¹⁵ DTI investigation under the Companies Act 1985; see esp s 434 and s 436

¹⁶ *Heaney and McGuinness v Ireland* (2001) 33 EHRR 12 at paras 53-59, *Quinn v Ireland* unreported, 21 December 2000 paras 53-60; *Shannon v UK* (2006) 42 EHRR 31 at paras 38-41

¹⁷ (2011) 52 EHRR 1 at para 178

complacency must be avoided and the system must have checks to ensure that such ill treatment does not occur in the future. In that context, the decision of the European Court in *Dayanan v Turkey*¹⁸ is significant in its requirement for early intervention, if requested, by a lawyer to witness a suspect's condition, to hear his concerns and for other purposes in connection with his continued detention. Although prisoner welfare has not, perhaps, been at the forefront of a Scottish criminal court solicitor's thinking when receiving a telephone call from a suspect, it is clear from the Convention jurisprudence that it is a task which the Court expects a lawyer to undertake where appropriate. The interlinking between Article 3 and Article 6 requires consideration in the context of the reasoning in *Dayanan*.

Article 8 – Right to Respect for Private and Family Life

3.0.19 Many of the elements of a criminal investigation, including custody, questioning (e.g. at a suspect's home), the search for evidence and the taking of samples, will have an impact on a suspect's Article 8 right to respect for his/her private life and, in some cases, his/her family life. Holding a suspect in custody not only deprives an individual of his/her liberty, it can also interfere with his/her ability to provide support and care for any dependants. Although these considerations are not the central focus of the Review, they have been borne in mind in the development of the recommendations.

¹⁸ *Dayanan v Turkey* (no 7377/03), 13 October 2009, as yet available officially only in French

Rights of the Victim

3.0.20 There is a further critically important aspect to the Convention's declaration of individual rights and this is the concept of the rights of the victims or potential victims of crime. The state has a positive obligation to secure and protect those rights; not merely to avoid infringing them. In some respects, the Convention is explicit in relation to these rights. Article 2, for example, states that "Everybody's right to life shall be protected by law". More generally, however, it is understood that such rights as those to liberty and security of person, the right of respect for private and family life and the entitlement to the peaceful enjoyment of possessions¹⁹ can only be meaningful if the state secures their protection through an effective system for the prevention, investigation and prosecution of crime. This is encapsulated in Article 13, which states that:

"Everyone whose rights and freedoms as set forth in this Convention are violated shall have an effective remedy before a national authority notwithstanding that the violation has been committed by persons acting in an official capacity".

3.0.21 Although this primarily requires that there be a legal procedure within each jurisdiction for raising a complaint that an individual's rights have been violated, the European Court has recognised that Article 13 can apply more widely and carry with it a requirement that there be proper investigation of alleged crime²⁰. In the United Kingdom, such an obligation on the state may also be derived from section 6 of the Human Rights Act 1998, which renders it

¹⁹ The entitlement to enjoy possessions is contained in Article 1 of the First Protocol to the Convention

²⁰ *Aydin v Turkey* (1997) 25 EHRR 251 at paras 103-109

unlawful for a public authority to act in a way which is incompatible with a Convention right. “An act’ includes a failure to act”²¹.

3.0.22 The European Commission has been developing the concept of victims’ rights with its proposal for a Directive published in May 2011²². Although this primarily focuses on the ability of victims to intervene in a court’s consideration of a case by means of a victim statement, it is indicative of a growing recognition that the criminal justice system has obligations to those who suffer, or may suffer, from the effects of crime. The Review has been conscious of the need for its recommendations to take into account, not only the legitimate protection of the rights of the individual suspect or accused, but also the need for effective and efficient investigation and prosecution of crime because of their importance in the protection of the rights of citizens in general and the victims of crime in particular.

²¹ Human Rights Act s 6 (1) and s 6 (6)

²² “Proposal for a Directive of the European Parliament and of the Council establishing minimum standards on the rights, support and protection of victims of crime” COM(2011) 275 final

4.0 THE PROPOSED CHANGES – AN OVERVIEW

Introduction

4.0.1 The criminal justice system in Scotland has evolved and developed over many years. There have been moments in its evolution when it has had to undergo substantial and radical change in order to meet the expectations and requirements of modern society. The implementation of the Thomson Committee's Second Report was one such moment. The system is at a similar point in the aftermath of *Cadder*. That decision highlighted dramatically the need for the system to be reviewed and reformed with a stronger focus on meeting the requirements of the Convention. The suite of recommendations in the following chapters is designed to re-cast and modernise aspects of the system so that it meets those requirements and provides a comprehensive, effective and fair criminal justice system for the foreseeable future.

4.0.2 In developing these recommendations, the Review recognised at the outset of its work that, whatever the theoretical possibilities, it was not practicable to devise a utopian system which could then be super-imposed over existing well established rules and practices, irrespective of long standing traditions. The system has, until relatively recently, been seen as broadly sound in Convention compliance terms and it is important to build on these good rules and practices. However, the Review has not shied away from proposing radical change where it is clear that the current approach is outdated, does not readily fulfil Convention obligations or is a hindrance to justice.

4.0.3 In short, the Review has grasped the opportunity presented to it not just to accept the temporary, if largely effective, solutions advanced in the 2010 Act but to re-build and reinforce the system's foundations by incorporating Convention rights in larger measure and at greater depth. The thinking does not dwell upon, nor stop at, the creation of a Convention compliant set of rules. Rather it has contemplated changes that would surpass the minimum requirements dictated by the Convention jurisprudence and be capable of withstanding any predictable changes in that jurisprudence in the medium, if not longer, term.

4.0.4 In order to achieve this result, the Review returned to first principles in a number of areas of the law of evidence and procedure. It challenged traditional legal thinking, seeking to uncover the reason for the existence of particular principles and rules within the system. It had in mind throughout the need for the maintenance of an efficient and effective system for the investigation and prosecution of crime, whilst at the same time developing that system and modernising, clarifying and simplifying it wherever possible. This required an examination of almost all stages of the criminal justice process, from the commencement of the police investigation, through the report to the procurator fiscal and the suspect's first court appearance, to the evidence adduced at trial and the courts' decisions on sufficiency, on to the appellate courts' assessment of miscarriages of justice and finally to the determination of references from the SCCRC. In this last context it took account of the need

of all affected by the system to achieve such certainty and closure as is consistent with a civilised course of justice.

4.0.5 The most significant articles of the Convention which underpin the system are those expressing the right to liberty (Article 5) and the right to a fair trial (Article 6). In determining where and how the system needed to change, it was necessary to examine individual elements in each article and to contemplate a variety of situations in the processes mentioned above which would require new Convention compliant solutions. The four main areas scrutinised were custody, investigation, evidence and appeals. The substance of the report has been laid out under these main headings. The ultimate intention, however, has not been to achieve minimum Convention compliance but to re-establish Scotland at the forefront of the law and practice of human rights in general.

4.0.6 Concern has been expressed that the Review was commissioned with a view to re-balancing a criminal justice system which had been thrown out of kilter by *Cadder*. There was some perception that *Cadder* had tilted the system in favour of the suspect in a criminal investigation and there required to be a re-adjustment by adding weight to the causes of the police and prosecution. The Review has not sought to analyse whether there has been a tilting or not and, in any event, in whose favour the balance has wavered. It has not approached its remit with a view to re-adjusting the system in favour of any particular institution or group of persons.

The System

4.0.7 The recommendations combine a range of new elements within well-established principles and procedures. Additional safeguards for the suspect are proposed together with greater police powers. Some obstacles to effective and efficient investigation are removed but other measures are introduced to bolster the human rights of the suspect during that investigation. Radical changes to the law of evidence are recommended so that the focus is directed away from the present task of gauging the quantity of testimony towards a more fruitful analysis of its relevance and an assessment of its quality. Greater trust is placed on the judge and jury to make accurate translations from testimony to findings in fact. Alterations to the law on the admissibility of statements by suspects are advanced with a view to improving the quality of justice generally by sweeping aside unnecessarily complex and often misunderstood legal rules. Measures to streamline the appeal system ought to improve consistency and efficiency whilst at the same time securing access to justice at the appellate level, wherever that is deemed appropriate.

4.0.8 The recommendations place a particular emphasis on a person's right to liberty, recognising that the occasions when that liberty can be removed must be both well defined yet strictly constrained. A general right of arrest on "reasonable suspicion" is proposed to replace common law and statutory rules on arrest and detention. Detention is an area where clarity of the rules governing deprivation of liberty and an ongoing review of individual circumstances is required. In the context of there being a presumption, albeit

rebuttable, in favour of a person's liberty at all times in advance of trial, increased police and procurator fiscal powers to liberate are recommended.

4.0.9 In the different area of the right to a fair trial, it is proposed that all suspects who are to be questioned must be advised of their right of access to a lawyer; albeit that it is only if they are in a police station that the state will require to take positive steps to provide one. Following upon recent Convention jurisprudence and other developments in Europe, all persons in custody in a police station will have the right of access to a lawyer, even if they are not to be questioned.

4.0.10 Looking at both the right to liberty and the right to a fair trial, the Review has attempted to achieve a balance in determining the stages after arrest and detention when a suspect can be questioned and must be charged or reported in custody to the procurator fiscal. It has recommended that questioning ought, in the ordinary case, to be completed within a twelve hour period before, or at the end of which, the suspect must be either charged/reported in custody or released. The Review does not consider that there should be scope for the police to extend this maximum twelve hour period and that any further questioning beyond the maximum must be authorised by a judge, either by warrant on the application of the police or at (or after) the suspect's first appearance in court. Within the maximum period, there is scope for the police to liberate the suspect pending further investigation, such as scientific testing or the interrogation of mobile telephones or computers. The police may require the suspect to re-attend on a particular day, within a twenty eight day

window during which these investigations might be completed. Further questioning in detention on the basis of the investigation results may continue up to a combined twelve hour maximum.

4.0.11 The proposed regime of solicitor access operates primarily in the context of the Article 6 right to a fair trial. In all but the most exceptional cases, evidence of an admission made by the suspect before he has been afforded that right will be inadmissible in any subsequent trial. That is the direct effect of *Cadder*. However, suspects have the ability to waive the right to speak to a solicitor and they often exercise that power for a variety of reasons. Waiver of the right is an important aspect of the Review and considerable care has been taken to examine, and to make recommendations upon, the circumstances in which suspects, especially child and vulnerable adult suspects, can validly waive the right. The Review has ultimately determined that children aged 16 or 17 may waive their right of access to a lawyer, but only if their parent, carer or responsible person agrees. Children aged 15 or under should not have the capacity to waive the right. That is not to say that the police are thereby prohibited from questioning them with affording such access. The protections are only relevant where there are court or other formal proceedings in contemplation. In many situations, such proceedings will never take place and, if that is the case, questioning of a child at home or in school in informal conditions will remain an entirely appropriate process. The Review has made similar recommendations in relation to vulnerable adults but considers that further work is needed in that area especially in relation to the qualifications, professional or otherwise, of an “appropriate adult”.

4.0.12 The Review has been particularly concerned about the periods during which suspects can be kept in police custody in advance of their first appearance in court and hence any application for a judicial determination on the need for, or proportionality of, their being kept in custody. The Review considers that a suspect should appear in court on the next lawful court day after charge/report to the procurator fiscal. This ought to mean that all suspects appear in court within at least thirty six hours of their initial detention at the police station. However, the Review considers that systems will have to be put in place to see that this actually happens; particularly where suspects are arrested at weekends. Encouragement must be given to all those in the criminal justice system to participate in a manner which ensures that suspects are not unnecessarily or disproportionately held in custody, especially over weekend periods.

4.0.13 The analyses and recommendations which follow are intended to strengthen the foundations of what ought to be a modern, open criminal justice system that will: reduce to a minimum the time that a suspect is held in police custody prior to his/her appearance in court; render effective the right which a suspect has of access to a lawyer while in detention or before questioning; clarify the situations in which that right can be waived and, in that regard, provide added protections for the young and vulnerable; eliminate, so far as practicable, the potential for oppressive or otherwise unfair conduct during a suspect's period in custody; and ensure that evidential and procedural rules do not act as unnecessary impediments to the course of justice. At the same time, the recommendations are designed to promote the efficient and effective investigation and prosecution of crime and to achieve a balanced system that

operates in a context where the human rights of all, including those of both suspect and victim, are adequately and effectively protected.

4.0.14 In considering the road down which Scotland should travel in relation to securing justice in its adversarial trial system, the Review has concluded, after much reflection, that the requirement for corroboration, which has existed since time immemorial, should be abolished in favour of a qualitative assessment of evidence. This will, if accepted, prompt widespread change in police and prosecution practice. It will terminate the situation, which currently exists, whereby the alleged perpetrator of a crime cannot be prosecuted because corroboration chances not to have been found. It is the Review's conclusion that the abolition of the requirement will not, to any material degree, increase the likelihood of miscarriages of justice occurring within the system. It will promote the idea of justice for all and introduce into the courts a more liberal approach to the assessment of evidence, of a nature which exists throughout continental Europe and is prevalent too in the other parts of the United Kingdom, Ireland and countries where common law adversarial systems predominate. Although not so evident in those systems, the Review also recommends, for similar reasons, the abolition of the complex rules which discriminate between the admissibility of statements by accused persons according to whether they are classified as incriminatory, exculpatory or mixed.

4.0.15 The abolition of the requirement for corroboration may change the type of advice which is given by solicitors to clients about to be interviewed by the

police, but the Review has stepped back from the suggestion that an adverse inference should be drawn from a suspect's decision not to respond to some, or all, questions posed by the police.

4.0.16 In relation to appeals, the proposals aim to abolish outmoded methods of appeal in favour of an integrated system of appeals, with leave of first instance courts, from all pre trial decisions and, with leave of the High Court, from all determinations of a final nature. There are measures designed to achieve greater finality and certainty in the appeal process and to eradicate abuses of, and delays in, that process. Finally, it is recommended that the High Court should not have a gate keeping role in references from the SCCRC but that the wider interests of justice should be a consideration for the Court in deciding reference appeals.

5.0 CUSTODY CHAPTERS OVERVIEW

5.0.1 The original intention behind the introduction of section 14 detention was to provide for a short period of custody during which a suspect could be questioned with a view to helping the police further their investigation. Detention was conceived as part of the investigative process and not as an element in the prosecution, which followed arrest and charge, far less the trial. It has, however, proved helpful to look at detention, and other forms of custody, separately from fairness in the investigative and trial processes, principally in terms of securing compliance with the distinct rights provided by Article 5. It has been vital for the Review to consider the most effective way to secure a prompt appearance before the court, thus ensuring that any new system recommended will comply with a person's fundamental right to liberty.

5.0.2 The Review's overall impression is that some suspects, including children, are held in custody for too long, prior to their first appearance in court. This is particularly concerning given that custody involves keeping suspects in what is, of necessity, temporary accommodation in the form of police and court cells. So far as the Review was able to judge from its limited travels, this accommodation can best be described as Spartan. The cells are not only unavoidably restrictive, they are unpleasant, sometimes crowded and, again at least partly of necessity, devoid of most of the facilities and essential, if modest, comforts which might be found in the greater permanency of a prison cell.

5.0.3 The Review is not tasked to enquire into cell conditions and has not done so.

It has not been submitted to the Review that persons kept in these temporary cells are generally exposed to ill treatment, at least in Article 3 terms. In the absence of such a submission, the Review has not considered whether schemes of cell monitoring or other forms of safeguard, beyond those which are already in place, are either necessary or desirable. However, the Review has kept firmly in mind the general nature of the accommodation when considering the tests to be applied before removing or restricting a person's liberty and the periods of time appropriate to these limitations.

5.0.4 There are three broad areas that are explored in this section: first, Chapter 4.1

– Arrest and Detention, considers what should constitute the core elements of bringing someone into custody; the procedures, the grounds and purpose of doing so and the extent to which these should be codified. It looks at the practical distinction between section 14 detention and arrest (as understood in Scots law). It concludes that this distinction has been eroded to such an extent that there is little purpose in continuing with two different states of police custody and that it would be simpler, and more clearly in tune with the Convention, if there were a single period of custody, once a suspect has been arrested on suspicion.

5.0.5 Secondly, Chapter 4.2 – Period of Custody, focuses on ensuring that a suspect is detained for as short a time as is reasonably practicable, given that Article 5 requires that he/she is brought before the court, where that is the appropriate

next step, as quickly as possible. The Review considers there should be a period of no more than twelve hours before a suspect is charged, reported to the procurator fiscal or released. The point of charge/report should then trigger the requirement for appearance the next lawful court day. This initial twelve hour period of detention should contain a review after six hours, and should not be subject to extension by the police.

5.0.6 Finally, Chapter 4.3 – Liberation from Police Custody, looks at the circumstances under which a suspect should be liberated prior to his/her appearance in court and the conditions which might be attached to any such liberation. Given the emphasis which the Review places on the right to liberty, there should be greater powers for the police to be able to liberate a suspect during the pre charge period and for either the police or the procurator fiscal to release a suspect on condition of an appearance in court at a certain future date. All of these powers should be subject to appropriate safeguards and constricted by strict timescales. The introduction of these measures should ensure that the removal of a suspect's liberty is only done at a point, and for a period of time, which is both necessary and proportionate. The final part of this section looks at the circumstances in which a suspect could or should be liberated prior to his/her appearance in court and the conditions which might be attached to any such liberation.

5.0.7 When the above areas are considered together, the recommendations create a custody system which ought to secure compliance with Article 5 in the long term and in practice mean that suspects will generally spend less time

unnecessarily in police custody; thus providing a more efficient use of police and court resources.

5.0.8 A potential alteration, which may require to be made in the future if there is to be full integration of human rights into the criminal justice system, is in the hours and work practices of those engaged in the system. A rights based system cannot operate on a part time basis. Like all essential services, it must, to some degree, continue around the clock. Thus, steps may have to be taken to ensure that persons are not deprived of their liberty unnecessarily or disproportionately at any time. In particular, decisions on liberation by the police or the procurator fiscal and ultimately bail by the court must be taken promptly. That ought not to be a difficulty in the case of the police, who do operate at all hours. It is, however, potentially a problem in terms of the local procurators fiscal and the Sheriff and Justice of the Peace Courts. As will be seen, the Review does not consider it acceptable for suspects to be kept in custody for more than thirty six hours, without the opportunity of seeking a judicial ruling on whether they should continue to be deprived of liberty. The situation will need to be monitored and, if necessary, enforced changes made to working practices in order to facilitate a rights based system.

5.1 ARREST AND DETENTION

Introduction

5.1.1 This chapter considers the powers of the police to take a suspect into custody and to hold him/her for investigative or other purposes pending appearance at court. The Review has considered these powers in relation to the statutory section 14 detention procedures and arrest at common law. It has not examined any other specific statutory powers to arrest or detain¹ in the absence of any complaints about their operation.

5.1.2 The Review has not looked at the system of arrest and detention with a view to designing a utopian system on a blank sheet of paper. Such an approach would be academically interesting and potentially possible to adopt, given time, but it would fail to recognise that the Scottish system already has certain distinct features and current police practice involves several well understood concepts, such as reasonable suspicion, which make it relatively straightforward to operate. Imposing an entirely new culture would prove extremely difficult to operate in reality and would be likely to cause major disruption in the criminal justice system of a type which the Review is anxious to avoid.

5.1.3 The Review has attempted to identify faults, both in principle and detail, within the current system, especially having regard to *Cadder*. In particular, it

¹ e.g. Misuse of Drugs Act 1971 s 23; Road Traffic Act 1988 s 6; and the Criminal Law (Consolidation)(Scotland) Act 1995 s 50 (offensive weapons)

has looked at the present utility of section 14 detention and its interlinking with arrest, with and without warrant, at common law. The Review has then formulated recommendations designed to enhance and improve the system, having regard to existing traditions and concepts in light of modern Convention jurisprudence.

5.1.4 The existence of two distinct means of taking a person into custody, that is by arrest at common law and statutory section 14 detention, is a peculiar, if not unique, feature of modern Scots criminal procedure. Historically, arrest was the only means of achieving this end² and, in common with many other jurisdictions, the law distinguished between arrest under warrant from a court and arrest without such a warrant. As a general principle, and subject to certain important and extensively used exceptions, the present law is that arrest should be effected only under the authority of a warrant.

5.1.5 Detention, as a distinct method of taking a person into custody, was devised by the Thomson Committee as a response to criticisms of the then current widespread police practice of taking and keeping someone, who had not formally been arrested, into custody. Since its introduction in 1980, section 14 detention has been regarded as a necessary power enabling the police to take a suspect into custody and to question him/her with a view to establishing whether a case against him/her exists.

² *Swankie v Milne* 1973 JC 1, Lord Cameron at 6

5.1.6 The Review has considered whether the current system of section 14 detention and common law arrest should be reformed and, specifically, whether there remains a case for retaining separate powers of detention and arrest. The matter has been approached by looking, first, at the purposes for which a person may be taken into police custody and held there and, secondly, at the grounds (or standard of information) required before the powers may be exercised. Related matters, including whether these powers require to be defined in statute and whether a suspect should be afforded a distinct status in law, have also been examined.

Current law

5.1.7 In the Scottish legal tradition, the purpose of arrest, whether under warrant or not, is to bring the suspect before a court, usually the sheriff, for examination. Arrest has not been permitted merely to take a suspect into custody for the purposes of further investigation or questioning by the police. Indeed, it is generally, but not universally, thought that questioning after arrest is problematic³ even where the arrest has proceeded on the grounds of only reasonable suspicion coupled with a risk of escape or destruction of evidence and there is insufficient evidence to charge. Contrary to some modern belief, arrest has to be accompanied by a charge⁴ even if, for logistical reasons, there might be a short time lapse between these events. Questioning after charge is prohibited. This limitation was less significant in the days when the sheriff had an investigative function and would personally ask questions of the

³ *Chalmers*, LJ-C (Thomson)

⁴ Thomson Committee para 3.07; *Chalmers*, LJG (Cooper) at 78; *HM Advocate v Aitken* (*supra*), cf *Johnstone v HM Advocate* (*supra*)

suspect. But once the sheriff's investigative role had passed to the procurator fiscal and, through that office, to the police, the absence of a power to take into custody for the purpose of questioning as part of an investigation was highlighted⁵. As the Thomson Committee recognised, arrest, whether with or without warrant, was⁶:

“... competent only when police enquiries have reached the stage at which there is sufficient evidence to charge, it follows that the police have no power to detain a person whom they have reasonable grounds to suspect of a crime unless and until the evidence against him is sufficiently corroborated to justify reporting him to the procurator fiscal”.

Arrest by warrant

5.1.8 A warrant to arrest a suspect is obtained from a court, on the application of the procurator fiscal, where it is necessary to secure an accused's attendance at court. If the suspect can be expected to appear at court when cited to do so, no warrant ought to be granted. According to Hume⁷, sheriffs and other judicial office holders may grant a warrant “*on due information of any crime*”. A warrant, in the case of a summary complaint, is sought on the basis of corroborated evidence. In solemn⁸ cases, where a petition is presented, it is requested on the basis of at least a single source of evidence. As already observed, it has generally been accepted that arrest ought to be accompanied by a charge⁹ and a charge can only be proffered on the basis of evidence. Reasonable suspicion alone is not a sufficient basis for an arrest.

⁵ *ibid*

⁶ para 3.10

⁷ Hume ii, 77

⁸ i.e. serious

⁹ cf *Johnstone v HM Advocate (supra)*, which the Review considers to be wrong in principle having regard to other authority such as *Chalmers*

Arrest without warrant

5.1.9 A police officer has the power to arrest without warrant where that is necessary for the purposes of preventing crime, the escape of the suspect or the destruction of evidence¹⁰. This power is exercisable where there is a reasonable suspicion of a person having committed an offence¹¹. A police officer may arrest on credible information that a serious crime has recently been committed, or attempted, and the offender is likely to abscond¹². He/she may also arrest, in similar circumstances, if he/she witnesses a crime being committed or attempted, or violence being threatened, or if he/she sees a suspect fleeing from the scene of a crime¹³. Although the law on arrest at common law, with or without warrant, could be clearer, it seldom poses a problem in practice.

5.1.10 Parliament has created powers to arrest without warrant in a wide variety of, sometimes relatively minor, statutory offences. In almost every instance, reasonable suspicion is stated to be a sufficient ground. Such powers arise, for example, in drink driving offences¹⁴ and breaches of domestic abuse interdicts¹⁵. A similar power is provided to allow a police officer to arrest a person whom he/she finds committing certain public nuisance offences¹⁶. None of this legislation makes reference to the power of arrest being

¹⁰ Hume ii, 75 *et seq*; Renton & Brown (6th ed) at para 7.05; *Peggie v Clark* (1868) 7 M 89, Lord Deas at p 93

¹¹ *Peggie v Clark* (*supra*)

¹² Renton & Brown para 7.05; *Peggie v Clark* (*supra*), Lord Deas at p 93

¹³ Hume ii, 75 *et seq*

¹⁴ Road Traffic Act 1988 s 6

¹⁵ Matrimonial Homes (Family Protection) (Scotland) Act 1981 s 15(3)

¹⁶ Civic Government (Scotland) Act 1982 s 59(1)

contingent on the existence of evidence, as distinct from suspicion, far less on a corroborated case.

Section 14 Detention

5.1.11 Arrest was perceived as a status which required to be accompanied by a charge, at which time questioning had to stop. It could hardly, therefore, be used as an investigative tool. As already noted, the only alternative for the police was to “persuade” a suspect to accompany them to a police station to “help with their enquiries”. The Thomson Committee was concerned that such a suspect did not have the rights of a person arrested and charged¹⁷. These rights included, and still include, intimation to, and later consultation with, a solicitor prior to appearance in court on the next lawful court day¹⁸. The Committee recognised, as was indeed the case, that the absence of a power to take a suspect into custody as part of an investigation presented the police with considerable problems. It reported that¹⁹:

“The policeman’s real difficulty arises in investigations where he wants to interview a suspect or prevent him from interfering with evidence such as stolen property. At present the police are powerless to act without the consent of the very person who is likely to have most interest in refusing to give that consent. Clearly the police should not be entitled to arrest anyone they want to interview but it seems plainly wrong, for example, that a suspected violent criminal with significant evidence on his clothing has to be left at large while the police seek other evidence of his guilt sufficient to entitle them to charge”.

¹⁷ para 3.10

¹⁸ 1995 Act s 135

¹⁹ para 3.13

5.1.12 It was because of this lack of power that the Committee recommended²⁰ that there should be a separate investigative procedure whereby a person suspected of an offence could be “detained” on reasonable suspicion, but only for a very limited period and for specific narrowly defined purposes, including questioning. Detention was conceived by the Committee as a compromise in which there was no right of access to a lawyer prior to or during questioning, although it was not prohibited, and the suspect had to be either arrested and charged or released within six hours. This was an extremely short period in European, if not global, terms and was far less than that subsequently authorised in England and Wales under PACE or in Ireland under the Criminal Justice Act 1984. It may be that the requirements of modern policing might have meant that such a short detention period would have struggled to survive as a maximum in any event. But, perhaps not surprisingly given the alternative, there was little pressure from defence solicitors to change it. This was not because “nobody thought that there was anything wrong with this procedure”²¹. There have been debates amongst lawyers about this subject for years, not least at the time of the Thomson Committee²². Rather, many defence lawyers considered that the system worked reasonably well for all concerned, including suspects, distinguishing, in the context of an adversarial system, between what was acceptable as part of an investigation and what could be done when, and if, a prosecution had commenced. In this context, the short maximum period was seen as a particularly important consideration. *Cadder*, by placing a duty on the police to facilitate a suspect’s access to a lawyer within the period of detention, effectively put an end to this particular

²⁰ para 3.24

²¹ *Cadder*, Lord Hope at para 4

²² paras 5.08 and 7.16

maximum by prompting the extension of the period in the 2010 Act. This was so even if, in many cases, it is still possible to complete questioning, after affording a suspect his/her right of access to a lawyer, within the six hours originally permitted.

5.1.13 Section 14 of the 1995 Act, as amended by the 2010 Act, states:

“(1) Where a constable has reasonable grounds for suspecting that a person has committed or is committing an offence punishable by imprisonment, the constable may, for the purpose of facilitating the carrying out of investigations —

(a) into the offence; and

(b) as to whether criminal proceedings should be instigated against the person,

detain that person and take him as quickly as is reasonably practicable to a police station ... and ... the detention may continue at the police station ...

(2) Subject to section 14A, detention under subsection (1) above shall be terminated not more than twelve hours after it begins ...”.

Grounds for Arrest or Detention

5.1.14 Any restriction on the liberty of a person, whether by way of section 14 detention or arrest, requires, at least, reasonable grounds for suspecting that the individual has committed a crime. It is at the point when suspicion crystallises on an individual that he/she becomes a “suspect” who, in certain circumstances, acquires certain legal rights and becomes potentially subject to certain police powers. But a “suspect” does not have a distinct legal status merely by being suspected by the police. There is, for example, no obligation on the police to advise a person that he/she has become a suspect in an inquiry.

5.1.15 Reasonable suspicion permits section 14 detention, and hence questioning, at a stage before there is sufficient evidence to arrest and charge at common law or, consequently, to prosecute. In other jurisdictions, suspicion has been described in the following way²³:

“Suspicion in its ordinary meaning is a state of conjecture or surmise where proof is lacking: ‘I suspect but I cannot prove.’ Suspicion arises at or near the starting point in an investigation of which the obtaining of *prima facie* proof is at the end”.

As already observed²⁴ reasonable suspicion exists when there is information which would satisfy an objective observer that the suspect may have committed the offence. But it must also exist where proof exists. It is reasonable to suspect someone against whom the evidence is overwhelming.

5.1.16 Before carrying out a section 14 detention, or an arrest in urgent circumstances, the investigating police officer requires to distinguish mere suspicion or belief, such as one based purely on the suspect’s criminal record, from a state of suspicion held on reasonable grounds. As the Lord Justice-Clerk (Thomson) said in *Chalmers*²⁵:

“just where that point in time is reached is in any particular case extremely difficult to define – or even an experienced police official to realise its arrival”.

²³ *Hussien v Chong Fook Kam* [1970] AC 942, Lord Devlin at 948

²⁴ see above para 3.07 under reference to *Fox v United Kingdom* (*supra*)

²⁵ 1954 JC 66 at 82

In practice there are few challenges, other than in the statutory context of the recovery of real²⁶ evidence, to the basis upon which a detention or arrest has been instructed or carried out.

Other jurisdictions

5.1.17 In England and Wales, the only general power to take a suspect into custody is the power of arrest. The purposes for which arrest can be effected are defined in the Police and Criminal Evidence Act 1984. Section 24 of PACE provides that an arrest (without warrant) can only be made for certain reasons, including to allow the prompt and effective investigation of the offence or the conduct of the suspect. Arrest for investigative reasons, which can be done on the grounds of reasonable suspicion, under PACE, is broadly the equivalent of section 14 detention.

5.1.18 In Ireland, under section 4 of the Criminal Justice Act 1984 a person can be arrested, without warrant, where there is reasonable cause to suspect him/her of a crime punishable by imprisonment of 5 years or more. If the officer in charge of the police station has reasonable grounds for believing that his/her detention is “necessary for the proper investigation of the offence”, the suspect may be detained and questioned before charge.

5.1.19 In New Zealand there is no general statutory power of arrest. Where legislation provides for a specific power of arrest, a police officer has power to

²⁶ in the Latin sense of a thing such as a breath sample or a packet of drugs

arrest, without warrant, any person who has committed an offence, and any person whom the police officer has reasonable and probable grounds to suspect has committed an offence²⁷. In New South Wales, arrest can proceed upon reasonable suspicion²⁸ but the purpose must be to bring the suspect before the court, not simply to question him/her²⁹.

The Convention: Arrest and Detention under Article 5

5.1.20 Under Article 5 of the Convention, the test for the legitimacy of both arrest and detention is the same. A person may be arrested or detained “on reasonable suspicion of having committed an offence”. Just what “reasonable suspicion” is will vary according to circumstances. Although arrest can also be used to prevent a person from committing an offence, this Review is not directly concerned with that provision. There is no express obligation upon the police under Article 5 to charge a suspect at the point of arrest or at the stage of his/her detention in a police station, although he/she must be told of the reason for the arrest or detention.

5.1.21 Article 5.1(c) stipulates the purposes for which arrest, which, as defined, encompasses section 14 detention, may be effected. It is clear from this that, in the context of the Review, the only legitimate *purpose* of arrest and detention is to bring the suspect before the “competent legal authority” on reasonable suspicion of having committed an offence. As already

²⁷ ss 31 and 32 Crimes Act 1961

²⁸ Law Enforcement (Powers and Responsibilities) Act 2002 s 99 (this whole act is an impressive codification of police and other powers of arrest)

²⁹ *Williams v R* (1986) 161 CLR 278, cf ss 114, 115 of the 2002 Act

commented³⁰ the Review considers that such an authority means someone independent of the Government, prosecution service or police and who is the equivalent of a judge³¹.

5.1.22 The purpose of arrest and detention, in the Scottish context, must ultimately remain to bring the suspect before the sheriff or other judicial office holder in respect of a particular crime. Yet section 14 detention does not have that as a necessary aim, unless it is seen in the context of an investigation which, if pursued *bona fide*, has an appearance before the court as its intended ultimate goal. Article 5 does not expressly encompass detention for police questioning nor does it authorise any other form of “investigative” custody. In short, the Convention precludes a suspect being taken into police custody solely for investigative purposes.

5.1.23 However, the European Court has held that Article 5 does not presuppose that arrest and detention are only permitted when the police have obtained sufficient evidence to bring charges. Quite the contrary, all that is required is reasonable suspicion that the person has committed a crime. Thereafter, the police can hold the suspect, pending appearance at court, and continue their investigations, which may include questioning. In *Murray*³² the applicant was neither charged nor brought before a court. Rather, she was released after

³⁰ see above para 3.0.8

³¹ *Schiesser v Switzerland* (1979) 2 EHRR 417 at para 29 and see *dicta* in *Murray v United Kingdom* (*infra*) about bringing the person before the competent legal authority after charge

³² *Murray v United Kingdom* (1994) 19 EHRR 193

interview. The Court stated that the ultimate absence of a charge or court appearance³³:

“...does not necessarily mean... that the purpose of her arrest and detention was not in accordance with Article 5 para. 1 (c)...since “the existence of such a purpose must be considered independently of its achievement” (...*Brogan*³⁴ ... para. 53). As the domestic courts pointed out ... in view of her persistent refusal to answer any questions at the Army ... it is not surprising that the authorities were not able to make any headway in pursuing the suspicions against her. It can be assumed that, had these suspicions been confirmed, charges would have been laid and she would have been brought before the competent legal authority”.

The Court summarised the position as follows³⁵:

“Provided that the purpose of the arrest and detention is genuinely to bring the person before the competent legal authority, the mechanics of how this is to be achieved will not be decisive”.

5.1.24 Subject to a suspect being advised of his/her rights and these rights being, where required, complied with, there is no express bar on questioning or any limit on the nature and extent of that questioning. This follows from the purpose of Article 5, which, again as already noted, is intended to guard against the ill treatment of persons in custody (as well as arbitrary arrest) rather than to promote fairness in trials, which is the function of Article 6.

5.1.25 This reasoning may seem convoluted to the casual reader of Article 5, but police questioning after arrest and detention is regarded by the European Court as legitimate because it is regarded as an integral part of a continuing process

³³ at para 67

³⁴ *Brogan v United Kingdom* (*supra*)

³⁵ at para 68

of bringing a suspect before the court. In practical terms, and despite the plain wording of the article, arrest for a purpose which includes questioning a suspect with a view to developing a case against him/her is compliant with Article 5, provided that the police intention is to bring the suspect before the court should the reasonable suspicion be confirmed as a result of the investigations, including the questioning, carried out after arrest.

5.1.26 The Convention thus permits arrest and detention on grounds of reasonable suspicion of an offence having been committed by the suspect. Many states across Europe apply reasonable suspicion or a similar threshold³⁶ to permit the deprivation of the suspect's liberty for the purpose of bringing him/her promptly before a court.

Consideration

5.1.27 The definition of who is a "suspect" is likely to develop with Convention jurisprudence. A "suspect" does not have a distinct legal status, nor is there any requirement on the police to advise a suspect of his/her potentially precarious position. A statutory definition of "suspect", and the rights accruing, could provide greater clarity and certainty to all those involved in a police investigation. However, if matters were formalised at too early a stage, a disproportionate and unnecessary burden would be placed on the police which would risk compromising investigations. The marking of a person as a suspect could be given undue weight by the public and media, to the detriment

³⁶ see Kalmthout et al (eds): Pre trial Detention in the European Union: An Analysis of Minimum Standards in Pre Trial Detention and the Grounds for Regular Review in Member States of the EU (2009) Table 4.1 on the various descriptions of the level of suspicion required for pre trial detention

of the suspect and subsequent criminal proceedings. For these reasons, the Review has concluded that it is neither necessary, nor would it be advantageous, to confer a distinct status on a suspect.

5.1.28 In the consultation document the Review addressed the extent to which the distinction between detention and arrest remained valid and useful. The law of arrest and detention is currently a mixture of somewhat antiquated common law and modern statute, notably section 14 detention as now amended by the 2010 Act. There may be a commonly held perception that a person can presently be arrested where there are reasonable grounds to suspect him/her of committing a crime, but, with some statutory exceptions, that is not strictly accurate other than in situations of urgency. A person can only be detained on reasonable suspicion for a limited period using the section 14 procedure. The overlapping of the legal rules leads to anomalies. For example, if a person is detained, whether or not there are grounds for arrest, he/she can be questioned provided he/she is afforded his/her right of access to a lawyer. If he/she is arrested and charged, he/she cannot be questioned, even if he/she has legal advice.

5.1.29 The Review considers that the opportunity should be taken to simplify, modernise and clarify the circumstances in which, where an individual is under suspicion of having committed a crime, the lawful deprivation of his/her liberty can take place. The principal reason for having a detention procedure distinct from arrest, as recommended by the Thomson Committee, was that the police could have a period within which they could pursue an investigation by

questioning a suspect prior to his/her rights, including that of access to a lawyer, being triggered by charge. This reasoning has been overtaken by *Cadder*. Against that background there is no longer any merit in retaining section 14 detention as distinct from arrest. It is recommended that a new approach is adopted in which the only general power to take a suspect into custody is the power of arrest. Arguments that the distinction would remain useful as a means of placing a limit on police questioning of a suspect in custody can be accommodated in other ways, as is explored later.

5.1.30 The Review considers that there would be benefit in stipulating exactly what “arrest” is in statute and defining the subsequent holding of an arrested person in custody prior to any potential court appearance. In line with the concepts expressed in Article 5 of the Convention, arrest should be defined in terms of the initial deprivation of liberty, i.e. the restraining of the person and taking him/her to, or keeping him/her at, a police station, broadly as is currently stated in section 14 for detention. The subsequent period in which the arrested person continues to be deprived of his/her liberty prior to his/her appearance in court needs to be described. It is hard to avoid calling this period anything other than “detention”, but it should be understood to be different from section 14 detention.

5.1.31 In the new system, there should be clarity on the grounds for arrest and subsequent detention and these should be compliant with the requirements of Article 5. As detailed earlier, there is a relatively consistent approach throughout Convention countries which identifies reasonable suspicion as the

appropriate ground for both arrest and detention. “Reasonable suspicion” is the standard currently required to detain a suspect in Scotland and it is, therefore, a threshold with which the police and other law enforcement agencies are familiar, even if it is not sufficient, without more, to justify arrest at common law. It is therefore proposed that this standard is adopted as the uniform ground for arrest.

5.1.32 It is not sufficient justification for the continued detention of a suspect that there is a reasonable suspicion that he/she has committed a crime. When the suspect is brought to the police station, a decision ought to be taken on whether he/she should be detained in custody. That decision should be based on whether, notwithstanding that there is reasonable suspicion, it is necessary and proportionate for that detention to be authorised. If the suspect can reasonably be brought before the court without resort to the continued deprivation of the suspect’s liberty, then detention ought not to be authorised. There are two broad grounds where it would be reasonable not to release a suspect prior to his/her court appearance. These are: (i) where the suspect is, if released, likely to behave incompatibly with the due administration of justice; and (ii) where his/her presence is reasonably required to enable the crime to be properly investigated, for example by means of questioning or by the taking of samples in line with the decisions in *Brogan* and *Murray*. Examples of the former category include the risk of escape, prospective failure to appear at an appointed court diet, the likelihood of committing further crimes and the possibility that the suspect may destroy evidence, interfere with witnesses or otherwise obstruct the course of justice.

5.1.33 The police require to consider the proportionality of holding a suspect in custody. If, for example, the offence is one which does not attract a custodial sentence, it is unlikely that custody prior to court appearance will be justified other than in the most exceptional circumstances. It is therefore incumbent on the police, in determining whether the suspect's continued detention is necessary or proportionate, to take into account the nature and seriousness of the crime and the probable disposal if convicted.

5.1.34 If arrest is redefined to refer purely to the initial deprivation of liberty on reasonable suspicion, the current close link between arrest and charge should be weakened. As is discussed in later chapters, there still requires to be a point at which a suspect is notified that the state intends to bring him/her before a court charged with the commission of a specified crime. But under the proposed new approach, a formal charge need not be proffered immediately, or even soon after, the point of arrest or detention. That is not to say that a suspect should not be told of the reason for his/her arrest and detention. That must continue to occur.

5.1.35 If arrest and detention are to be redefined in statute, there should be a provision specifying the purpose and reason for making an arrest. It is clear that any such provision would have to be consistent with Article 5, although the Review accepts that the verbatim incorporation of the terms of Article 5 would serve little purpose. Any such provision should allow for the police pursuing their investigations, whilst respecting the fact that the ultimate purpose of arrest and detention must be to bring the person before the court, if

justified by the evidence gathered³⁷. It is therefore proposed that the reason for arrest and subsequent detention should be stated as being to bring the person before the competent legal authority, by way of continued investigation into the merits of the case and reporting to the procurator fiscal with a view to service of a summary complaint or a petition in the usual way. The current phraseology of section 14, which refers to “facilitating the carrying out of investigations etc”, should be amended to remove any suggestion that a person can be arrested and detained for investigative purposes only. It would, however, be helpful to clarify in statute that, where a suspect has been arrested and detained, the police do have the powers to question him/her and to carry out any other investigative procedures, in the same way as they have at present with a suspect in section 14 detention. This will, of course, be subject to all the safeguards necessary for a fair trial in Article 6 terms, some of which are considered in the following section.

5.1.36 The Review has considered whether there should be changes to the requirements regarding warrants for arrest. Under the proposed new approach, arrest would now perform a similar function as section 14 detention already does currently. It would be the principal means of bringing a suspect into custody, where questioning may occur. Given that the existing system of section 14 detention appears to have been accepted as operating proportionately without the intervention of judicial authority, no court warrant for arrest or detention ought to be required for imprisonable offences. However, for other offences, such a warrant should be a requirement unless

³⁷ i.e. in line with the European Court’s decisions in *Brogan* and *Murray* (*supra*)

the police officer is of the view that, were he/she required to secure such a warrant, the suspect: (i) would be likely to escape; or (ii) may destroy evidence, interfere with witnesses or otherwise obstruct the course of justice pending any court appearance.

Recommendations

I therefore recommend that:

- **a suspect, who is not detained or being questioned, should not have a distinct legal status with statutorily defined rights;**
- **section 14 detention should be abolished and the only general power to take a suspect into custody should be the power of arrest;**
- **arrest should be defined as meaning the restraining of the person and, when necessary, taking him/her to a police station;**
- **arrest should be distinguished from detention, which should be defined as the holding of a suspect in custody once he/she is at a police station and pending possible appearance in court;**
- **the ground for both arrest and subsequent detention should be defined in statute as reasonable suspicion that the person has committed a crime;**
- **legislation should make it clear that, although a person must be advised of the reason for his/her arrest and detention and of any charge against him, it is not necessary for an arrest or detention to be accompanied by a charge;**
- **the reason for arrest and subsequent detention should be stated to be to bring the person before the court, by way of continued investigation into the merits of the case and reporting to the procurator fiscal with a view to service of a summary complaint or a petition in accordance with current practice;**
- **statute should provide that a suspect should not be detained unless it is necessary and proportionate and in particular that the suspect:**
 - (a) is liable to escape;**
 - (b) will not appear at an appointed court diet;**
 - (c) is likely to commit further crimes; or**

- (d) may destroy evidence, interfere with witnesses or otherwise obstruct the course of justice;**
- it should be an express statutory requirement that, in determining whether a suspect's detention or continued detention is necessary and proportionate, the nature (including level of seriousness) of the crime and the probable disposal if convicted must be taken into account. Only in exceptional circumstances should a person be detained where the charge does not involve an imprisonable offence;**
- it should be made clear that the police have power to question a suspect and to carry out any other lawful investigative procedures notwithstanding the suspect's arrest and detention, in the same way as they have at present with a person in section 14 detention;**
- no court warrant ought to be required to arrest and detain for imprisonable offences on reasonable suspicion; and**
- for non imprisonable offences, such a warrant should be a requirement unless the police officer is of the view that, were such a warrant to be obtained, the suspect:**
 - (a) would be likely to abscond; or**
 - (b) may destroy evidence, interfere with witnesses or otherwise with the course of justice pending any court appearance.**

5.2 PERIOD OF CUSTODY

Introduction

5.2.1 The period during which a suspect can be detained in police custody requires to be closely regulated. As explored in detail in the last chapter, the purpose of arrest and detention by the police is to bring the suspect to court as an accused person. Article 5 requires the suspect to appear in court “promptly” and the maximum time allowed by the law for that process to be completed is of vital importance to the protection of human rights. This chapter deals principally with setting the extreme parameters of time beyond which there should be no deliberate straying without judicial sanction.

5.2.2 The Review recognises that there has been much debate over the period for which the police should be permitted to detain a suspect for questioning. The nature and extent of police questioning in the context of the fair trial requirement are considered in Chapter 6.2. But the important consideration in Article 5 terms is not so much the time for questioning or investigation generally but the overall period permitted before a suspect must be brought before the court, when he/she has the opportunity of requesting a judicial determination on the lawfulness, including proportionality, of his/her continued detention.

Current law

5.2.3 In terms of section 17 of the Police (Scotland) Act 1967, it is the duty of police officers not only to take all lawful measures to bring offenders “with all due speed to justice” but also to ensure that:

“without prejudice to the operation of section 135(3) and (4) of the Criminal Procedure (Scotland) Act 1995 (bringing of apprehended person before court on first lawful day after arrest) ...any person charged with an offence is not unreasonably and unnecessarily detained in custody”.

Although this section does not appear to be quoted often in the courts, it is, and must remain, central to police thinking. It was not the Review’s impression that those in charge of the police cells were keen to keep suspects in custody. Quite the contrary, the police were anxious that they should be processed as efficiently as possible and either liberated or reported promptly to the procurator fiscal in custody for court appearance.

5.2.4 In terms of section 135(3) of the 1995 Act:

“A person apprehended under a warrant or by virtue of power under any enactment or rule of law shall wherever practicable (if not liberated under section 22(1B)(a) of this Act) be brought before a court competent to deal with the case not later than in the course of the first day on which the court is sitting after he is taken into custody”.

This provision is directory rather than mandatory and there may be situations where it is impractical to comply with it¹. Failure to comply will not normally bar prosecution of the suspect. Nevertheless, this section was for many years, and to a degree still is, a cornerstone of Scots criminal procedure. Especially prior to the introduction of detention, it was regarded as a jewel in the system. It does not override, but it does derive from, the common law rule whereby a person, who has been arrested, has a right to be brought before a court “without delay”² or “at the earliest practicable opportunity”³ for examination. This rule originates from a time when the police had little investigative function and their duty, on arresting a suspect, was simply to bring him/her before the sheriff for examination. In 1948 the editors of Macdonald⁴ commented that “detention for a single night is permissible, if distance or lateness of the hour render this necessary”⁵. Mill⁶, in similar terms, states that “overnight detention should be resorted to only where there is no reasonable alternative”. If the person arrested had been processed by the police prior to the conclusion of the court day, then the thinking was very firmly that he/she ought to be taken to court on that day. As will be seen, there has been a marked change in this practice in the modern era despite all the advances in transportation and communication.

¹ *Robertson v MacDonald* 1992 SCCR 916 where a person arrested on a Thursday in Glasgow on a petition warrant from Wick did not appear there until the following Monday

² Macdonald: Criminal Law (5th ed) (1948) p 200; Campbell: The Law and Practice of Diligence and Citation (1862) pp 335-6

³ *McDonald v Lyon and Main* (1851) Shaw 516, LJ-C (Hope) at 517-518 referring to keeping a prisoner in jail from a Monday morning to a Wednesday afternoon as “preposterous”

⁴ Criminal Law (5th ed) (1948) at p 200

⁵ at p 200, following Hume ii 80

⁶ The Scottish Police: Powers and Duties (1944) 97

5.2.5 Particularly in view of the terms of Article 5, it is interesting to reflect on how important prompt appearance in court is at common law and in statute.

However, the modern practice is expressed thus⁷:

“As soon as possible after his arrest, the accused is brought before a sheriff for examination. Such examination should, if possible, take place not later than the morning of the first day after arrest, not being a Saturday, Sunday or court holiday. But in some courts it has become routine to delay it until the afternoon”.

5.2.6 “As soon as possible” is a very elastic phrase and can depend on a wide range of circumstances. Moreover, and of considerable significance in the current context, the jewel in the system became dulled with the introduction of section 14 detention. As commented upon previously, the Thomson Committee had not envisaged that detention would be used in cases where there was already a sufficiency of evidence and the suspect could simply be arrested and charged in the normal way⁸. In those commonplace cases, the period from the suspect being restrained and subsequently appearing in court would remain that under section 135 of the 1995 Act. He/she would be in court on the day after he/she first came into police custody. But if a person were not arrested, but merely detained, section 135 did not immediately bite. It would only be once the person were arrested at the expiry of a detention period that time would start to run.

5.2.7 In practical terms, detention became the common method of placing a suspect in custody in the more serious cases where there was an intention to interview.

⁷ Renton & Brown (6th ed) at para 12.10, reflecting in part the earlier formulation of s 135(3)

⁸ see para 2.0.20 above

Thus, prior to the 2010 Act, if a suspect were detained at 7 pm on a Thursday night, he/she could theoretically only be arrested at about 1 am on the Friday and thereby not due in court until some time on the Monday. If Monday were a public holiday, he/she might not (but for Article 5 or, perhaps even better, the common law) be due in court until the Tuesday. Under the current section 14 detention system, a suspect may be detained for up to twelve hours, extendable by a further twelve hours where necessary “to secure, obtain or preserve evidence (whether by questioning the person or otherwise)”. There is, therefore, a prospect at present that a person could be detained under section 14 for up to twenty-four hours before being arrested and thereafter being brought before the Court “as soon as possible”.

- 5.2.8 The Review was able to take a snapshot of what actually occurs with custodies in an urban area during a particular weekend. This revealed that, of the many persons dealt with in the custody court on the Monday, one person had been detained from the previous Thursday morning until bailed on the Monday evening. There were six others held from the Thursday night, three from the very early hours of the Friday morning, five from before noon on the Friday and six from mid afternoon that day who did not appear in court, and hence were not bailed or committed to prison, until late on the Monday afternoon or early in the evening of that day. These custodies amounted to about 16% of the total. The Review does not consider that this is acceptable in a modern judicial system. A further 22% of custodies, which were only dealt with late on the Monday, were persons who had been in custody since either late on the Friday night or early on the Saturday morning. Even with this group, the

individuals were being detained without court appearance for periods in excess of 60 hours⁹. The Review does not consider that this is acceptable either. Of the total custodies, less than 25% were committed to prison as distinct from being released unconditionally or on bail.

Other jurisdictions

5.2.9 In relation to Europe, there are a number of different time periods during which a person can be arrested and detained without appearing in court. These have been the subject of extensive research under the auspices of the European Commission¹⁰. It would not be productive to rehearse that material in detail here; much of it being concerned with pre trial detention as a whole rather than focusing on the period from arrest to first appearance in court. However, the research does provide approximate time spans prior to that appearance, ranging from the next day to ninety-six hours after arrest. The table setting these out is in Annex C.

5.2.10 More specifically, in England and Wales, an arrested person can be detained by the police without charge for an initial period of twenty-four hours¹¹. Where deemed necessary for the purposes of the investigation, he/she can be detained for a further twelve hours on the authority of a police superintendent¹². A Magistrates Court can grant a warrant of further detention

⁹ e.g. 2 am on the Saturday until 5 pm on the Monday

¹⁰ van Kalmthout et al (eds): Pre Trial Detention in the European Union: An analysis of Minimum Standards

¹¹ PACE s 41

¹² s 42

for another thirty-six hours¹³, but the suspect must appear in court for that purpose. An extension even to that period can be granted, but the overall detention of a suspect without charge cannot exceed ninety-six hours. The important period for present purposes is that before any appearance before the court. The detained suspect can be held for thirty-six hours without charge, but his/her continued detention is reviewed by the police after six hours and thereafter at nine hourly intervals¹⁴. It is also reviewed after charge, specifically in relation to whether the suspect should be given police “bail” pending an appearance in court. Once charged the suspect must be brought before the Magistrates Court as soon as practicable and, in any event, no later than the first court day after charge¹⁵.

5.2.11 In Ireland, the maximum permitted periods of detention following arrest, but before formal charge by the police, are laid down in several statutes. The most significant, in the present context, is that contained in the Criminal Justice Act 1984. Prior to that Act, with the exception of terrorist type offences¹⁶, the sole purpose of arrest was, as in Scotland, to bring the suspect, who had already been charged by the police, before the court. The 1984 Act introduced specific periods during which the suspect did not require to be charged and thus brought before the court. Henceforth, in the case of offences punishable with imprisonment of five years or more, the suspect could be arrested without warrant and held for six hours¹⁷. This period, which is applicable to all

¹³ s 43

¹⁴ s 40

¹⁵ s 46

¹⁶ Offences against the State Act 1939, which has an initial 24 hour period and then possible extensions of 24 hours authorised by the police and a further 24 hours authorised by the court

¹⁷ 1984 Act s 4, if released, the suspect cannot be re-arrested without a warrant, see s 10

significant crimes, reflected that already selected in Scotland but, in Ireland, a superintendent could authorise a six hour extension if that were necessary for the proper investigation of the offence. This period can, with the suspect's consent, be suspended for rest purposes from midnight until 8 am. In terms of section 9 of the Criminal Justice Act 2006, a chief superintendent can now authorise a further twelve hour detention period. Thus, a maximum of twenty-four hours is permissible before the suspect need be charged. In murder cases, there is further statutory innovation¹⁸ to enable an initial six hour period to be extended by the police by eighteen and then twenty-four hours, with further extensions of seventy-two and forty-eight hours being authorised by the court. In drug trafficking cases there is a similar regime in place¹⁹. In both types of crime, the maximum period prior to court appearance can thus be as much as seven days. Once charged, the detained suspect must be brought to court as soon as possible. If he/she is charged after 10 pm, this can be up until noon on the following day. In the case of offences not covered by the statutory provisions, the suspect requires simply to be arrested, charged and brought to court in the same way.

5.2.12 In New South Wales, the comprehensive code²⁰ on this subject permits only a four hour "investigative" period after arrest²¹ unless it is extended by an investigation warrant²² issued by a magistrate or similar judicial office holder. The maximum extension is a further 8 hours and requires the magistrate to be satisfied that: (a) the investigation is being conducted diligently and without

¹⁸ Criminal Justice Act 2007

¹⁹ Criminal Justice (Drug Trafficking) Act 1996

²⁰ Law Enforcement (Powers and Responsibilities) Act 2002

²¹ s 114

²² s 118

delay; (b) the period is reasonably necessary to complete the investigation; (c) there is no reasonable alternative in that regard; and (d) it is impracticable to complete the investigation within the 4 hour period. There are detailed provisions for determining reasonable time and periods which can be disregarded in the calculation²³. In New Zealand, on the other hand, where arrest and charge tend to be simultaneous, the suspect must appear in court as soon as possible and there is no express provision for a period for questioning, although this does take place and can do so after charge.

The Convention

5.2.13 Article 5(3) provides that every person arrested in accordance with Article 5(1)(c) is to be brought before the court “promptly”. The European Court seems, for the moment, to consider that a period of up to four days detention is Convention compliant²⁴. This is apparent partly from *Brogan*²⁵, in which a detention period of 4 days before an arrested person was brought to the court was deemed not to be an infringement of Article 5(1)(c) or (3). Normally, any period beyond that would be regarded as a violation of the right to liberty. The court has put the matter succinctly thus²⁶:

“Only exceptionally can periods of more than four days before release or appearance before a judicial officer be justified under Article 5(3)”

²³ ss 116-117

²⁴ see generally Reed and Murdoch: A Guide to Human Rights in Scotland (2nd ed) para 4.93 under reference to *Egue v France* (1988) DR 57; Clayton & Tomlinson: Human Rights (2nd ed) para 10.225

²⁵ *supra*

²⁶ *Tas v Turkey* (2001) 33 EHRR 15 at para 86, referring back to *Brogan (supra)* at para 62

Consideration

The period before charge

5.2.14 It is assumed that it is accepted that the police are entitled to question suspects and that a blanket prohibition on interviewing detained suspects is unrealistic in the modern world. The abolition of section 14 detention would, in the absence of other statutory amendments, return the system to its pre 1980 state. A suspect would require to appear in court on the day after he/she was taken into police custody. This is an option which the Review has seriously considered. It has certain attractions, including, not least, simplicity. There would be no formal period of detention during which questioning were permitted or prohibited. An arrested person would not require to be charged immediately after arrest but he/she could be questioned by the police up until at least the point at which he/she was charged by the police. This could be shortly before any required appearance in court. If matters rested there, however, he/she could conceivably be questioned repeatedly and for hours. Because of that it is clear that there requires to be some formal regulation of the time during which the police can question arrested suspects during their detention.

5.2.15 Under the current system, the police have only a limited time during which they can detain a suspect against whom there is insufficient evidence to justify a charge. In contrast, they may be holding a suspect in section 14 detention although there is sufficient evidence to charge and prosecute him/her. Suspects may be arrested or released without charge within, or at the end of,

the detention period, whether that is set at the six, twelve, twenty four hour or other maximum limit. Under a new regime of arrest only, it is desirable that this area be regulated so that there is a maximum period beyond which the police cannot simply hold a person in custody without charging him/her with an offence or alternatively at least advising him/her that he/she is to be reported to the procurator fiscal with a view to being charged with a particular offence. That would start the clock running for court appearance.

5.2.16 The Review considered whether there might be situations in which the police would invite a suspect to attend at a police station voluntarily and question him/her for some time under that regime, thus avoiding the commencement of time running for both questioning and court appearance. However, in the absence of complaints that this has been something done in practice in relation to section 14 detention, no recommendation is made to have any time spent voluntarily at the police station count towards the maximum custodial period. This may require review if circumstances change.

5.2.17 Prior to *Cadder*, suspects against whom there was insufficient evidence required to be released after only six hours. This highly restrictive investigative window ended with the consequent 2010 Act. As already commented upon, the short time limit had probably already become unrealistic in many, especially serious, cases. There are several different types of situation to be embraced and practical solutions have to be sought which, in all circumstances, ensure the protection of the suspect's rights to liberty and to a fair trial but, at the same time, promote an effective and efficient system for

the investigation and prosecution of crime. In other words, care should be taken to ensure that, within reason and having regard to the suspect's Article 5 rights, an investigation is not carried on in such a hurried manner that it infringes the suspect's Article 6 rights and/or ceases to be effective because of excessive time constraints.

5.2.18 With low level crime, such as minor public disorder, where the offender is arrested at the scene, a relatively short period for investigation, including questioning, is likely to suffice. Certainly prior to *Cadder*, such cases could easily be accommodated within a regime which required a decision on charge to be taken within six hours of detention (if detention was employed in preference to a simple arrest). With an efficient system of securing the right of access to a lawyer, such a short timescale may still be adequate. Where a case has been thoroughly investigated in advance, similar considerations might arise. But, especially where the suspect has been arrested at the scene, there are significant operational difficulties in managing to conduct and complete the investigation of a serious crime to the point where an informed decision can be taken on whether to charge, or to report the suspect to the procurator fiscal, within a period of six hours.

5.2.19 Such rapid decision-making might have been possible at the time of Thomson Committee, when an investigation often consisted mainly in the taking of relatively cursory, unsigned and non-disclosable witness statements. But it is seldom possible in the modern world where CCTV recordings may require ingathering and viewing, scientific evidence needs preliminary analysis and

even witness statements require greater precision in form and execution than before. In addition, there is likely to be a need to contact a solicitor, provide him/her with information and permit him/her a private consultation with the suspect before an interview. Where there are a number of suspects in relation to a single crime, or a number of connected crimes, the need for more time is likely to increase. Furthermore, quite apart from the issues which might arise with a particular suspect or crime, it is not to be assumed that the inquiry into his/her case is the only one which the police, or the particular officer, has to deal with at the time. There may be other, some more pressing, operational demands.

5.2.20 There is therefore little, if any, doubt that a six hour maximum is unrealistic in many, albeit not most, cases. This is borne out by consideration of the information that has been provided by ACPOS²⁷ since the introduction of the new arrangements under the 2010 Act. Since the extended detention periods were introduced, ACPOS data discloses that the vast majority (83.5%) of detentions have continued to be concluded within that period, and the average detention period (3 hours 55 minutes) remains well within the six hour period. This still leaves a significant proportion of cases (15.7%) where the period of detention has exceeded the six hours, but has ended within twelve hours. If this pattern persists, this would relate to more than 5,500 detentions every year.

5.2.21 Less than half of one per cent of detentions has involved an extension beyond the twelve hour initial maximum. In numeric terms, however, this is not to be

²⁷ ACPOS Solicitor Access Data Report, 23 June 2011

ignored. There are about 100 detentions per day. In a given year, therefore, there may be in the region of 350 suspects, whose questioning is not completed within a twelve hour period.

5.2.22 Further data from ACPOS, which covers November 2010 to August 2011 inclusive, suggests that there are many factors which lead to the extension of detention beyond twelve hours. Most commonly the requests for more time have stemmed from the complexity of the investigation, the existence of multiple suspects, a proliferation of allegations and/or witnesses or the need to arrange searches or samples. Another significant factor is the fitness of the suspect to be interviewed. He/she may need to recover from the influence of alcohol and/or drugs, require medical attention or have other welfare needs. Another major category is the need to secure the attendance of a third party; either an appropriate adult or responsible person for respectively a vulnerable or child suspect, a solicitor where requested or an interpreter if there are language barriers. However, the Review notes that, of the ninety-three extensions which occurred during this period, just twelve were triggered wholly or in part by a delay in securing solicitor access.

5.2.23 The Review has no reason to suppose that the statistics do not paint an accurate picture of what is reasonably required by way of time for the initial investigation of a crime up to the point at which a decision on whether to charge or report for charge can be made. It is confident that there will continue to be a significant proportion of cases for which six hours will be too restrictive a period to allow proper and effective investigation. It is also clear

that the need to extend detention for questioning beyond twelve hours should occur only in exceptional circumstances.

5.2.24 There is some confusion on whether the police ought to charge a detained suspect as soon as there is sufficient evidence to do so. The Review's understanding of the law is that there is no such requirement and that the point at which the police elect to charge a suspect is a matter for their discretion, subject to the general requirement of fairness. The Review has not been convinced that there is any reason to change this approach. It does, however, seem sensible to remove the confusion by explicit statutory provision clarifying how and when the police must charge a suspect.

5.2.25 The current law and practice has the potential to allow a person to be held, in certain circumstances, for a period of four, and perhaps five, days in police custody prior to appearance in court. Such lengthy periods may not be typical. Many suspects do appear in court on the day following their arrest. However, it remains the case, as demonstrated by the figures in the snapshot of custody cases described above, that a significant proportion of suspects are held for periods which are at least at the outer limits of what may be regarded as acceptable even under the Convention. More important than that, suspects are being held for periods that are longer than ought to be regarded as acceptable in Scottish human rights terms. It is worth exploring the causes for the prolonged custody periods and the available remedies for what the Review considers to be a serious problem.

5.2.26 Scotland is a small jurisdiction and it ought to be able to run an effective and efficient system for the prompt liberation or remand of, respectively, suspects and accused. This requires positive participation by all concerned. The criminal justice system cannot operate on a part time basis. In a human rights based system, it cannot simply close down in part over periods of days whilst suspects languish in temporary cells awaiting decisions on their continued detention or liberty. So far as the Review can ascertain, there is little problem in securing the human rights of a person detained at some point from late morning on a Sunday to a Wednesday evening. He/she is likely, if not certain, to appear in court on the next, or next but one, court day. But, at least in some areas, if he/she is detained on a Thursday morning through to the early hours of a Sunday, different considerations apply and such a person may be in custody for far longer than is either necessary or desirable. Yet the length of the deprivation of a person's liberty ought not to depend on the day of the week upon which he/she is arrested. Greater practical steps must be taken to ensure that those suspects who are to be reported in custody appear in court with greater promptness than is currently achieved in some sheriffdoms.

5.2.27 It was the Thomson Committee that recommended²⁸ that Saturday be declared to be a "*dies non*". It did so primarily on the pragmatic basis that recruitment for Saturday working, especially with a 6 am start, was becoming difficult and would shortly become impossible because a five day week had become the accepted social pattern. At the time, it was noted that²⁹ "the sheriff, sheriff clerk and staff in Glasgow also have to work all day on Saturday to get

²⁸ para 9.07
²⁹ para 9.06

through the business and this is a source of dissatisfaction”. The Saturday court was unable to start until midday because of the pressure of business and there was a concern that cases were not being prepared properly because they were being rushed into court. The modern observer in some areas might consider that this haste is still evident, but it now occurs two days later, with no benefit to the suspect or the state.

5.2.28 It is worth repeating that any timescales set must be sufficient to accommodate the effective investigation and prosecution of crime. In particular, they must be sufficient to permit a reasonable initial police investigation to take place and to allow time for the preparation of a report to the procurator fiscal. The process of reporting now takes hours. The police report can run to fifty computer generated pages when, in the 1970s, it might have extended to two sheets of typescript. The Review has noted the terms of the McInnes Report³⁰ in this area and, in particular, its recommendation that the preparation of full police reports³¹ is not an effective use of police time and the production of abbreviated reports might be considered. The Review understands that this recommendation has not been followed through. Although there were some pilots for low level cases, such abbreviated reports were not thought appropriate for custody cases for fear that crucial information might be omitted at an early stage and perhaps never fully recovered.

³⁰ The Summary Justice Review Committee: Report to Ministers, 2004 at paras 10.1 - 20

³¹ partly caused by the need for corroboration, see para 10.10

5.2.29 Continuing with the custody process, the procurator fiscal and his/her deputies have to consider the reports and prepare the cases for prosecution³². The time for this is also now measured in hours rather than minutes. In short, the work involved in each of these stages should not be underestimated. It is far greater than it was at the time of the Thomson Committee's deliberations. The number of considerations is significant. Both the police and the procurator fiscal must assess and record, not only matters of law, evidence and the public interest, but also wider issues such as potential risks to and vulnerabilities of the accused, witnesses and victims.

5.2.30 The Review has not thought it necessary to recommend legislation to force a more focused effort at weekends. What is required is not legislation but a system which involves the continued operation of the legal system, so far as is desirable and necessary, to ensure the protection of a suspect's human rights not only during the working week but also at the weekends. Although the police are engaged on a round the clock basis, they require to be encouraged to report custody cases as soon as is reasonably practicable. That cannot be achieved if few in the prosecution service are available to receive and mark the reports as and when they are received, in particular on Saturdays and Sundays. The Review is not in any way criticising the work ethic of the prosecution service or its individual members. It also appreciates that, especially in these times of economic constraint, there may be staffing and other resource difficulties. It realises that work is sometimes done at weekends in some areas. The concern of the Review is not in relation to the overall workload, which is what it is, but relative to the organisation of that

³² paras 12.1 - 16

work. The Review does not pretend to be expert in business systems. However, it does look somewhat askance on a system for dealing with, for example, Thursday and Friday detentions, which involves no weekend working but sudden and intense activity on Monday mornings and afternoons and which still means that, because of the timing of the marking, custody cases are not processed by the court until, in large measure, Monday evenings.

5.2.31 It is readily appreciated that the work of a defence solicitor can be arduous. He/she works with a client base which may not be the easiest to deal with. The work can be pressured, especially, under the current regime, on a Monday. The physical conditions of the work, including the cell and interview accommodation, are not of the best. Since *Cadder*, some may now be facing more unsocial working hours than before. But it must not be forgotten that, in the context of the obligation of the state to safeguard human rights, a responsible legal profession must operate in a manner designed to safeguard human rights, notably the right to liberty. There may be a conflict of interest between the client's rights and the lawyer's need to balance his/her work and life. There is also a certain convenience for both client and solicitor in the client waiting in custody in order to see his preferred choice of adviser in due course. The effect of *Cadder* must be that legal advice is available to suspects in custody within a reasonable period and, standing Article 5 and the need for an effective system for the investigation of crime, it is simply not legitimate to permit such waiting. Whilst the rights require effective protection from the state, the state cannot do that without the assistance of the country's legal profession.

5.2.32 The sheriffs principal and sheriffs may be encouraged to take on some role in overseeing Article 5 compliance within their sheriffdoms. Unless there is some extraordinary feature preventing it, a person should be appearing in court, at the very latest, within thirty six hours of arrest, whatever day of the week that arrest occurs upon. Indeed, the system should be working towards a shorter timetable. If all of this means that a limited number of procurators fiscal, and possibly some defence agents and sheriff courts, have to operate at weekends and on public holidays, then, like all necessary public services, that is what must happen. With modern technology, it should not be necessary to have every court, or even most courts, open for the purposes of a first appearance, nor is there a need for the suspect or legal representatives to attend court in person in every situation, especially if the suspect is in a rural police station. But steps ought to be put in place to see that, if it is practicable for a person to appear in court on a Saturday, or even a Sunday, so that he/she can be either liberated or remanded to prison, that is what does happen. The Review understands that there may be financial implications involved on this aspect of the report, but the costs ought to be mitigated by savings in connection with releasing persons from custody and reducing week day hours. The Review is not recommending additional work, only a reorganisation of the timing of when the existing work is done.

Conclusion

5.2.33 It is important to maintain the central principle that persons suspected of an offence are not unnecessarily or disproportionately kept in custody. This is the principle established in part in section 17 of the Police (Scotland) Act 1967

but relative to suspects who have been charged. This section was framed in pre section 14 detention days when persons who were arrested were, very soon after, charged. In a regime where arrest and charge do not always occur at the same time, the focus ought to be on preventing persons who are *arrested* from being unreasonably or unnecessarily detained. Section 17 requires amendment, therefore, to reflect this.

5.2.34 It is reasonable to place a limit on the time during which an arrested person can be kept in police custody without charge or report to the procurator fiscal. This is not too dissimilar from the current system, whereby a suspect requires to be liberated or arrested prior to the expiry of the maximum detention period. Having regard to all the circumstances, and the absence of significant criticism³³ of the operation of the 2010 Act as a generality, a period of twelve hours is reasonable. There was a “strong body of opinion” in favour of that period at the time of the Thomson Committee³⁴. The changes in available investigatory tools, such as CCTV footage and DNA, in the accuracy of police reporting and the effect of *Cadder* all point towards the necessity of a longer period than the original six hours for initial investigation, including questioning. The Review has been influenced by the ACPOS statistics on actual detentions and, in particular, the low number of cases in which extensions to the existing twelve hour initial maximum have been required³⁵. It has also been noted that, although some systems have longer police authorised detention periods, the recommendation is in line with other

³³ the Review acknowledges that some criticisms were made and has taken into account the reasons for detentions exceeding 6 hours

³⁴ para 3.25

³⁵ *supra*

jurisdictions where judicial or other similar authorisation is required for an extension of a period greater than twelve hours for investigative purposes.

5.2.35 There was some concern expressed at the time of, and subsequent to, the emergency legislation that the extension of the detention period to twelve hours represented a diminution in the protection of a suspect's right to a fair trial (e.g. prolonged and oppressive questioning) and an increase in the likely discomforts of unnecessary time spent in custody. Although other jurisdictions have longer potential periods of pre charge detention, these tend to be tempered by the safeguard of regular review. The most obvious example of this is the requirement under section 40 of PACE for reviews of a suspect's detention no later than six hours after the initial detention, and then two further reviews each within nine hours of the previous review.

5.2.36 The Review considers that it would not be an unreasonable burden on the police similarly to require that, where a suspect has not been charged/reported for charge, they conduct a formal review of a suspect's detention at or about six hours from the time at which he/she is brought into custody under arrest and detained. The figures released by ACPOS suggest that, on current trends, this is likely to affect less than 20% of cases³⁶. The purpose of this six hour review would be to ensure that the continued detention of the suspect is justified, that any causes for continued detention, such as the suspect's fitness for interview or delays in contacting a solicitor, were being properly addressed and that his/her welfare is being taken into account. For obvious reasons, such

³⁶ *ibid*

a review should not be carried out by an officer who is actively engaged in the investigation. The Review therefore recommends that statute incorporate a provision similar to that in PACE which requires that a review should be carried out “by an officer of at least the rank of inspector who has not been directly involved in the investigation”³⁷. For the avoidance of doubt, this does not necessarily imply that, in all circumstances, the inspector would require to be present in the police station where the suspect was being detained, but that should be regarded as the desirable norm at least in urban areas.

5.2.37 There needs to be a safeguard requiring the prompt appearance of a suspect before the court. Under the proposed system of arrest and detention on reasonable suspicion, it would make sense to set the time for appearance at court from the end point of any period of detention which is being used for questioning or other preliminary investigations prior to charge or report to the procurator fiscal. This in itself requires there to be a recognised time at which that period must come to an end. At present, detention ends with release or arrest. It would seem appropriate, subject to investigative liberation, for the end of the investigation period to occur when either the suspect is: (a) released from police custody with or without charge; (b) charged by the police and advised that he/she is to be kept in custody pending a report to the procurator fiscal and appearance in court; or (c) simply advised that he/she is to be kept in custody pending such a report and appearance. In the case of the latter, the Review considers that the police should have an option to reporting to the procurator fiscal without themselves proffering an actual charge in cases

³⁷ PACE s 40 (1)(b)

where they are uncertain of what the exact charge should be or on whether there is sufficient evidence to merit that charge. As discussed earlier, the point at which the police must charge the suspect, within what should be a twelve hour maximum, should be at their discretion, subject to the general test of Article 6 fairness.

5.2.38 All of this pre-supposes, of course, that there remains a reasonable suspicion that the suspect has committed a crime and that he/she has been advised of the general nature of that crime. But from the point at which the suspect is charged or advised that he/she is to be reported and, in each case, told that he/she is to remain in custody, a maximum period must be set for his/her first appearance in court. Standing the traditional “next lawful court day” approach, and subject to the above remarks on improving the processing of custodies, the appearance should take place not later than in the course of the first court day after charge or notification of intention to report. This maximum period ought to secure that, in effect, everyone arrested and detained in custody must appear in court within thirty six hours, and hopefully a lot sooner, subject to a court operating on the relevant day. As explored above, if it emerges over time that it still regularly occurs that even a few suspects are being kept in custody for more than thirty-six hours, then measures must be taken to address this.

Recommendations

I therefore recommend that:

- **section 17 of the Police (Scotland) Act 1967 should be amended so that the duty of the police is to ensure that persons arrested are not unnecessarily or disproportionately detained in custody;**
- **there should be a requirement that a person cannot be kept in police custody for more than twelve hours without being:**
 - (a) charged; or**
 - (b) advised that he/she is to be reported to the procurator fiscal with a view to him/her being charged with a specific offence;**
- **there should further be a requirement on the police to review any period of detention before charge at or about six hours after detention. Such a review should be carried out by an officer of at least the rank of inspector who has not been directly involved in the investigation;**
- **the time for appearance at court should be altered to the first court day after charge or notification of an intention report to the procurator fiscal; both the common law and section 135(3) of the 1995 Act should be amended accordingly;**
- **it should be made explicit that there is no rule requiring the police to charge a suspect upon arrest, or once a sufficiency of evidence has been reached, and that, subject to compliance with the proposed regime in relation to arrest, detention and court appearance, the point at which the police proffer a charge or decide to report the suspect to the procurator fiscal is a matter for their discretion; and**
- **the period of time during which suspects are kept in custody should be kept under review by the COPFS. If it transpires under the new regime that suspects are being kept in custody without court appearance for more than thirty-six hours from the time of their arrest, measures (e.g. Saturday courts) should be introduced to prevent that from occurring. Meantime consideration must be given to the reorganisation of the times of existing workloads in the procurator fiscal service and the courts.**

5.3 LIBERATION FROM POLICE CUSTODY

Introduction

5.3.1 Article 5 permits the deprivation of liberty only when necessary for certain purposes. It is implicit, therefore, that the suspect must not be detained beyond the point when there ceases to be a need for him/her to be held in custody. The decision to arrest the suspect does not mean that it will be necessary to continue to hold (or “detain”) him/her until his/her appearance in court. Although the purpose of arrest and, thereafter, detention, under the proposed new regime, must remain to bring the suspect before the competent legal authority, the Convention does not set out what criteria might be applied to determine when it is necessary or proportionate for a suspect to remain in custody pending court appearance. The presumption must be in favour of liberation in all cases and the main reasons for which a suspect will continue to be held in police custody legitimately must, as previously outlined, be confined to situations in which he/she poses some risk, either to an individual, the public or the interests of justice, if at liberty.

5.3.2 The Review is not concerned with the liberation of suspects once they have appeared in court on petition or summary complaint. Such liberation, or remand to prison, is a matter for the sheriff or Justice of the Peace and, on appeal, the High Court, in terms of relatively well known and established principles. The Review is concerned with the liberation of suspects during the different stages, and at the end, of an investigation, prior to that appearance.

The grounds for arrest and initial detention have already been considered. Where a person has been arrested on reasonable suspicion and is either brought to, or is already in, a police station, it must be that, if the conditions for detention are not met (i.e. where detention is not considered necessary and proportionate), that first detention should not be authorised and the suspect must be liberated. This should also occur at any point during a detention when the grounds for reasonable suspicion cease to exist or when it becomes clear that the conditions justifying continued detention are no longer applicable.

5.3.3 If detention is authorised, there is, secondly, the period following upon it, during which a break in the suspect's detention to allow for further investigations may be necessary or desirable. Thirdly, there is the point at which the police charge the suspect or intimate to him/her that they intend to report him/her to the procurator fiscal with a view to such a charge (i.e. once the initial police investigation is complete). Fourthly, there is the period after the suspect has been reported to the procurator fiscal but before the appearance in court. At all of these stages, the significant principle should be that the suspect should not be deprived of his/her liberty unless that is necessary and proportionate. The approach of the Review has been to propose reforms which will promote that principle, without prejudicing the effective investigation and prosecution of crime.

Current law

Suspect at Liberty

5.3.4 There are circumstances in which the police may have reasonable grounds for suspicion, but it would not be proportionate, in the terms of the Convention, to deprive the suspect of his/her liberty. In such situations, any questioning that is carried out, either at or outwith a police station, should be on a voluntary basis only, albeit that the suspect is entitled to similar rights as a person who is formally detained. The only difference in rights between this suspect and one who is detained is that he/she can terminate any interview at any point by, depending on the circumstances, leaving the police station or asking the police to leave if the premises are his/her own. Such, at least, is the theory and, in some instances, the practice.

Liberation during Detention

5.3.5 In the modern era, there are a number of steps in a police investigation which can take a considerable time. It may not be practicable for them to be completed within the proposed twelve hour maximum period. Yet it may be neither necessary nor proportionate for a suspect to be detained whilst these steps are being undertaken. For example, it may take some time to investigate mobile telephone records or to carry out DNA comparisons. Alternatively, in his/her police interview, a suspect may provide an explanation which merits further enquiry. Although it may have been necessary to arrest a suspect for a variety of reasons, including the preservation of evidence, the immediate purpose may have been spent. In all of these situations, if the police or the

procurator fiscal consider that there is insufficient information to justify a charge against a suspect but reasonable suspicion still remains, the only option is to release the suspect unconditionally during or at the expiry of the detention period. It may be possible to permit the re-arrest of the suspect for the same offence¹, but it would not seem appropriate for the police to question him/her further, at least without judicial sanction under the proposed new regime, if the maximum period has already expired. In any event, re-arrest itself may seem unnecessarily draconian if a suspect can be expected to attend at a police station at a particular set time.

- 5.3.6 In England and Wales, section 37(2) of PACE provides that, if the custody officer does not consider that there is enough evidence to charge a suspect or that the suspect's detention is necessary to obtain evidence by questioning him/her or otherwise, he/she can release him/her "either on bail or without bail". The custody officer can attach conditions to that release² for the purpose of ensuring that the suspect surrenders to custody at a police station, does not commit an offence, does not interfere with witnesses, does not obstruct the course of justice and makes himself/herself available to assist with certain enquiries. There is no time limit placed on the length of the liberation and the courts in England and Wales have been reluctant to terminate liberation conditions³. Thus restrictions can be placed on a suspect almost indefinitely where there is insufficient evidence to charge him/her, although it

¹ cf in Ireland, when judicial authority would be required for this; see Criminal Justice Act 1984 s 10

² PACE s 47(1A)

³ *R (on the application of C) v Chief Constable of A* [2006] EWHC 2352, see the problems in *R (on the application of the Chief Constable Greater Manchester Police) v Salford Magistrates Court* [2011] EWHC 1578 (admin)

may be possible to challenge these under the Convention in certain circumstances⁴.

Liberation Post Charge

5.3.7 Pending court appearance, the criteria used by the police to decide whether to liberate suspects charged by them are those set out in the Lord Advocate's Guidelines to Chief Constables on Liberation by the Police⁵. These follow upon the provisions in the 1995 Act⁶, which allow the police to liberate suspects, on or without undertakings, pending court appearance on a specific day no later than twenty-eight days after liberation. The provisions do not apply to murder or rape cases and, where it is likely that the case will not proceed on a summary complaint, the police are requested to consult the procurator fiscal. The Guidelines provide that there should be no release on an undertaking where there is a substantial risk that the suspect will fail to appear at the court diet, commit further offences, interfere with witnesses, obstruct the course of justice or fail to comply with the undertaking. Obviously, where it is thought that the suspect poses a danger to the public or the investigation process, he/she should not be released under these provisions. Where a suspect has been arrested on a non-appearance warrant, there is a presumption that he/she will not be liberated pending appearance, but this is rebuttable where exceptional circumstances exist.

5.3.8 Breach of an undertaking is a criminal offence with a maximum penalty of twelve months imprisonment. Any undertaking can include compliance with

⁴ e.g. *SF v Switzerland* (1994) DR 76, at para 13

⁵ <http://www.copfs.gov.uk/sites/default/files/Publications/Resource/Doc/13547/0000523.pdf>

⁶ s 22(1), (1A) and (1B)

the standard bail conditions and, in that connection, can be to prohibit a person from being in a particular area or contacting a particular person. But it cannot include special conditions, such as curfew requirements.

Custody Post Charge and pre Court Appearance

5.3.9 The principal reason for the Crown bringing suspects before the court in custody under the current regime should be to secure either their remand in custody or the imposition of special bail conditions. The procurator fiscal has power to liberate a suspect, but no power to release him/her subject to conditions, although he/she could presumably authorise the police to have done so.

Consideration

5.3.10 As described in the previous chapter, the general principle that persons suspected of an offence are not unnecessarily or disproportionately kept in custody must be maintained. The presumption, albeit rebuttable, must always be in favour of liberty. Even where reasonable suspicion continues, a suspect should not be detained longer than is necessary and proportionate. Liberation, subject to conditions, for a limited period whilst the police investigation is completed would seem a sensible alternative to prolonged detention in some cases.

5.3.11 Under the regime proposed in this Review, a suspect could be arrested, detained and questioned for a limited period prior to charge or report to the

procurator fiscal. If released without charge, it would be envisaged that, similar to the provisions for detention at present, the suspect could be re-arrested on suspicion of the same crime, but any period of pre charge detention would be reduced by any earlier period in detention for that offence. Especially where a suspect has been detained in situations of urgency, it may be convenient for both the police and the suspect if the suspect were to be released relatively early on in the detention period, but required to return to the police station for questioning at a later date, by which time certain necessary or desirable investigations might have been completed. It will often be reasonable for the police to advise the suspect of their intended course of action, but there will be many situations in which the investigation would be jeopardised were the police to inform the suspect of their plans.

- 5.3.12 It is recognised that having split periods of detention may lead to uncertainty for a suspect. It would result in a longer period under which he/she remained under suspicion, as distinct from being charged or not. If no further provision were made, if a suspect were arrested and detained, he/she would either have to be released unconditionally or charged (and released or reported in custody) at the end of the investigative period. Investigative liberation pending a decision to charge would, if created, mean that the suspect would still be “officially” under suspicion. This could cause practical problems for suspects. For example, if a person were liberated in relation to a sexual offence, this could lead to him/her being suspended from his/her job. The longer the liberation period, the greater the potential detrimental impact to the suspect, especially if, eventually, he/she were cleared of all suspicion. It would seem

prudent, therefore, to constrain any period of liberation without charge. A balance needs to be struck. It is proposed that the period of investigative liberation on conditions should be limited to a maximum of twenty-eight days. It is important to protect the suspect against repeated periods of detention which accumulate beyond the twelve hour maximum. Any period spent in pre charge/report detention throughout, before or interspersed between, periods of liberation on conditions will require to be aggregated and must not exceed the twelve hour maximum.

5.3.13 A robust framework is needed to avoid uncertainty. Investigative liberation should only be permitted on the basis that there remains reasonable cause to suspect the person of the particular offence. When it is granted, the police must provide a time and place for a return to the police station, when, of course, the rights of access to a lawyer would revive. The conditions for liberation should include specific special conditions, which are necessary for the proper conduct of the investigation, such as prohibiting the suspect from visiting a particular area, speaking to certain people and making himself/herself available for other legitimate investigative purposes. Breach of conditions of investigative liberation should be an arrestable offence as currently is the case for a breach of a condition of an undertaking.

5.3.14 The exercise of these powers will require to be subject to independent judicial scrutiny. There should be a simple summary process, whereby the suspect may make an application to the sheriff for a review of any investigative

liberation conditions. The sheriff should be able to vary a condition or to terminate the liberation on conditions altogether.

Liberation at or post charge

5.3.15 As detailed in the introduction to this chapter, the Review is concerned to ensure the liberation of the suspect, when appropriate, both at the point of police charge or report to the procurator fiscal and during any subsequent period in custody prior to his/her appearance in Court. Again, the principle is that no person should be kept in custody prior to court appearance for any longer than is necessary and proportionate. In this regard, the police should be given the power to liberate a suspect after charge or intimation of intention to report the suspect to the procurator fiscal, on special conditions, such as a curfew. As with investigative liberation, a summary process to review any conditions should be available.

5.3.16 When the police do not intend to recommend opposition to bail at a court hearing, the suspect should be released, either unconditionally or on an undertaking to appear at court on a specified future date. Such decisions should be taken, as does happen at present, at the discretion of the police, applying guidelines from the Lord Advocate. But in borderline cases, the direction of the procurator fiscal should be actively sought and given. The procurator fiscal should have an express power to review police decisions on liberation and to liberate also on standard or special conditions. In the case of liberation on any conditions, which should remain time constrained as at present, there ought once more to be a summary process enabling the suspect

to challenge any conditions before the sheriff. Breach of any condition of an undertaking to the procurator fiscal should be a criminal offence.

5.3.17 In a significant proportion of cases, where the suspect has not been liberated by the police, the procurator fiscal does not seek the accused's remand in custody when the case calls in court. There are three general situations when this may occur: (1) where the procurator fiscal does not agree with the police recommendation to oppose bail; (2) where circumstances have changed since the police decision to report in custody rather than release on an undertaking⁷; and (3) where the police recommend, and the procurator fiscal agrees, that bail on special conditions (as distinct from the accused being ordained to appear or released on a police undertaking) is appropriate.

5.3.18 One option is for the procurator fiscal to adopt an earlier role in deciding on the liberty of the suspect in cases in which the police do intend to report him/her in custody. This would require the involvement of the procurator fiscal before the formal reporting of the suspect by the police. Another option is to give powers to the procurator fiscal to release accused persons on bail, including with special conditions, pending appearance at a future specified date. This would, in essence, be a power to release the accused on an undertaking. This would not achieve much if, by the time the procurator fiscal were to consider the matter, the suspect was already in the cells at court. The short point is, however, that at each hierarchical stage of the criminal justice process, the authority dealing with the suspect should have adequate powers to

⁷ e.g. the finding of a suitable address (domicile of citation) for the suspect

release the suspect on the type of conditions competent to the court, provided that the court has the power to review these conditions in a summary process.

Recommendations

I therefore recommend that:

- **the police should be given express power to liberate a suspect from detention, pre charge/report, subject to any appropriate conditions for the purpose of carrying out further investigations. The police should not have to specify the nature of any enquiries, if that would compromise the investigation, but otherwise they should do so;**
- **the period of liberation on such conditions should be limited to a maximum of twenty-eight days. Where this is done, the period already spent in pre charge/report detention and any future period will be aggregated and must not exceed the twelve hour maximum;**
- **investigative liberation should only be granted on the basis that there remains reasonable cause to suspect the person of committing the particular offence;**
- **when it is granted, the police must provide a time and place for a return to the police station, when, of course, the rights of access to a lawyer would revive;**
- **the conditions for liberation may include special conditions, necessary for the proper conduct of the investigation, such as prohibiting the suspect from visiting a particular area, speaking to certain people and making himself/herself available for other legitimate purposes;**
- **the police should be given the power to liberate a suspect after charge or intimation of any intention to report the suspect to the procurator fiscal, on special conditions, including a curfew;**
- **where the police do not intend to recommend opposition to bail, the suspect should be released by them, either unconditionally or on an undertaking to appear at court on a specified future date. Where the police are uncertain whether or not to recommend bail they should seek the direction of the procurator fiscal;**
- **the procurator fiscal should have an express power to review police decisions on liberation and to liberate also on standard or special conditions;**

- the exercise of the powers to liberate at any stage prior to appearance in court should be subject to a summary process, whereby the suspect may make an application to the sheriff for a review of any liberation conditions. The sheriff should be able to vary a condition or to terminate the liberation on conditions altogether; and
- breach of conditions of liberation should be a criminal offence and breach of any condition of an undertaking should remain a criminal offence.

6.0 INVESTIGATION CHAPTERS OVERVIEW

6.0.1 The principal concern for the Review in addressing police investigations has been to ensure that the procedures comply with the right to a fair trial under Article 6 of the Convention. Although Article 6 sets out a number of “minimum rights”, it is the implied rights, such as that of access to a lawyer once a suspect is detained, that have precipitated this Review. It should be recognised immediately that, in part because of the knock-on effects of *Cadder*, the jurisprudence on the right of access to a lawyer is still developing. The United Kingdom Supreme Court has recently issued further judgments in this area, which the Review has taken into account. There may well be consequences of these that will need further exploration and, quite possibly, the consideration of yet more cases in this field, ultimately by that Court.

6.0.2 In the light of, or even in spite of, the degree of activity affecting the law in this area, the Review has sought to recommend how best to provide clarity: on a suspect’s right of access to a lawyer; the point at which those rights arise; and the measures required to make the provision of those rights practical and effective. The Review repeats that it is conscious that it is the obligation of the state to protect the rights of its citizens in general, and the actual and potential victims of crime in particular, by means of an efficient and effective system for the proper investigation and prosecution of crime. The police, other investigating authorities and COPFS must be permitted to carry out their responsibilities within a sensible and workable legal framework. This section contains four chapters that specifically look at the right of access to a lawyer,

the nature and scope of police questioning and how child or vulnerable suspects can be protected within the investigation process.

6.0.3 First, Chapter 6.1 – Legal Advice, reaffirms and elaborates on the need to provide suspects with access to a lawyer and the form which that access can take. The Review recommends that a suspect’s right of access to a lawyer should arise as soon as practicable after the start of detention, regardless of whether he/she is to be questioned. The suspect should be able to: access a solicitor of his/her choice, as long as this does not impact unreasonably on the period of detention or on the investigation; within reason, choose the form in which any consultation with the solicitor takes place; and, within a clear statutory framework, waive the right to legal advice altogether. The Review highlights the importance of promoting general understanding and consistency across the system through the recommendation of training and guidance on the right of access to a lawyer for police, COPFS and solicitors.

6.0.4 This chapter refers to the European Union’s draft Directives on the Right of Access to a Lawyer in Criminal Proceedings¹ and on Rights to Information in Criminal Proceedings². Any prospective legislation by the EU is likely to complement the approach taken by the European Court.

6.0.5 Secondly, Chapter 6.2 – Police Questioning, sets out a new approach to police questioning, granting the police greater powers, while strengthening the safeguards on the use of those powers. It is recommended that there should

¹ Com (2011) 326/3

² Com (2010) 392/3

continue to be no statutory provision on pre-interview briefing, allowing the police to make informed decisions on a case by case basis. The police should be allowed to interview suspects after charge with the authorisation of a sheriff, either by warrant or at, and after, the suspect's first appearance in court.

6.0.6 Thirdly, in Chapter 6.3 – Child Suspects, the Review makes it clear that additional statutory safeguards need to be put in place to protect child suspects in the criminal justice system. For the purposes of arrest, detention and questioning, it is the recommendation of the Review that a child be defined as a person under the age of 18 years. Statutory provisions should be introduced: to state that the child's best interests are a primary consideration when the police take decisions on his/her arrest, detention and questioning; to define the role of the parent, carer or responsible person to some degree in the process of detention and questioning; and to give the child detainee the right of access to a parent, carer or responsible person. The Review appreciates the added importance of access to a lawyer for child suspects. Children under the age of 16 ought not to be able to waive that right. In recognition that children's maturity and understanding varies greatly, children of 16 or 17 should be allowed to waive their right of access to a lawyer, but only if their parent, carer or responsible person agrees to that course of action.

6.0.7 Finally, Chapter 6.4 – Vulnerable Suspects, recommends, at the outset, that there should be a statutory definition of a 'vulnerable suspect'. Alongside this, further statutory provision, similar to that for child suspects, should be put in place: to define the role of the appropriate adult; and to give the vulnerable

suspect the right of access to an appropriate adult. Again the Review recognises that, as with child suspects, vulnerable adult suspects have a wide range of ability and understanding. Therefore, the Review recommends that a vulnerable suspect should be able to waive his/her right of access to a lawyer, but only if the appropriate adult agrees.

6.0.8 By looking at the chapters in this section together, an investigative process should be created that gives the police the flexibility to question suspects, where that is required or desirable in order to gather information. The safeguards that are recommended should ensure that the suspect's right to a fair trial is not infringed, regardless of his/her age or any vulnerability, and that therefore the risk of evidence, gathered during the police investigation, being regarded as inadmissible in Article 6 terms is reduced.

6.0.9 There is a general concern that is worth emphasising, even if the Review is not clear about what it may ultimately mean. Traditionally, the law has looked upon the trial of a person as being that stage at the end of a first instance criminal process when the accused appears before a judge, or judge and jury, and evidence is led of his/her involvement in the crime charged. The procedure of that adversarial process is monitored by the judge, as the competent authority entrusted with ensuring that the trial is fairly conducted. At various earlier procedural stages, the judge is also present and can oversee what occurs. This is, of course, a core function of a judge in any legal process. After the transfer of the investigative role from sheriff to procurator fiscal to police, the interview of a suspect by the police was still not regarded as part of

the trial process. Indeed, questioning was generally discouraged as not being the function of the police. Interview of a suspect was seen as the preserve of the sheriff. This attitude prevailed long after the sheriffs had ceased to examine suspects. However, as time has passed and public expectations have changed, the role of the police interview as both an investigative tool and a source of evidence has become enhanced.

6.0.10 In Convention terms, the interview is likely to be regarded as part of the trial process, should a prosecution follow. The consequent curiosity of that is that, during this part of the trial, there is no judge to oversee or to regulate its fairness at the time. Thus, when a suspect complains of a lack of information on the nature of the charges or the evidence against him/her, neither he/she, nor his/her solicitor (if any), has any immediate means of compelling or persuading the police to provide that information before proceeding to interview. Where he/she complains of tiredness or other condition undermining his/her ability to answer questions, there is no independent method available to address that problem. The judge's role is one which can only be to review the interview *ex post facto*. The practical effect of all of this, in a system which encourages interview, perhaps with a lawyer present or at least with access to a lawyer beforehand, as an integral or essential part of the trial process, is that a significant part of the suspect's trial, in a traditional sense, is being moved in both time and location from the court room setting to that of the police station. The right to silence and the privilege against self incrimination, which are afforded by the presence of the judge and the formalities of the court room, are removed, or rather replaced, by a system

involving the suspect having information concerning his/her human rights and access, should he/she desire it, to a lawyer. There is no judicial involvement at the time, only the potential for retrospective review.

6.0.11 This Review is concerned with such a general development, which involves the introduction, or perhaps re-introduction, of inquisitorial methods employed by the police (i.e. the executive), and not the judiciary, into what has become in recent years a highly adversarial trial process. The more the interview is perceived as part of the trial, the more that protections, which were traditionally provided only in the context of court room proceedings, will require to be afforded at the outset of a suspect's detention. This in turn is likely to move the trial further from the court room and into the police station. Thus, it might be anticipated, if the trend continues, a suspect will become entitled to greater notice of the potential charges and evidence against him/her in advance of questioning. Taken to its logical conclusion, it would, in theory, ultimately end up in a situation where the suspect in the police station is entitled to all the rights and privileges afforded to an accused prior to an actual trial; a situation which is, of course, impossible to sustain in a practical sense within an adversarial process which does not involve judicial intervention at its inception.

6.1 LEGAL ADVICE

Introduction

6.1.1 At the core of *Cadder*, and hence of this Review, is the suspect's right of access to a lawyer before being questioned by the police. In terms, the United Kingdom Supreme Court relied on the *dicta* in the European Court's judgment, already quoted, in *Salduz* that¹:

“... the Court finds that in order for the right to a fair trial to remain sufficiently “practical and effective” article 6(1) requires that, as a rule, access to a lawyer should be provided from the first interrogation of a suspect by the police...”;

and that:

“The rights of the defence will in principle be irretrievably prejudiced when incriminating statements made during police interrogation without access to a lawyer are used for a conviction”.

6.1.2 The 2010 Act was designed to provide an immediate remedy to the problem, inherent in the lack of solicitor involvement in section 14 detention. It was acknowledged, during the parliamentary process, that by its very nature, the legislation could not cover all aspects of the need to protect the right of access to a lawyer. The legislation was an interim measure, pending the outcome of this Review and other considerations, including any subsequent United Kingdom Supreme Court or European Court decisions.

¹ at para 55

6.1.3 It was essential that the Review consider the full range of issues involved in securing the right of access to a lawyer. As was emphasised in *Salduz*, the right must be provided in a way that is “practical and effective”. This means identifying more precisely when the right arises, how it is to be communicated to the suspect, how it is to be provided and the circumstances in which it can be waived.

Current Law

6.1.4 The rights of a suspect arrested at common law or detained under section 14 of the 1995 Act are now set out in sections 14, 15 and 15A of that Act, as amended by the 2010 Act. He/she must be informed of the general nature of the offence, which he/she is suspected of having committed, and the reason for his/her detention or arrest. Once at the police station² he/she is entitled to have intimation of the arrest or detention and the location of the police station sent to a solicitor and one other reasonably named person. If a suspect’s detention is terminated, the suspect must be informed of that immediately.

6.1.5 A suspect who is detained, arrested or merely attending voluntarily at a police station now has a statutory right to a private consultation with a solicitor (and not any other legal adviser) before questioning begins and at any other time during questioning. The 2010 Act made it clear that this consultation may be by telephone as well as in person. This right to a consultation, which prior to the 2010 Act applied only to arrested persons before their first court

² suspects in Scotland are seldom, so far as is known, taken anywhere else

appearance, can only be delayed in exceptional circumstances, which will rarely occur.

Other Jurisdictions

6.1.6 In England and Wales, a person who has been arrested and detained is entitled to intimation to a reasonably named person³ and to a private communication with a solicitor⁴, although the latter term is interpreted as including an accredited representative of a solicitor (i.e. a paralegal). The right to communicate with a solicitor is not specifically related to any interview. In practice⁵, the communication is made by telephone to the Defence Solicitor Call Centre which will refer the suspect to a nominated or duty solicitor, both of whose services are publicly funded, or to CDS Direct who provide free telephone legal advice, but only for relatively minor offences such as road traffic contraventions. Although there is no express right to have a solicitor present during any interview, such presence must be afforded if requested. At least until the recent introduction of fixed fees for solicitors in the investigative process, it is not unreasonable to comment that the provision of legal services at this early stage resulted in considerable business to legal firms, especially in urban areas, and consequent significant cost to the public purse. There are some firms of solicitors specialising exclusively in this pre trial⁶ work.

³ PACE s 56

⁴ PACE s 59

⁵ see generally Skinns: the Right to Legal Advice in the Police Station: Past, Present and Future (2011) Crim LR 19 at 20-21

⁶ in the domestic rather than Convention sense

6.1.7 In Ireland⁷, a suspect in custody has the right to consult a solicitor, derived from the Constitution⁸ and the Convention jurisprudence and detailed in subordinate legislation⁹. Failure to afford the person the right will render the detention itself unlawful and any statements made during it inadmissible¹⁰. An unlawful detention can, however, become lawful after access to a lawyer is afforded. The right may be confined to a telephone conversation and there is no right to have a solicitor present during an interview¹¹. In practice, such presence is not currently permitted. Perhaps reminiscent of the approach in Scotland pre *Cadder*, whether an interview is fair depends upon all the circumstances of the case and not on any absolute exclusionary rule¹². There is no formal duty solicitor scheme in place to deal with requests for access to a lawyer.

6.1.8 In Canada, there is a constitutional right “on arrest or detention... to retain and instruct counsel without delay and to be informed of that right”¹³. The Canadian courts regard this as a means of ensuring that any decision to speak to the police is an informed one, rather than as a measure of protection for a suspect from pressure to speak against his/her will¹⁴. The Constitution does not entitle a person to have a lawyer present during an interview. A short

⁷ see generally McGrath: Evidence para 8 – 12

⁸ para 40.3.1; see *People (DPP) v Ryan* [2011] IECCA 6, Murray CJ under the heading “Decision on the access to a solicitor/legal advice issue...” para (i); *People (DPP) v McCrea* [2010] IESC 50; unpublished research paper by Conor O’Keeffe: “Strasbourg Knocking on the Door of Garda Interrogation Room”

⁹ Criminal Justice Act (1984) Treatment of Persons in Custody in Garda Siochana Stations Regulations 1987 (SI 119) reg 8

¹⁰ *People (DPP) v Ryan* (*supra*) under reference to (*People*) *DPP v Healy* [1990] 2 IR 73

¹¹ see McGrath: Evidence para 2.8

¹² *People (DPP) v Buck* [2002] 2 IR 268. See also *People (DPP) v Madden* [1977] IR 336, O’Higgins CJ at 355, referred to in *People (DPP) v Gormley* [2010] IECCA 22, Finnegan J at para 14. The Supreme Court is to hear an appeal in *Gormley*

¹³ Canadian Charter of Rights and Freedoms s 10(b)

¹⁴ *R v Sinclair* [2010] SCC 35

conversation with a solicitor, by telephone or otherwise, even if it is followed by several hours of interrogation, may be sufficient to ensure the fairness of any replies made in answer to police questioning¹⁵. In New South Wales, a detained suspect has a right to contact a friend, relative or lawyer and to consult them¹⁶. The lawyer is entitled to be present at any interview.

6.1.9 In relation to continental Europe, there have been a number of studies¹⁷ of the extent to which defence rights, including those of access to a lawyer, exist and/or are effective within the jurisdiction of EU Member States and other signatories to the Convention. It is not necessary to repeat the results of the various research studies here. What they demonstrate is that there are few countries in which there is effective access to a lawyer at the investigative stage and before the first appearance in court. At the time of the research, there was no right to have a lawyer present at an interview in France, Belgium or the Netherlands. The situation in France is particularly instructive in that, although under the commonly used “garde à vue” procedure there was a right to consult a lawyer, it was limited to a 30 minute meeting and did not involve attendance at interview. This practice has recently changed significantly. In the Netherlands, the view was expressed that a suspect in an investigation was primarily a source of information and that legal assistance, at that stage, hampered what was a truth finding exercise¹⁸. Thus there was no right to a

¹⁵ *ibid*; see also *R v Willier* [2010] SCC 37; *R v Singh* [2007] 3 SCR 405; *R v McCrimmon* [2010] SCC 36; see also Pattenden: “Right to counsel at the police station” [2011] 10 International Journal of Evidence & Proof

¹⁶ Law Enforcement (Powers and Responsibilities) Act 2002 ss 122-3

¹⁷ including: (1) T. Spronken et al: EU Procedural Rights in Criminal Proceedings (2009) as cited and updated in the European Commission’s Impact Assessment accompanying the Proposal for a Directive...on the Rights of Access to a Lawyer and of Notification of Custody to a Third Person in Criminal Proceedings; and (2) Cape et al (eds.): Effective Criminal Defence in Europe (2010)

¹⁸ Brants: The Reluctant Dutch Response to *Salduz* (2011) Edin LR 298 at 299

lawyer at that stage, although the right did arise once a judge opened a pre trial judicial investigation¹⁹. In many countries, there is a technical right of access to a lawyer from the moment of arrest. But in many of these, including Germany, Hungary and Turkey, the absence of effective provision of free legal aid at that stage means that such access is rarely achieved. Similar considerations apply in Italy, where the right to access can even be delayed at the instance of the prosecutor or the court.

Convention and European Union

6.1.10 In both *Salduz* and *Cadder*, there was some limited discussion of the exact point when the right of access to a lawyer arose. It was not made at all clear in the judgments just when this was. Some *dicta* stated that the right arose when a suspect is *detained* for questioning, but others suggested that the right was connected to the questioning itself, regardless of whether the suspect had been detained.

6.1.11 More recently, it has been affirmed by the European Court that the right of access to a lawyer is not confined to cases where a suspect is to be interviewed. Although, in Article 6 terms, it might have been thought that access to a lawyer could only have a bearing on trial fairness if such access were denied in advance of interview, it is clear that this is not the position. In *Dayanan* the applicant had been arrested on charges that he belonged to Hizbullah. He had been arrested, advised of his right to remain silent and had remained silent

¹⁹ *ibid* at 300

when questioned. The official text is only available in French but the Review understands that, fairly translated, the Court said this²⁰:

“With regard to the absence of a lawyer whilst he was in custody, the Court draws attention to the fact that the right of any accused person to be effectively defended by a lawyer... is one of the fundamental elements of a fair trial (*Salduz...*)...

It considers that in general for the purposes of article 6 of the Convention, a fair criminal trial requires the suspect to have the possibility of legal assistance when placed in custody or on remand.

...as soon as he is deprived of his freedom, an accused person must have access to a lawyer regardless of the questioning that he undergoes... Indeed, a fair trial requires that the accused person have access to the full range of services provided by the lawyer. In this regard, discussion of the case, organisation of the defence, the quest for evidence in favour of the accused, preparation for questioning, support for an accused person in distress and monitoring of the conditions of detention are fundamental elements of the defence that must be freely exercised by the lawyer”.

6.1.12 Assuming that little is to be read into the changes in wording contained in the three paragraphs from “accused”, to “suspect” and then back to “accused”, the Court makes it clear that anyone deprived of his/her liberty must have the opportunity of gaining access to a lawyer. There is much sense in that approach from the angle of legal theory. If a person has been arrested on suspicion of having committed a crime, he/she may wish to instruct immediate steps to demonstrate his/her innocence and secure his/her freedom. These might include, for example, the ingathering of evidence to support an alibi or real evidence such as CCTV recordings. The extent to which this is a real problem, from an Article 6 viewpoint, in Scotland may be another matter. But it follows from the Court’s decision that, to be Convention compliant, a

²⁰ at paras 30 - 32

detained suspect must have prompt access to a lawyer even if he/she is not going to be questioned at all.

6.1.13 This approach is consistent with the draft EU Directive on the Right of Access to a Lawyer etc.²¹, which provides in Article 3(1) that:

“Member States shall ensure that suspects and accused persons are granted access to a lawyer as soon as possible and in any event:

- (a) before the start of any questioning by the police or other law enforcement authorities;
- (b) upon carrying out any procedural or evidence gathering act at which the person’s presence is required or permitted as a right in accordance with national law, unless this would prejudice the acquisition of evidence;
- (c) from the outset of deprivation of liberty”.

6.1.14 As currently drafted, the suspect or accused must be allowed to meet the solicitor and the solicitor can be present at any interview, when he/she can ask questions or require clarification and make statements²². The solicitor is entitled to check the conditions of the place of detention. The Directive may or may not be agreed in its current form, but it serves as a pointer to the way the law may develop.

6.1.15 The recent decision in *Ambrose* states that the right of access to a lawyer does not only arise at the point when a person has been formally arrested or detained. It will arise when a suspect has been put in a “sufficiently coercive” position or is “deprived of his liberty of movement”. The Review has some

²¹ 2011 COM 326/3

²² Article 4

difficulty in grasping when such situations could arise in practice short of arrest, either at common law or under a specific statutory provision, or detention. But it proceeds tentatively on the basis that there may be hybrid situations where a suspect has been restrained but not fully informed of his/her formal legal status. It must be recognised that, in such situations and those in which the person is under arrest or detention, it will often not be practicable to provide access to a lawyer at the place of arrest, detention or informal restraint. That being so, unless the right is waived, the answers to any questions will be inadmissible until access is afforded.

Consideration

When and how the Right Arises

6.1.16 In his submissions to the United Kingdom Supreme Court in *Ambrose*²³, the Lord Advocate argued that the right of access to a lawyer under Article 6 arose only when a suspect was in police custody and subject to interrogation. This submission succeeded to the extent that, in terms of the protection afforded by Article 6, the suspect required to be being questioned at a point when his/her position was “sufficiently coercive” or he/she had been deprived of “his liberty of movement”.

6.1.17 Under the 2010 Act, when a suspect has been arrested and is detained at a police station, or if he/she has attended a police station voluntarily, he/she must be able to access a lawyer including before and during any police

²³ at para 61

interview. That is the general position that requires to be secured and its continuance, in so far as contained in the amendments to the 1995 Act introduced by the 2010 Act, must follow. This is so even if Article 6 does not require this for the suspect who is not under any compulsion to remain at the police station. The problems identified by the Thomson Committee relative to “helping the police with their enquiries” could re-appear were the position to be otherwise. It follows, however, from *Dayanan* and the draft EU Directive that the legislation requires amendment to permit all arrested or detained suspects access to a lawyer, even if no questioning is to take place.

- 6.1.18 It does not seem to be a necessary requirement that the police actually secure access by a suspect to a lawyer when the suspect is not in a police station. After all, a suspect in that situation is at liberty and free to obtain such advice as he/she wishes in any event. He/she will have been cautioned that he/she need not answer any questions as soon as he/she becomes a suspect. Any interviews with a suspect outwith a police station will be subject to the overall requirement of Article 6 fairness. If the actions of the police are seen as an attempt to circumvent the right of access to a lawyer or the procedures for the recording of the interview in the police station, the prospects of the answers to police questioning being ruled inadmissible will, no doubt, increase. It is clear, however, that, if a suspect is arrested or otherwise has his/her liberty of movement curtailed, he/she must be afforded the right of access to a lawyer prior to being questioned, if the answers are to be used as evidence.

6.1.19 Stipulating that the right to be provided with access to a lawyer arises only when the suspect is in the police station, whether voluntarily or in detention, makes the law straightforward and readily understandable. It is also the only practical place at which access to legal advice can normally be arranged. This aim has already been achieved by the 2010 Act. Such a scheme does not prevent a suspect who is not at a police station from making his/her own arrangements to access a lawyer.

6.1.20 It is now appropriate, however, if the risk of article 6 unfairness is to be reduced so far as practicable, that the standard caution prior to the questioning of a suspect outwith a police station include that the suspect has a right of access to a lawyer, if he/she wishes. In the event that he/she elects to access a lawyer, but fails to do so within a reasonable time, he/she will require to accompany the police to the police station on a voluntary basis or be arrested and taken to a police station so that such legal advice can be made available prior to interview. That may be unfortunate in some cases, but it may be an inevitable result of *Cadder* and *Ambrose*.

6.1.21 The Review is conscious of the fact that, although at present the recording of questioning outwith a police station is rare, advances in audio and video technology are such that this may be possible in many cases in the near future. It may be, therefore, that interviews at a suspect's home or elsewhere become more practicable and could occur with, or without, the presence of a solicitor. It is likely to become much more feasible to have remarks made at a locus recorded by police officers at the scene, but the admissibility of those will no

doubt remain dependent upon the status of the person interviewed as witness or suspect, the giving of an appropriate caution to any suspect, the degree of curtailment of the suspect's liberty at the time and the validity of any waiver by the constrained suspect of his/her right of access to a lawyer.

Communication of Rights

6.1.22 Following the 2010 Act, a suspect, who is in a police station voluntarily or otherwise, must be informed of the right to have intimation of his/her arrest or detention sent to a solicitor and of the right to a private consultation with the solicitor²⁴ prior to any interview. There is no statutory provision on how this should be done. The ACPOS Manual of Guidance on Solicitor Access specifies standard wording, which it recommends should be used to ensure that any decision by the suspect to waive his/her rights is properly informed and recorded.

6.1.23 The proposed EU Directive on the Right of Access to a Lawyer²⁵ says very little on this topic. However, the EU Commission is developing a Directive on the Rights to Information in criminal proceedings²⁶. The current draft includes a requirement to provide information in the form of a "letter of rights". This was inspired by the letter of rights currently available to suspects who have been arrested in England and Wales²⁷.

²⁴ s 15A (6) of the 1995 Act, as inserted by Criminal Procedure (Legal Assistance, Detention and Appeals) (Scotland) Act 2010

²⁵ *supra*

²⁶ *supra*

²⁷ http://www.homeoffice.gov.uk/publications/police/815449/notice-of-rights/NOTICES_OF_RIGHTS_ENTITLEMEN.pdf?view=Binary

6.1.24 Notwithstanding that EU legislation may in time require the provision of a letter of rights, there is no reason why this should not be done now. Every suspect, who is in a police station, should be entitled to a paper copy of that letter unless there are special reasons why he/she should not be given such a copy. The letter should include information about the right of access to a lawyer. Provision of this letter will assist in demonstrating that the suspect has indeed been informed of his/her right to legal advice. Obviously, the letter should be available in different languages and in different forms²⁸ to take account of any linguistic difficulties or physical and other disabilities.

How the Right is provided

6.1.25 Access to a lawyer should mean just that. The advice should be provided by an enrolled solicitor. For a right of access to a lawyer to be “practical and effective”, the advice needs to be provided by a person who is a lawyer and thus suitably qualified to give such advice. As a generality, there appears to be no shortage of enrolled solicitors who are willing to advise suspects, provided that the financial arrangements are satisfactory.

6.1.26 The Review notes that, when PACE was first introduced in England and Wales, the opposite was the case. There was considerable delegation to non-qualified staff or to agencies, especially for calls from police stations outwith normal working hours²⁹. There was a variety of reasons for this, partly, but not exclusively, related to the legal aid rates for police station work. The use

²⁸ e.g. audible and braille

²⁹ see Royal Commission on Criminal Justice Study: Custodial Advice and the Right to Silence (1993) and McConville et al: Standing Accused : The Organisation and Practices of Criminal Defence Lawyers in Britain (1994)

of non-qualified persons posed a problem in relation to the quality of advice being tendered, which of itself in turn discouraged suspects from seeking advice. Even in relation to qualified persons, research indicated that, to be effective, the regime required the solicitor to be able to establish and maintain a relationship of trust with the client. This necessitated a willingness on the solicitor's part to take an active interest in the client's predicament, including his/her welfare, to spend sufficient time to understand the nature and extent of that predicament and to provide reasonably comprehensive advice where appropriate.

Intimation

6.1.27 The first step in securing the suspect's right of access to a lawyer is the contact with a solicitor made by the police at the police station. Section 15A (7) of the 1995 Act states that intimation to a solicitor must be sent by a police constable. This has been interpreted by some as meaning that the intimation has to be done personally by a police officer, as distinct from, for example, a civilian police employee. It has also been said that it means that a solicitor, and not someone from his/her office or call centre, must be spoken to. It would seem sufficient if the intimation is caused to be sent, rather than that it be done personally, by a police officer. Again, there is no need for the intimation to be given to the solicitor personally. It should be sufficient if intimation is made to the solicitor's usual place of business or contact number. There is no reason why the form of intimation should be restricted to telephone contact. What is important is that a system is developed that allows for the most effective and efficient means of contacting solicitors promptly. This should include e-mail

and text contact or other forms of electronic communication. Legislation in this area should not preclude or restrict intimation to forms of communication that may become outdated.

Solicitor of Choice

6.1.28 In looking at the practicalities, the Review recognises that there are at least three different categories of suspect, so far as solicitor of choice is concerned. There is, first, the suspect who has no preferred solicitor or firm of solicitors and who may be content with one provided under the duty scheme. There will, secondly, be a suspect who knows the name of a solicitor, but who has had no contact with him/her in the past. Thirdly, there will be the suspect who has a preferred solicitor, who has represented him/her on some, perhaps several, occasions and who might be expected to do so in the future. The right of access to a lawyer does not extend to the provision of assistance from a solicitor of the suspect's choice³⁰. But it is normally undoubtedly preferable to allow the suspect to consult that solicitor, if he/she can accommodate the request within a reasonable time, given that he/she will have some background knowledge of the suspect. The importance to the criminal justice system of the client having confidence in the solicitor should not be underestimated. This is why there should be an initial effort to contact the nominated solicitor.

Delay

6.1.29 Delay in contacting and obtaining advice from the suspect's nominated solicitor may harm an investigation. The suspect should not be able to avoid

³⁰ Criminal Legal Assistance (Duty Solicitors) (Scotland) Regulations 2011 reg 3, see generally *Croissant v Germany* (1993) 16 EHRR 135, at para 29

being interviewed, or otherwise hinder an investigation, by deliberately asking for a solicitor whom he/she knows will not be available within a reasonable time. However, since it is a matter for the suspect to decide whether to answer questions, he/she is quite entitled to refuse to do so if his/her solicitor of choice is not available. Equally, although the suspect may be keen to have the services of a particular solicitor, and may even be prepared to wait several hours, if not days, for him/her to appear, the Review does not consider that it would be in accordance with the effective protection of a suspect's Article 5 rights to entertain a lengthy period of detention, even although that might suit both suspect and solicitor in Article 6 terms.

6.1.30 It is estimated that over two thirds of suspects requesting legal advice name a preferred solicitor, although that does not mean that he/she will have had previous dealings with that solicitor. As already observed, it may not be possible to make contact with the nominated solicitor. That solicitor may not be willing or available to provide advice within a reasonable time. The Review understands that, where the police seek to contact a named solicitor through the Scottish Legal Aid Board's Contact Line Centre, there are limits applied to how long the Centre will continue to attempt to contact that solicitor. At present, the vast majority of nominated solicitors have been able to put in place business systems which enable them to respond to calls from the Centre within an acceptable time. The system is that, if the nominated solicitor does not answer the call immediately, he/she will have 25 minutes, with a reminder call after the first 15 minutes, to respond and advise that he/she will contact the police station and provide advice within a reasonable time. Again, the vast

majority of suspects seeking advice will obtain that advice, initially by telephone, within half an hour. If the suspect requests the solicitor's personal attendance at the police station, a period of one hour is generally deemed reasonable in an urban area and two hours is acceptable in rural areas, although this will depend on exactly where the suspect is being held. There must be a substantial degree of flexibility. Account will have to be taken of many factors including, for example, the distance which the solicitor has to travel, the availability of transport and the prevailing weather conditions.

6.1.31 Where no contact is made with a nominated solicitor within the specified time, or if the named solicitor cannot, or is not willing to, provide advice within a reasonable time, the Centre will call the police back to inform them of this and to offer immediate telephone advice if the suspect requests their advice as an alternative to that of his/her solicitor of choice. A similar procedure will then follow if the suspect requests personal attendance. The Centre will organise an attendance by one of the solicitors on the duty scheme or, if necessary, by one of its own solicitors. From what it has seen at first hand, the Review considers that this is a sensible and practical approach, in which appropriate efforts are made to contact the solicitor requested by the suspect, but this request is not allowed to obstruct the investigation indefinitely or to prolong unnecessarily the suspect's time in police custody.

6.1.32 It has to be recognised that there may, in certain situations, be a conflict between the business interests of the solicitor and the Article 5 requirement that a suspect should not be detained for more time than is necessary and

proportionate. If a conflict does occur, the matter must be resolved in accordance with the Article 5 right by providing access to a lawyer within what the criminal justice system must determine is a reasonable time. As this Review is proposing a maximum of twelve hours detention before charge/report, with a review after six hours, the effect is that, at least in the normal case in the Central Belt and other urban areas, what is a reasonable time must be calculated in terms of a few hours, and certainly normally a period well short of the Review maximum. So far as has been observed with the practical operation of the Call Centre system, this is achievable in almost all cases. However, the effort required to secure effective protection of Article 5 and 6 rights in this context should not be overlooked. Even at present, under the existing arrangements, the Centre often has to deal with over 60 calls per day and this may well increase over time.

Withholding the Right

6.1.33 In exceptional circumstances, the police must be able to delay all, or any part of, a suspect's right of access to a lawyer or to withhold all, or any part of, that right. The Review does not consider that there is any need for a statutory definition of what is meant by "exceptional circumstances". *Cadder* has made it tolerably clear that "exceptional" effectively means "very rare". The Review would understand that a rare situation would be, for example, where the immediate interview of a suspect is required in order to protect persons³¹ or property from serious harm.

³¹ e.g. the situation in *Gafgen* (*supra*)

6.1.34 There may be exceptional circumstances when it is not appropriate for the solicitor of choice to advise, or to continue to advise, a suspect. The solicitor may, for example, be suspected of involvement in the crime under investigation or thought capable of passing on inappropriate messages from the suspect to others, including those also involved. The Review accepts that this would be an extremely rare event, but it is not one which should be discounted altogether. In such circumstances, the police will be entitled to refuse a request to contact a solicitor of choice. The ACPOS Manual of Guidance on Solicitor Access deals with this situation adequately albeit in general terms³². Were its application to be perceived as unfair in a particular case, the court would exclude any answers made to questioning accordingly. Of course, the police response to such circumstances ought to be proportionate. Thus they should not withhold the entire right to legal advice, if withholding of part of the right would be sufficient. For example, if it were not thought appropriate for a suspect to speak to his/her solicitor “in private” then this should not result in the suspect not having any access to his/her solicitor at all.

Role of the solicitor

6.1.35 The role of the solicitor in providing advice does not require to be set out in legislation. However, for the system to be effective, solicitors advising clients must have adequate training. The Review has no reason to suppose that solicitors working in criminal defence work will not be so trained, but there will remain a need to guard against complacency in this area, especially given the experience in England and Wales.

³² e.g. para 11.1 of version 1.0 January 2011

6.1.36 In England and Wales, research findings prompted the creation of the Criminal Litigation Accreditation Scheme for duty solicitors and associated Law Society competency standards³³. A number of problems were identified. It was ascertained that, contrary to popular belief, solicitors did not advise silence in almost every case. In nearly half of the cases examined, the suspect was advised to speak; this being prevalent especially where: the suspect admitted the offence to the solicitor, although he/she may have had an explanation to proffer; where he/she vehemently denied the offence and had a positive defence to advance; and where the client maintained his/her innocence, but the evidence against him/her was nevertheless overwhelming. In only about a quarter of cases was silence advised; that being regarded as appropriate where insufficient information on the charges or the evidence had been provided or where the solicitor feared that the client would indeed self incriminate. In the remaining cases, there was no real guidance given. But even when silence was advised, few clients were able to maintain total silence, as distinct from stating “no comment”, in the face of determined interrogation. It was also found that some solicitors took a very passive role in the interview itself, even in the face of such interrogation³⁴.

6.1.37 What advice is given will depend on many circumstances, not least the experience of the suspect with the police custody regime. Of course, prior to the interview, the solicitor may be advising the client primarily on the advantages and disadvantages of responding at all to police enquiries. There is some material on this and the whole police station process, at least from the

³³ <http://www.lawsociety.org.uk/productsandservices/accreditation/accreditationcriminallitigation.page>; and Hodgson: Improving custodial legal advice 1995 Crim LR 101

³⁴ see *Paris* (1993) 97 Crim App Rep 99

experience in England and Wales³⁵. During the interview, matters may be somewhat more complex, but, subject to the caveat on complacency, experience of situations where the solicitor has been present dictates that problems do not often arise at that stage. If the solicitor considers that the interview is being conducted unfairly, he/she can intervene and state his/her objection. Such an action will no doubt be taken seriously by any court ruling on subsequent admissibility. During an interview the solicitor can also ask for a private consultation where that is desirable. There must be some scope for the solicitor to ask questions, at least where an answer is ambiguous or further clarity is desired. But the solicitor is not entitled to disrupt the questioning process in any major way or otherwise to obstruct the ongoing investigation.

6.1.38 In this whole area, care will have to be taken by the appropriate academic³⁶ and professional institutions, especially the Law Society, to see that there is appropriate training and guidance available for solicitors in relation to police station interviews. There is little formal guidance as yet available, specifically tailored to Scottish needs. No doubt the nature and extent of that guidance will depend upon what regime is ultimately implemented. It will be important for the profession to consider when, as a generality, it is advisable for the suspect to remain silent and when he/she would benefit from providing an account of his/her movements and/or actions. The nature of that advice may bear some similarities to that given to an accused person, at or prior to the conclusion of the crown case, on whether to give evidence. But, in this

³⁵ see e.g. JUSTICE: Giving Legal Advice at Police Stations: Practical Pointers (November 2010); see also University of Warwick (Professor Hodgson): Police Station Advice: Promoting Best Practice; Research based findings from England and France

³⁶ i.e. the Law Schools at least by or at the diploma stage

context and returning to the general theme of when and where the trial takes place, the Convention jurisprudence dictates that the trial no longer starts at the door of the court but at least by the time the suspect is in some form of custody. It is that, perhaps relatively new, feature of the criminal justice system that augments the role of the solicitor at this early stage of the proceedings. Understanding the part which this new role has to play must be a key element in the training of the solicitor and both police and prosecutors.

Legal Aid

6.1.39 The detail of the nature and extent of the provision of legal aid is broadly outside the scope of this Review. This is something for the Scottish Government and the Scottish Legal Aid Board to consider. But the manner in which the right of access to a lawyer is made “practical and effective” will depend very much on that provision. Many, indeed most, suspects will not have the means to pay for a solicitor. Nevertheless, the right of access to a lawyer is not a right to be provided with all forms of legal assistance, free of charge, in all circumstances. It is, of course, for the state to ensure effective protection of a suspect’s Article 6 rights. Unless the state were to engage solicitors directly by employment or contract, this must be done in conjunction with, and with the necessary consent of, the legal profession. The Legal Aid Board established a Police Station Duty Scheme, connected to its Call Centre, in July 2011. Payment from the legal aid advice and assistance scheme³⁷ is only available to those solicitors who are on the duty list³⁸.

³⁷ Legal Aid (Scotland) Act 1986 s 6

³⁸ Criminal Legal Assistance (Duty Solicitors) Regulations 2011 (SSI No 163)

Types of advice

6.1.40 Subject to what can reasonably be funded by the Legal Aid Board or the suspect himself/herself, it is ultimately for the suspect to decide whether the advice from the solicitor should be provided by telephone or in person. Initially, he/she will be expected to speak to a solicitor in private on the telephone. No doubt, in time, this may be over an internet (e.g. Skype) video link. This will enable the solicitor to give immediate initial advice and to discuss whether the solicitor's attendance at the police station is necessary or desirable. Solicitors are best placed to advise a suspect on whether telephone advice is sufficient, taking into account all the circumstances, including the seriousness and complexity of the crime, the possible impact on the suspect and his/her vulnerabilities, if any. However, the decision on the manner in which the advice should be given remains that of the suspect and not the solicitor even if, equally, it is for the solicitor to decide how to act in the light of a request in that connection and the applicable legal aid provision. In many cases, especially where the suspect is familiar with detention procedures, there is little reason to suppose that personal attendance would result in better or more effective advice than that which could be given, much quicker, by telephone call or over an internet video link. Clearly, however, there will be situations where personal attendance is required. The Review would expect such attendance, and appropriate legal aid funding to be available, at least where the crime involves a homicide or other offence likely to be tried in the High Court or where the suspect is a child or vulnerable person.

Waiver

6.1.41 The European Court has stated clearly that Article 6 rights can be waived. It has said that³⁹:

“Neither the letter nor the spirit of Article 6 prevents a person from waiving them [Convention rights] of his own free will, either expressly or tacitly”.

6.1.42 But for a person to do so: (1) the waiver must be unequivocal; (2) there must be minimum safeguards commensurate with the importance of the right being waived; and (3) the waiver must not go against any important public interest⁴⁰. The person waiving an Article 6 right must understand that right and appreciate that he/she is waiving it⁴¹. For such a right to be waived by a person’s course of conduct, it must be shown that the person could reasonably have foreseen the consequences of that conduct⁴². Accordingly, if a person has requested access to a lawyer, the fact that he/she then answers police questions in advance of the solicitor’s attendance or call does not necessarily constitute waiver of the right to legal advice. The Court has applied a subjective test which looks at whether the particular suspect can be seen, in the particular circumstances, to have waived his/her rights. Some suspects will not have the capacity to understand the right of access to a lawyer and will thereby be unable to waive that right. This can apply particularly to child and vulnerable adult suspects. But otherwise there must be a limit to what the

³⁹ *Scoppola v Italy* (No.2) (2010) 51 EHRR 12 at para 135

⁴⁰ *ibid* see also *Pishchalnikov v Russia* 24 September 2009 (no 7025/04) at para 77

⁴¹ *Jude v HM Advocate* 2011 SCCR 300, currently awaiting judgment on appeal by the Lord Advocate to the United Kingdom Supreme Court

⁴² *Talat Tunk v Turkey* (no 2343/96), 27 March 2007; *Jones v United Kingdom* (2003) 37 EHRR (CD) 269

Convention jurisprudence requires by means of an effective expression of waiver.

6.1.43 The 1995 Act, as amended by the 2010 Act, makes no express provision for waiver of the right of access to a lawyer. But, as is clear from the above analysis of the Convention jurisprudence, there is nothing to prevent a person waiving his/her right and this is frequently done⁴³. The procedure in relation to waiver used by the police in practice is set out in the ACPOS Manual Guidance on Solicitor Access. It provides⁴⁴:

“Waiver of rights

Where a suspect chooses to waive their (*sic*) rights to solicitor access and/or their right to a private consultation with a solicitor, this must be recorded on the Solicitor Access Recording Form (SARF), and should be referred to at the start of any interview and also recorded in the Standard Prosecution Report. The suspect will be required to sign a waiver of their rights on SARF A (attached at Appendix B)...

Suspect’s change of decision or change of status

Police officers and staff are reminded that individuals have the right to access advice from a solicitor at any time during which they remain suspects. This means they may ask at any time for advice from a solicitor, even if they have previously indicated they did not wish the advice of a solicitor. Where suspects change their mind about the exercising of rights this must be accurately recorded on the SARF A and SARF B (attached at Appendix C) and reference made in the Standard Prosecution Report.”

6.1.44 ACPOS statistics reveal that approximately 75%⁴⁵ of suspects waive their right of access to a lawyer. The precise reasons for this are not known, but the circumstances will include situations where the suspect is familiar with the procedures and may not require, or may not think he/she requires, legal advice

⁴³ see ACPOS Solicitor Access Data Report, 23 June 2011, at p 8

⁴⁴ at paras 3.4.1 and 3.5.1

⁴⁵ see ACPOS Solicitor Access Data Report (*supra*) at p 7. The figure is higher in rural than urban areas and is lowest in the Strathclyde police area (approx 73-74%)

until shortly before his/her attendance at court. It may also be that some suspects will consider that requesting legal advice is likely to prolong their period in custody.

6.1.45 In recent studies carried out in England and Wales, a variety of factors influencing a suspect's decision to waive advice was identified. These included⁴⁶:

“factors connected to suspects (including ethnicity, haste, offence seriousness, self-defined guilt/innocence, prior experience of custody and of legal advisers); the police (including ploys and informal conversations); and legal advisers (including their availability, experience and competence)”.

The decisions made by suspects were complex, highly subjective and contingent on the custody environment and what suspects were told by solicitors.

6.1.46 It is predicted, following the experience in England and Wales, that, over time, waiver rates will fall. Within a short number of years, waiver will cease to be the norm⁴⁷.

6.1.47 It is important that the circumstances under which waiver is exercised are carefully regulated for the protection of suspects against the inadvertent or unwitting surrender of their human rights. This is in the interests of the criminal justice system as a whole, particularly given that the admissibility of

⁴⁶ Skinns (*supra*) at 34; see also Pleasance et al : The Justice Lottery Police station advice 25 years on from PACE [2011] Crim LR 3

⁴⁷ Skinns (*supra*) at 22

statements made during questioning now depends in part on how the right of access to a lawyer is delivered. It would, therefore, be helpful if legislation expressly provided that adults who are not vulnerable may waive the right of access to a lawyer but that the waiver must be express and recorded. As noted above, the right cannot be waived unless and until the person had been fully informed of the right⁴⁸.

Recommendations

I therefore recommend that:

- **there is no need to require the police to secure access by a suspect to a lawyer outwith a police station and no legislation is required in that regard;**
- **part of the standard caution prior to the interviewing of suspects outwith a police station should include the information that he/she has a right of access to a solicitor if he/she wishes;**
- **the provisions of the 1995 Act (s 15A(3)) introduced by the 2010 Act, which entitle a suspect to have access to a solicitor (a) before any questioning at a police station and (b) during questioning, require to be amended to provide that such access is available, regardless of questioning, as soon as practicable after (under the recommended regime) the detention of the arrested suspect at the police station;**
- **a “letter of rights” should be drafted without delay. Every arrested and detained suspect should be provided with a copy of that letter unless there are particular reasons not to do so;**
- **it should continue to be the case that access to a lawyer means only to an enrolled solicitor;**
- **the legislation should be amended to make it clear that, although it is the police officer’s obligation to ensure that “intimation” of arrest, detention and request for assistance is made, it need not be made specifically by a police officer or to a solicitor in person. It should allow for forms of contact other than by telephone;**

⁴⁸ *Jude v HM Advocate (supra)*

- the right of access to a lawyer does not extend to the provision of assistance from a solicitor of the suspect's choice and no alteration to the legislation is required in this regard. Where the suspect requests access to a named solicitor, however, in accordance with current practice, efforts should be made to secure the attendance of that lawyer within a reasonable time. No legislation is required in this area;
- in exceptional circumstances, the police must be able to delay all, or any part of, the person's right of access to a lawyer or to withhold all, or any part of, that right. But there should not be any statutory definition of what is meant by "exceptional circumstances";
- there is no need to set out in legislation what the role of the solicitor may be. The University Law Schools and the Law Society should be encouraged to formulate guidance for solicitors in advising clients in a police station. Understanding the role of the solicitor in that regard should be part of COPFS and police training;
- subject to what is determined to be reasonable remuneration in legal aid cases, it is for the suspect to decide whether the advice from a lawyer should be provided in person, or by other means such as by telephone or internet video link and whether he/she requires a solicitor to be present during any interview; and
- legislation should expressly provide that adults who are not vulnerable may waive the right of access to a lawyer. It should state that waiver must be express and recorded. The right cannot be waived unless and until the person has been fully informed of the right.

6.2 QUESTIONING

Introduction

6.2.1 The decision of the European Court in *Salduz* was that the right of access to a lawyer arose “as from the first interrogation of a suspect by the police”. In *Dayanan*, the Court broadened the ambit of the right of access to a lawyer beyond pre-interrogation advice by stating that it applied to all persons who were detained in custody and not just to those who were to be interviewed. In *Ambrose*, the United Kingdom Supreme Court provided some clarification on the meaning of *Salduz* by confining the right of access to a lawyer to those suspects who have been put in a “sufficiently coercive” position or “deprived of [their] liberty of movement”. A principal focus of this Review has been the extent to which the conduct of police questioning of a suspect can be consistent with his/her right to a fair trial. This Chapter therefore explores the purpose of, and limitations on, police questioning in general and looks specifically at the issue in *Cadder*, which addressed the circumstances in which statements by suspects, obtained in response to questioning, are admissible as evidence at trial.

Current Law

6.2.2 Police questioning may serve a number of purposes. It allows the police to seek to establish: whether a crime has been committed at all, whether a suspect can be identified, whether that suspect is indeed the perpetrator of the crime

and whether there is sufficient evidence to charge him/her with the crime. This means that the police may question at least three broad categories of person: the witness, the suspect and the accused. Police powers, as this field of the law has been traditionally called, have been defined accordingly.

The witness

6.2.3 Where a person is not under suspicion, but is regarded only as a witness, the police can question that person, if they wish. They have no power to compel him/her to submit to questioning¹, far less to answer any questions or to do so truthfully. They have no power to detain a witness because he/she will not respond to questioning. The only requirement on a person who is a potential witness is to provide personal details (name, date of birth and address etc). He/she may be required to “remain with” the police officer for that purpose². Failure to provide personal details is a criminal offence, punishable by way of a fine. The police officer can arrest without warrant a person who fails to comply with his/her request for those details. Otherwise, there is no sanction in respect of a witness who refuses to co-operate with the police by not answering questions or by doing so in a manifestly untruthful or unreliable manner.

6.2.4 If the police do ask questions of a witness, there is no obligation to advise the witness of any rights. In particular, there is no requirement to tell the witness about the general right of silence or that he/she need not answer any questions which might incriminate him/her or indeed at all. There is no obligation to

¹ the procurator fiscal can, however, compel a witness to attend for precognition; 1995 Act s 267A

² 1995 Act s 13

explain to the witness that he/she might want to seek legal advice. There is no requirement to facilitate access to a lawyer. Of course, if a witness wishes to consult a lawyer before answering any questions, other than those relating to his/her personal details, he/she is at liberty to do so.

6.2.5 The line between who is a witness and who is a suspect is not always a clear one. In many situations, when the police question persons to elicit information about a crime, these are persons whom the police do not suspect of any involvement in the crime. The risk of such a witness incriminating himself/herself would not normally be anticipated and any unexpected incriminating statement made by him/her in response to questioning is likely to be regarded as having been fairly obtained and thus admissible against that person at any subsequent trial. However, once some form of incriminating response is made, the witness immediately becomes a suspect who must be cautioned before being questioned further.

6.2.6 There are witnesses of whom the police are vaguely suspicious, but where there are no reasonable grounds for suspicion or upon whom suspicion has not crystallised. Thus, the police may know that at least one person out of hundreds on the Orient Express may be the murderer, but have no indication as to which one. Any person on the train whom the police choose to question, although potentially the murderer, is not a suspect in the legal sense. The police have no power to detain him/her for questioning, but conversely they are not obliged to caution him/her before they do question him/her. In practice, the police may elect to caution a witness in such circumstances, depending on

the degree of suspicion, and to advise him/her of his/her general right to seek legal advice. This is likely to be the case where the range of suspects narrows to those occupying a carriage on the train and certainly if it were confined to a single old style compartment.

The suspect

6.2.7 Where there are reasonable grounds for suspicion, the police have the power to detain a suspect and to question him/her in custody³. Even for the detained suspect, however, the purpose of police questioning is not expressed in statute, at common law or in the European Convention. It is defined indirectly by the terms of section 14 of the 1995 Act, which states that detention is:

“to facilitate investigations into the offence and whether criminal proceedings should be instigated against the detainee”.

6.2.8 The European Court has held that⁴:

“The object of questioning during detention under sub-paragraph (c) of Article 5 para. 1 (art. 5-1-c) is to further the criminal investigation by way of confirming or dispelling the concrete suspicion grounding the arrest. Thus, facts which raise a suspicion need not be of the same level as those necessary to justify a conviction or even the bringing of a charge, which comes at the next stage of the process of criminal investigation”.

It is thus legitimate for the police to question a detained suspect, against whom they have a reasonable suspicion, for the purpose of obtaining evidence which

³ 1995 Act s 14 detention

⁴ *Murray v United Kingdom* (1994) 19 EHRR 193, see Chapter 5.1 – Arrest and Detention

will provide a sufficient basis on which to charge him/her or which will remove the original suspicion on which he/she has been arrested.

6.2.9 Section 14 detention provides a police officer with the power to ask questions which he/she considers to be relevant to the investigation of the crime of which the detainee is suspected. The detainee has an absolute right not to answer any or all of the questions other than to provide his/her name, address, place and date of birth and nationality⁵. The detainee does not, however, have a right not to be asked questions. Within the maximum detention period allowed, the interviewing officer is entitled to put each and every question he/she chooses to the suspect⁶. Especially where there has been inadequate time for police preparation, this can result in lengthy and repetitive interrogation, sometimes to little effect.

6.2.10 The police may decide that, although they wish to question a suspect, there is no need to detain him/her for that purpose. That will be possible where the suspect simply agrees to be interviewed. Such an interview could occur, for example, at the locus of an offence, at the suspect's home or in a police station if the suspect is content to attend voluntarily. Unless and until he/she is formally detained, the suspect remains at liberty and can terminate the questioning whenever he/she chooses.

6.2.11 When an interview occurs with the suspect voluntarily attending the police station, the procedure adopted is almost identical to that used when a suspect

⁵ 1995 Act s 14(9) and (10)

⁶ 1995 Act s 14(7)

is detained⁷. Regardless of whether a suspect is detained or attends a police station voluntarily, he/she must be cautioned at common law, told of his/her right of access to a lawyer and, where requested, provided with such access. In the latter respect, the existing law goes beyond that considered Convention compliant in *Ambrose*. Where an interview takes place outwith the police station, however, the problem is that it is not, at present, likely to be recorded electronically and the safeguards which such recording provides for both suspect and police are not present. As already noted, this may well change in the not too distant future.

6.2.12 When questioning a suspect for the purpose of furthering the investigation, the police may seek to ascertain whether the suspect is the perpetrator of the crime being investigated. But it should not be a specific function of the police to extract confessions from persons upon whom suspicion has already crystallised. Although it is sometimes alleged that detention and questioning is conducted with a view to obtaining incriminating evidence against the suspect, that should not be its primary purpose. It must be to provide the suspect with an opportunity to give any account which he/she wishes to provide or to advance any defence which he/she may have. This may be important. About a third of detainees are released without charge at the end of the detention, although it is recognized that some may be charged later.

6.2.13 That having been said, the Review recognises that one purpose of interviewing a suspect will be to see whether he/she admits committing the crime, or at

⁷ 1995 Act s 15A

least to see if he/she was involved in some way, and, if so, to what extent. When engaging in this process, the police will, or at least ought to, have had some form of training⁸. However, the suspects interviewed are often persons of low IQ. They may be anxious and feel isolated in police custody. Suspects very often confess during interview. That is almost always because they have committed the crime and wish, for a variety of reasons, to admit their involvement. The introduction of recording in 1980, as a result of the Thomson Committee recommendations, demonstrated just how often suspects do make true confessions in situations regarded, at least in the years that followed, as fair but which might, without the recording, have previously been challenged as coercive.

6.2.14 Following the quashing of the convictions in the “Guildford Four” and “Birmingham Six” cases in England and Wales in 1989 and 1991, and prior to the conclusion of the Royal Commission’s deliberations on the subject in 1993, there were a large number of research studies carried out in England and Wales concerning police interviews and confessions. The results of these⁹ are not repeated here, but it must be acknowledged that, occasionally, suspects do confess to crimes which they have not committed. The risk of that occurring must be guarded against. Access to a lawyer is likely to assist in this regard¹⁰, but it is only one part of the protections which a modern criminal justice system should have in place. In an adversarial system which permits police questioning, the main protection is the ability of the accused to ask the judge

⁸ see generally Gudjonsson: *The Psychology of Interrogations and Confessions: A Handbook* (2003)

⁹ *ibid*

¹⁰ although the research in Gudjonsson suggests that confession rates did not decrease significantly post *Miranda* in the US or PACE in England and Wales

at the diet of trial to exclude his/her interview on the grounds of general Article 6 unfairness, including the infringement of some particular exclusionary rule, such as the failure to afford him/her access to a lawyer.

6.2.15 There is no requirement on the police to question a suspect at any stage. There are many cases, such as minor public disorder offences, in which the criminal behaviour has been observed by the police, or others, and questioning would serve little, if any, useful purpose. It may be seen as involving unnecessary and pointless expenditure of time and resources. In these cases, the suspects are not normally interviewed. They are not detained under section 14. They are simply arrested and charged. There have been comments that the police should not be able to circumvent the right of a person in custody to have access to a lawyer by the expedient of not interviewing him/her. The Review does not consider that this happens in practice; that is to say that the police make such a conscious choice and, in any event, as is dealt with elsewhere, the right of access to a lawyer must now be taken to arise when a suspect is detained, irrespective of whether there is an intention to interview¹¹.

The accused – cessation of questioning

6.2.16 If police questioning has a clear purpose, such as to confirm or dispel any suspicion, then, at least in theory, it ought to cease when that purpose is achieved or when it becomes clear that the purpose cannot be achieved by further questioning. Most notably, when suspicion is confirmed, a suspect is entitled at common law to be protected from further questioning. At the risk

¹¹ see Chapter 6.1 – Legal Advice, para 6.1.11 under reference to *Dayanan*

of unnecessary repetition of quotations, as was observed by the Lord Justice-Clerk (Thomson) in *Chalmers*¹²:

“There does come a time, however, when a police officer, carrying out his duty honestly and conscientiously, ought to be in a position to appreciate that the man whom he is in process of questioning is under serious consideration as the perpetrator of the crime. Once that stage of suspicion is reached, the suspect is in the position that thereafter the only evidence admissible against him/her is his own voluntary statement”.

This protection is most clearly provided when the suspect is charged with the crime. If charged, questioning must, under the present law¹³, cease, although a charged suspect may elect thereafter to provide a voluntary statement, customarily taken by senior officers unconnected with the enquiry.

6.2.17 The prohibition against questioning is therefore bound up with the point of police charge. Under the common law, it was thought that a suspect should be charged at the point at which there becomes sufficient evidence to do so. Partly prompted by the section 14 detention system, which pre-supposes an interview, this is frequently not done. However, under the current system of detention, as distinct from arrest, there is a maximum statutory period on the expiry of which the suspect must be charged or released.

6.2.18 The Lord Justice-Clerk’s *dictum* in *Chalmers* remains an accurate, if incomplete, summary of the law. It is intended to protect suspects against whom there is already evidence, which is sufficient for a charge, but where the

¹² *Chalmers*, at 82

¹³ *Aiton v HM Advocate* 1987 JC 41 LJ-C (Ross) at 43; *HM Advocate v Penders* 1996 JC 107; *Stark and Smith v HM Advocate* 1938 JC 43; *Morrison v Burrell* 1947 JC 43

police elect, for whatever reason, not to arrest and charge. It has often been argued that it should not matter, if the spirit of the *dictum* were to be applied, whether the suspect has actually been charged, if such a charge will inevitably follow. But that is not the law¹⁴. The reasoning behind the argument is that no questions should be asked after the point at which the police are in a position to charge the suspect, whether or not they actually do charge him/her. If this were correct, questioning in Scotland could be, and has been, said¹⁵ to be solely for the purpose of establishing whether a case exists against the suspect, but not for the purpose of bolstering, through his/her own statements, a case of sufficient strength already established against him/her. However, this has not been the reality for many years. In modern practice, police questioning undoubtedly occurs after this stage.

6.2.19 There can be considerable difficulty in determining when the point for questioning to cease, according to the Lord Justice-Clerk's *dictum*, has arrived. It may be said to be all a matter of fairness, but the judge's decision on admissibility is a legal one, taking into account many circumstances, including the sufficiency of the evidence at the material time, the motive of the interviewing officer and the nature of the questions themselves. Objections to the admissibility of interviews, conducted under tape recorded conditions, have not been particularly common in recent years for a variety of practical reasons. But they do still occur when questioning is manifestly unfair by

¹⁴ *Johnstone v HM Advocate* 1993 SCCR 693 and *Murphy v HM Advocate* 1975 SLT (notes) 17

¹⁵ Thomson Committee para 7.03

reason of repetition, accusation and aggression and the answers given as a result are prejudicial to the accused's defence¹⁶.

6.2.20 In parallel with the requirement to charge or liberate at the expiry of the detention period, questioning should cease before that point, if it becomes clear from the suspect's account of events that he/she is not to be charged with the crime. As detailed in the previous section on Custody, where the reasonable suspicion is dispelled, the suspect should be released.

Admissibility

6.2.21 At common law, the test for the admissibility of answers by suspects to police questioning came to be relatively well defined under the general heading of "fairness". The history of this has already been explored in detail, but it remains important to understand where the law has reached and how, if at all, it dovetails with the more general right to a fair trial under Article 6 of the Convention.

6.2.22 The police may put a wide range of questions to the suspect. Some may be open questions seeking comment, others may be leading questions of the type asked of a hostile witness during cross-examination at trial. Police officers are entitled to adopt a robust approach to the questioning of a suspect, but, especially with relatively minor crimes or child or vulnerable suspects, an overly robust approach risks rendering any answers given inadmissible. Answers to questioning which amounts to "interrogation", in the Scottish

¹⁶ e.g. *PF (Aberdeen) v Forrester* [2011] HCJAC 71

sense, are inadmissible if objected to. It is worth repeating the *dictum* of the Lord Justice General (Emslie) in *Jones v Milne*¹⁷:

“It is not our law that a suspect's answers to police questioning will never be admissible and... in ...*Chalmers* the Lord Justice-General¹⁸ ... put the matter thus: ‘The theory of our law is that at the stage of initial investigation the police may question anyone with a view to acquiring information which may lead to the detection of the criminal; but that, when the stage has been reached at which suspicion, or more than suspicion, has in their view centred upon some person as the likely perpetrator of the crime, further interrogation of that person becomes very dangerous, and, if carried too far, e.g. to the point of extracting a confession by what amounts to cross-examination, the evidence of that confession will almost certainly be excluded.’ As the opinions in the case of *Miln* [*v. Cullen*¹⁹] show the objection is to interrogation in the proper sense of that word and to answers which can be seen to have been extracted from the suspect. In each case it is necessary to consider the whole circumstances to discover whether in these whole circumstances there has been unfairness on the part of the police. The mere fact that a suspected person is asked a question or questions by a police officer before or after being cautioned is not in itself unfairness, and if answers are to be excluded they must be seen to have been extracted by unfair means which place cross-examination, pressure, and deception in close company”.

6.2.23 The Review recognises, for reasons already given, that because of the earlier law that fairness was a question for the jury and not the judge²⁰, there came to be few objections to the admissibility of answers to questions posed under the recorded conditions of the section 14 detention procedure. The principles of *Chalmers* were not being applied by judges with much rigour. Such objections are probably still relatively uncommon but that is, at least in part, because, although there may be some point of unfairness which might be focussed on, the interview may provide a line of defence which is advantageous to the accused and which, were the interview to be excluded,

¹⁷ 1975 SLT 2

¹⁸ Cooper at 78

¹⁹ 1967 JC 121

²⁰ i.e. pre *Thompson v Crowe* 2000 JC 173

he/she might have to speak to in court and thus be exposed to potentially damaging cross-examination on the same or other matters in the witness box.

6.2.24 The pure question of whether a statement has been fairly obtained can be seen in two different ways. It can be looked upon in terms of the common law which, as the Lord Justice General (Cooper) said in *Lawrie v Milne*, regards fairness as something to be assessed, balancing²¹:

“two highly important interests... (a) the interest of the citizen to be protected from illegal or irregular invasions of his liberties by the authorities, and (b) the interest of the state to secure that evidence bearing upon the commission of crime and necessary to enable justice to be done shall not be withheld from courts of law on any merely formal or technical ground”.

6.2.25 This approach of balancing rights found favour, particularly in the Privy Council decision in *Brown v Stott*²². It may still have adherents in the United Kingdom Supreme Court²³. It can involve taking into account, for example, such factors as the seriousness of the offence in deciding whether the police have acted fairly in their dealings with the suspect, having regard to all the circumstances. It is a viewpoint which may take account of societal attitudes at a particular time and, to that extent, can be seen as a highly flexible instrument.

6.2.26 Alternatively, the test for admissibility can be whether the use of the answers infringes the accused’s Article 6 right to a fair trial. In the present context, the question is whether the methods used by the police can be seen as infringing

²¹ 1950 JC 19 at 26, see also *Miln v Cullen* (supra)

²² 2001 SC (PC) 43, especially Lord Bingham at 60-61 and Lord Steyn at 63

²³ *Ambrose*, Lord Hope at para 68, Lord Clarke at paras 119-120

the suspect's right to silence and his/her privilege not to incriminate himself/herself. This is the angle adopted by the same Lord Justice General (Cooper) in *Chalmers*²⁴ and which found favour with the High Court in *Brown v Stott*²⁵, that decision being reversed in the Privy Council. It is reflected by *dicta* of the European Court in *Saunders v United Kingdom*²⁶ and may be seen as the ultimate reasoning behind *Cadder*.

Pre-interview briefing

6.2.27 There is no requirement on the police to disclose to a suspect, or the suspect's solicitor, the nature and extent of any information upon which the suspicion is based. Only the general nature of the crime, of which the person is suspected, and the reason for any arrest or detention, need be given²⁷. This would normally include the time and place of the offence²⁸. However, there may be cases where the police choose to disclose much more information to the suspect, or his/her solicitor, either prior to, or during, the interview.

6.2.28 The police may have prepared a strategy in advance of the interview²⁹. This may be simply to seek the suspect's explanation of any evidence against him/her and to test any explanation given. As part of the strategy, the police may choose to disclose some aspects of their information, while choosing to withhold others. The intention of drip feeding the information may be with a

²⁴ at 79

²⁵ 2000 JC 328 LJG (Rodger) at 346

²⁶ (1996) 23 EHRR 313 at para 68

²⁷ 1995 Act s 14(6)

²⁸ *Mattocia v Italy* (no 23969194) 25 July 2000

²⁹ see Gudjonsson (*supra*)

view to assessing the veracity of the suspect's account. It should not, of course, be to trick the suspect into an inadvertent admission.

6.2.29 The police may alternatively decide to give a reasonably full account of the information available to them prior to the start of the interview. Such provision of information may occur where there has already been a long investigation and the police have detained the suspect at the end of that process, having ingathered and analysed the information about which they wish to seek the suspect's comment. It may also be prompted by the effects of *Cadder*, whereby it might be anticipated that more suspects will seek legal advice and may advisedly be told by their solicitors to say nothing until the nature and extent of the case against the suspect is revealed, at least in general terms.

Other jurisdictions

Cessation of Questioning

6.2.30 In England and Wales, the general rule is that questioning is not permitted after charge³⁰. Prior to that stage, however, the Code of Practice dictates that an interview should cease once³¹:

“(a) ...all questions... 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

³⁰ PACE Code C para 16.5 ; see Blackstone 2011 para D 1.63

³¹ para 11.6

and reliable, e.g. to clear up ambiguities or to clarify what the suspect said; and

...

(c) ... there is sufficient evidence to provide a realistic prospect of conviction”.

The practical effect of this is that, prior to formal charge, the police are entitled to continue questioning, even if they had all along intended to charge the suspect, because it is part of the investigative process and allows the suspect to explain his/her position. That explanation could, at least in theory, cause the police to change their minds on whether to charge.

6.2.31 A similar rule appears to apply elsewhere in common law countries on the same basis as it does in Scotland; that the charge marks a change in status from suspect to accused. But in New South Wales, such a person can be re-interviewed when that is necessary to prevent harm to a person, where new matter emerges or where it might assist to recover property³².

6.2.32 The distinction in status consequent upon police charge is less evident in other jurisdictions, notably those in continental Europe. This may flow from the notion that, even at the stage of interview, the trial has begun and the suspect is entitled to the fair trial protection of Article 6. As a generality, the Convention does not prohibit questioning after the point at which a sufficient case for prosecution has been established, after police charge, or even after a first or subsequent court appearance. The admission of statements elicited by questions asked by the police or prosecutor after those stages does not infringe

³² Police Instruction 37.14

the right to a fair trial *per se*. It is common in other European jurisdictions for police questioning to be permissible up to the formal trial diet. Although in some countries with an inquisitorial system³³ the questioning of a suspect will be by a judicial investigator rather than the police, the Review understands that in the Netherlands, for example, there is no prohibition on police questioning up to and including the trial, and in Poland a person can be interviewed by the police only once he/she has been charged.

Admissibility

6.2.33 In common law jurisdictions there tends to be a general rule about excluding evidence where it has been unfairly obtained. In England and Wales, the test for admissibility generally is relevancy rather than how the evidence was uncovered³⁴. However, PACE³⁵ provides that, in relation to confessions, the court must exclude the evidence unless it is proved beyond reasonable doubt³⁶ that the confession was not obtained:

“(a) by oppression³⁷ of the person who made it; or
(b) in consequence of anything said or done which was likely... to render [it] unreliable”.

6.2.34 There is an additional wider provision whereby the court can exclude any evidence if it³⁸:

³³ e.g. Germany; see Professor Weigend’s chapter 7 in Bradley (ed): *Criminal Procedure: A Worldwide Study* p 260

³⁴ see Blackstone 2011 para F2.8 referring to *Kuruma, Son of Kaniu v The Queen* [1955] AC 197, Lord Goddard CJ at 203

³⁵ s 76(2)

³⁶ the lower standard of proof is employed where a co-accused seeks to adduce the confession; s 76A

³⁷ defined as including Article 3 infringements and threats of violence

³⁸ s 78

“would have such an adverse effect on the fairness of the proceedings that the court ought not to admit it”.

This provides a judge with a wide discretion to exclude evidence upon this general ground rather than on the basis of some specific rule. It is this provision, rather than the earlier one specific to confessions, that would be relied upon to exclude an admission where a person had not been afforded his right of access to a lawyer³⁹.

6.2.35 In Ireland, evidence of a confession will be excluded if it is in breach of a suspect’s constitutional right⁴⁰. Such rights include prohibitions on confessions extracted by physical violence⁴¹, in the course of a “violation” of a suspect’s house⁴² or his/her privacy. But more important, they include the right to liberty and of access to a lawyer. Thus, if a person has been unlawfully detained or prevented from consulting a lawyer, any admission made whilst the detention remained illegal or in advance of the provision of legal advice may be excluded. It will also be excluded if: it is not proved to have been voluntarily made; it was obtained contrary to the nine 1922 English Judges Rules; it was in breach of certain custody and recording regulations; or its admission would be fundamentally unfair⁴³.

6.2.36 In Canada, the English common law rules still have some application to exclude admissions not proved beyond reasonable doubt to have been

³⁹ but such exclusion may not have occurred, at least pre-*Salduz*: *R v Samuel* [1988] QB 615

⁴⁰ see generally McGrath : Evidence chapter 8

⁴¹ infringement of the right to bodily integrity

⁴² e.g. in the course of an illegal search

⁴³ McGrath: Evidence at para 8-157 quoting Griffin J in *People (DPP) v Shaw* [1982] IR 1 at 61

voluntarily made⁴⁴ but this is overlain by the rights in the Canadian Charter of Rights and Freedoms. A very interesting feature of Canadian jurisprudence is that the court may admit evidence obtained in violation of a Charter right. It is worth quoting section 24(2) of the Charter in full:

“Where...a court concludes that evidence was obtained in a manner that infringed or denied any rights or freedoms guaranteed by this Charter, the evidence shall be excluded if it is established that, having regard to all the circumstances, the admission of it in the proceedings would bring the administration of justice into disrepute”.

There is no equivalent to this in Convention jurisprudence, but continental European jurisdictions do not generally have exclusionary rules of evidence of a type similar to those applied in countries operating broadly under the common law.

Pre-Interview Briefing

6.2.37 The provision of information in advance of an interview, and perhaps even of the likely questions, has been considered in other jurisdictions. In both England and Wales and Northern Ireland the courts, in considering issues relating to the provision of information to suspects, have stressed the importance of the police acting fairly and in good faith when questioning suspects. However, the courts have not considered that fairness requires the provision of any information, beyond the general nature of the suspected crime, prior to questioning.

⁴⁴ see the detailed analysis of the “Confessions Rule” in *R v Oickle* [2000] 2 SCR 3 by Iacobucci J delivering the majority Opinion

6.2.38 As noted above, section 78 of PACE gives the court a general power to refuse to admit evidence if it appears to the court that “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”. That would, no doubt, be in accordance with Scots law on the admission of confessions and probably on evidence generally. In *R v Farrell Buxton* LJ said⁴⁵:

“...First of all, it is a matter of judgment as to what should be disclosed⁴⁶ and what should not; and secondly, we are not prepared to accept that it is necessarily wrong or misleading for the police to hold back some part of their case before they interview a suspect. Taken to its logical conclusion, the suggestion ... that everything the police know has to be disclosed would, in our view, threaten seriously to handicap legitimate police enquiries. ...

Although he does not expressly say so, the [trial] judge made a distinction between active lying intending to induce a confession on the one hand, which was what happened in *Mason*⁴⁷, and omission or failure to state the whole case in advance, which is what happened in this case. Although we would not wish to lay down any binding rule, that seems to us to be a useful guide”.

6.2.39 In *Ward v Police Service of Northern Ireland* Lord Bingham said⁴⁸:

“...there is no rule of law which requires the police to reveal to a suspect the questions that they wish to put to him when he is being interviewed. Nor are they required to reveal in advance the topics that they wish to cover, even in the most general terms, in the course of an interview. In some cases providing these details in advance will not prejudice their inquiries. But in others it may well do so. This is a judgment that must be left to the police. The interview must be conducted fairly. But advance notice of the topics to be covered is not a prerequisite of fairness.”.

6.2.40 The Review understands that the position is similar in Ireland.

⁴⁵ [2004] EWCA Crim 597 at paras 22 and 24

⁴⁶ as it is known in England, Wales and Northern Ireland

⁴⁷ [1988] 1 WLR 139, where the police deliberately misled the suspect on fingerprint evidence

⁴⁸ [2007] 1 WLR 3013 at para 22

Consideration

The witness

6.2.41 There is no substantial reason for the present law on the questioning of witnesses to be changed. In particular, a provision which would entitle the police to detain a person purely for the purposes of questioning him/her would contravene Article 5. Where absolutely necessary, a witness can be compelled to answer questions by the procurator fiscal citing him/her for precognition⁴⁹ or by citing him/her to attend the trial diet and adopting the risky expedient of asking questions with no prior knowledge of the likely responses. A witness failing to answer questions in court is likely to be found in contempt of court and, because of the gravity of the crime to the justice process, is liable to be imprisoned⁵⁰.

The suspect

6.2.42 The purpose of police questioning of suspects has to be considered in the context of the societal requirement, which is also implicit in the Convention, that the police ought to take reasonable steps to investigate reported crime. It is not just to allow the suspect to give his/her account of events. That may be one reason and a satisfactory explanation at interview can, and not infrequently does, result in the evaporation of suspicion. But it is recognised that, in the modern world, the police must be allowed to question suspects, under appropriate safeguards, with a view to furthering their investigations and confirming or dispelling their suspicions. It is incumbent on the police to

⁴⁹ 1995 Act s 267A

⁵⁰ the maximum term is two years in solemn cases; see Contempt of Court Act 1981 s 15; cf *HM Advocate v Ains* 1975 JC 64

ensure that reasonable lines of enquiry are pursued. This much is relatively clear and there is no need to define the purpose of questioning in legislation.

6.2.43 In these circumstances there should be no requirement for the initial police investigation, including the questioning of a suspect, to cease once there is a bare sufficiency of evidence entitling the police to charge the suspect. It should rather be focussed on obtaining as much evidence as is reasonably possible at this preliminary stage, including any explanations which a suspect may be willing to advance.

Cessation of questioning

6.2.44 The nature of police questioning ought to be sufficiently regulated by the overall test of Article 6 fairness. The Review is conscious that there are occasions when, at the beginning of an interview, a suspect may state that he/she is not going to respond to any police questions. However, after a few questions, the suspect appears to change his/her mind and begins to talk. The Review does not regard this as automatically unfair or that there should therefore be a rule that an early indication of reluctance to answer should be acknowledged and no further questions should follow. Whether the actions taken by the police amount to an infringement of the suspect's right of silence or the privilege against self incrimination will depend upon the circumstances of each case as gauged primarily by the judge at first instance. Obviously, if the police choose to continue questioning in the face of a repeated refusal to answer, the potential for unfairness becomes more acute.

6.2.45 The proposed regime for custody is one in which the police would initially be permitted only twelve hours after the initial detention of a suspect to carry out investigations, including questioning, sufficient for them to decide whether to charge the suspect or at least to report him/her in custody to the procurator fiscal for consideration of charge. In general, and subject to the further proposals below, no further questioning would be permitted after the expiry of that period or the point at which the suspect is actually charged. The suspect, when in custody, would be brought to court on the next lawful court day after charge. This regime is primarily for the protection of Article 5, and not Article 6, rights. However, it does have an impact on Article 6 fairness. In the context of a normal police interview in an ordinary case, the Review considers that any court would view questioning which lasted, in total, for much in excess of an hour with some concern. However, there is no imperative to introduce restrictive rules in that regard.

6.2.46 The rule of the common law, that prohibited the questioning of a suspect after charge, developed as a further aspect of the court regarding the suspect as becoming an accused person, thus coming under its protection, at least from the point at which he/she was⁵¹, or ought to have been⁵², charged. However, in a human rights based system, there is no particular reason why there should be such an absolute prohibition, provided that the suspect's rights continue to be adequately and effectively protected. Furthermore, if the reasoning of *Cadder* and the Convention jurisprudence is followed, it is not the point of charge which is important, even if it may have some significance in

⁵¹ *Johnstone v HM Advocate (supra)*

⁵² *Chalmers*

determining fairness in certain cases. If, as is the case, the trial commences when suspicion crystallises and the suspect is detained and interviewed, it is from that earlier point (and not the point of charge) that the suspect (and later accused) comes under the protection of the Convention, rather than, under the common law, the court. The point of charge has much less relevance in that situation and serves essentially to emphasise to the suspect that he/she is likely to be prosecuted.

6.2.47 There are a number of situations in which, as part of the continued orderly investigation of a crime, the police ought to be able to question the suspect, or to question him/her further, after the expiry of the twelve hour period and even after charge. One is where, for medical or other good reasons, it has not been possible to question the suspect properly prior to the expiry of the twelve hour period. The influence of drink or drugs can be a factor here, as can a legitimate delay in obtaining access to a lawyer for the suspect because of the remote location of the police station or even just prevailing weather conditions. The occurrence of a psychotic episode is another not uncommon possibility. A second, quite different, situation is when, after a suspect has been charged, further or new evidence has come to light which the accused, as he/she would be by that time, might be able, and indeed wish, to comment upon. Although, as previously discussed, at the time of the Thomson Committee report, a police investigation may normally have been effectively concluded within a few hours of the incident, modern scientific, information technology and other police methods mean that the tendency is for an investigation of serious crime to be much more thorough and consequently to take much longer.

6.2.48 The fact that new evidence comes to light after a person has been charged does not, of itself, point to the investigation having been inadequate. For example, it can take some weeks to obtain a detailed technical report on the use of a suspect's, or a complainer's, mobile telephone or computer. New witnesses may come forward after a person has been charged. It does not seem reasonable that such evidence cannot be put to the accused until the trial diet. Indeed, there may be occasions, albeit no doubt few, when the new evidence, had it been put to the accused before trial, would have caused him/her to be exonerated.

6.2.49 There is, therefore, a compelling argument that it is reasonable both for the police to be able to pose further questions after charge/report to the procurator fiscal and for the accused to be able to make such comment as he/she wishes, subject to him/her being provided access to legal advice and cautioned in the normal way. This should, in theory, be able to occur at any point after charge until the accused's appearance at his/her trial diet.

6.2.50 If questioning post charge/report is to be provided for, care must be taken to ensure that an accused person is not repeatedly questioned or questioned unnecessarily. This is particularly important where the crime alleged is being prosecuted at summary level. For those reasons, this process should be regulated by the court, notably the sheriff. The Review believes that there should be a process whereby the police, if they feel there is good reason to question a suspect after he/she has been charged/reported to the procurator fiscal but before he/she has appeared in court, can apply to a sheriff for

permission to do so. The application should be in a standardised form, similar to that for a warrant, and should state the grounds for allowing questioning after charge.

6.2.51 The Review is concerned to ensure that this process can be conducted efficiently and smoothly. It is not in any person's interest for there to be a hiatus while a sheriff is located and a paper application is presented in person. In the modern age, where formal and legal communications are routinely transmitted electronically, it should be possible for the police to submit an application to the sheriff by e-mail or other remote means, and for the sheriff to respond in a similar fashion. This would be particularly important in relation to the period between charge/report and the first appearance in court when an application may well need to be made outwith normal court hours. It should be said, however, that, as seen in Chapter 5.2 – Period of Custody, the figures from ACPOS suggest that the number of cases where questioning is still required more than twelve hours after initial detention will be few. Times, however, may change.

6.2.52 As any such application would be to allow further questioning during the accused's time spent in police custody, rather than to extend that period of custody itself, Article 5 considerations are not affected. There would be no need to provide for the suspect to be able to make representations to the sheriff at the point when the warrant to question further is applied for by the police. Article 6 considerations of fairness would, of course, still apply.

6.2.53 The decision to make such an application, and its preparation, should be the responsibility of the police in the first instance, although there may clearly be a role for the procurator fiscal in serious or other defined cases. The extent of that role will vary according to the nature and complexity of the case and will be a matter for guidelines from the Lord Advocate.

6.2.54 An application to allow further questioning could also be made to the sheriff at the accused's first appearance at court following his/her charge, or at subsequent points prior to the accused's trial diet. It is to be expected that the closer it is to that diet, the less likely it is that permission will be granted. Questioning so late may only be justified in exceptional circumstances, such as the discovery of critical new evidence, where the accused's account or explanation of it may fundamentally alter or halt the progress of the prosecution.

6.2.55 In the case of any application made to it at any stage, the court should have a discretion to grant permission to question a person generally or only in relation to specific matters. It is not anticipated that the power to permit further questioning would be used often, or even regularly, in summary cases but it would probably be better were the rule to be a uniform one applicable to all cases. No doubt a sheriff would be reluctant to grant permission in a summary case.

6.2.56 The Review has, of course, considered alternative arrangements in this area. One obvious option was to permit the police themselves to extend the twelve

hour maximum detention period, in a similar manner to the way that this is permitted under the 2010 Act and in England and Wales or Ireland. It felt, however, that there was more merit in promoting the effectiveness of the Article 5 rights to liberty and a prompt appearance before the court, while allowing the police the appropriate flexibility, suitably safeguarded, to pursue their investigations thoroughly.

Admissibility

6.2.57 There are two possible tests for determining the admissibility of statements by a suspect in response to police questioning: (i) the common law approach, which has developed rules for the protection of a suspect from oppressive conduct on the part of the authorities, balancing the interests of the suspect with those of society and taking into account all the circumstances; and (ii) a Convention approach assessing whether the Article 6 right to a fair trial has been infringed. What is important to realise is that, although, in many cases, the application of either approach may result in the same decision on admissibility, that will not always be the case. They are different tests.

6.2.58 In England and Wales there is a test for admissibility specific to confessions and a more general one applicable to all evidence. In Ireland, confessions may be excluded for a number of reasons, including the failure to meet the fundamental fairness test. In Canada, there are rights which might be infringed, but where the evidence may still be admitted at the discretion of the court. Thus, a number of different approaches might be taken. However, in

the interests of legal clarity, it would be preferable not to have two tests for the admissibility of this type, if not all, evidence.

6.2.59 It would be better if there were a single statutory test which made the position on admissibility clear. Given that the Review is concerned to propose an approach that secures compliance with the Convention, the test ought to lean more in that direction than towards the more detailed existing common law rules. There should, in short, be a general test applicable to all evidence whereby any evidence, which would result in the trial proceedings as a whole being rendered unfair in Article 6 terms, ought to be excluded at the discretion of the trial judge. Such a test would dovetail with the theme proposed by the Review of allowing all relevant evidence to be considered freely by the finder of fact unless there is a sound reason, based on Convention principles, to exclude it. It would also allow the courts to focus more on whether evidence is relevant (that is to say whether it makes the prospect of the accused having committed the crime more or less likely), instead of wrestling with issues of whether it is admissible in traditional “rules of evidence” terms. Subject to Article 6 fairness, relevance should ultimately become the test for the admission of all evidence.

6.2.60 Legislation should therefore provide that statements made by suspects to the police, during the course of an interview or otherwise, should not be admissible in evidence if their admission would result in the trial of the accused being rendered unfair in Article 6 terms, including unfair by reason of an infringement of his/her right to silence or his/her privilege against self

incrimination. It should be specifically stated that statements obtained by the use of methods amounting to coercion or oppression in defiance of the will of the suspect are thereby inadmissible⁵³. Where objection is taken to evidence of an admission by a suspect, the onus would remain on the Crown to prove to the satisfaction of the trial judge, on a balance of probability, that the admission of the statement would not render the trial unfair. Such a provision would make it clear that this area of law must be governed by the application of Article 6 principles; that is to say from the perspective of the accused's human rights. It cannot be done by way of a general balancing of individual and societal rights as would be the case at common law, as that has the potential for decisions to be in conflict with the Convention⁵⁴.

6.2.61 A trial is either fair or not and fairness is not capable of modification to meet perceived societal requirements in any individual case⁵⁵. The Review has considered whether the standard ought to be proof of fairness “beyond reasonable doubt”. However, that is the test used in the overall factual assessment of a person's guilt and not in the determination of either constituent parts of a case or questions of law, such as the admissibility of evidence. In practice, it may not matter a great deal what standard is applied, but it would be consistent with principle if it remained that of balance of probability, as accepted in *Thompson v Crowe*⁵⁶.

⁵³ see *Gafgen* on the interaction between Articles 3 and 6, at para 175

⁵⁴ e.g. *McLean* as analysed in *Cadder*

⁵⁵ cf *Gafgen* at para 178

⁵⁶ 2000 JC 173, LJG (Rodger) at 192 following the approach of the Australian courts in *Wendo v The Queen* (1964) 109 CLR 559, Sir Owen Dixon at 572; followed in *Platt v HM Advocate* 2004 JC 113, LJG (Cullen) at para 11

Pre-interview briefing

6.2.62 Prior to interview, and indeed at the point of any arrest or detention, the police require to advise a suspect of the nature of the offence of which he/she is suspected. The Review does not consider that there should be any requirement to provide further information about the case or to give any advance notice of the questions to be asked. The police should retain a discretion as to what information should be provided and, if information is to be provided, when it should be provided. Of course, the lack of information may result in legal advice not to answer further questions. That must be regarded as an entirely legitimate stance for a suspect to take⁵⁷. It may be that any resistance on the part of the police to the provision of information will be overcome by that consideration, especially in serious cases. As any questioning must be conducted in the context of a fair trial, any deception on the part of the police relative to what evidence exists, especially one designed to encourage an admission, would be liable to render any answers inadmissible.

Implications for Judicial Examination

6.2.63 There is an existing statutory exception to the general rule relative to pre trial questioning. This relates to judicial examination; an antiquated process⁵⁸ into which the Thomson Committee tried to breathe new life⁵⁹. It was intended to provide an accused with an opportunity of stating his/her position or, put another way, to allow the procurator fiscal to elicit the nature of any defence⁶⁰.

In practical terms, judicial examination, which occurs at the stage of an

⁵⁷ see Chapter 7.5 Adverse Inference

⁵⁸ see Renton & Brown para 12.01 et seq, referring to the original process in Alison ii 137, 1995 Act ss 35-39

⁵⁹ paras 8.01 et seq

⁶⁰ *McEwan v HM Advocate* 1990 SCCR 401

accused's first appearance on petition, is instructed only in a limited number of murder and rape cases.

6.2.64 The revival of judicial examination failed as an experiment. This failure started with the disapproval of the use of prepared statements⁶¹ and was completed with the decision that exculpatory statements were inadmissible, notwithstanding that they were made in the context of a statutory procedure⁶². The judicial view was that the use of the procedure as a substitute for testimony required to be "stamped out"⁶³. As it is recommended that there should be no bar on questioning by the police after a charge has been made, provided judicial sanction is obtained, judicial examination will be unnecessary. The use of the judicial examination procedure has rightly fallen into disuse, and in future should serve no purpose. The procedure should be laid to rest by its formal abolition. For similar reasons, since accused persons brought before the sheriff on petition hardly ever emit declarations in practice, this part of criminal procedure should cease to exist. A person should continue to be brought before the sheriff, but not for examination. There may be a continuation for further "investigation" prior to full committal, but the procedure should be modernised to take account of what actually happens in practice.

⁶¹ *Carmichael v Armitage* 1983 JC 8

⁶² *Hendry v HM Advocate* 1985 JC 105

⁶³ *ibid* LJ-C (Wheatley) at 109

Recommendations

I therefore recommend that:

- there is no need for statutory provision on the purpose of questioning;**
- the prohibition on police questioning after charge should be abolished and there should be a process whereby the police, where they feel there is good reason to question a suspect after he/she has been charged or reported to the procurator fiscal, can apply to a sheriff for permission to do so prior to a first appearance at court. In particular such an application:**
 - (a) must state the grounds for allowing questioning post charge; and**
 - (b) can be made, and responded to, remotely by electronic means;**
- the Crown should also be entitled to make such an application to the court in the course of a prosecution, at the first appearance before the custody court; or at any time prior to the trial diet;**
- in all such cases, the Court should have the discretion to place whatever conditions, constraints or limits on such further questioning it sees fit;**
- legislation should provide that courts have a general power to exclude evidence, including statements made by suspects to the police during the course of an interview or otherwise if the admission of that evidence would result in the trial being rendered unfair in terms of Article 6, including unfair by reason of an infringement of a suspect's right to silence or his/her privilege against self incrimination. Consideration should be given to the abolition of all other rules for the exclusion of relevant evidence in criminal cases;**
- the common law rules of fairness concerning the admissibility of statements by suspects should be abolished in favour of the more general Article 6 test;**
- there is no need for statutory provision on pre-interview briefing of suspects; and**
- the procedures of Judicial Examination and the emission of declarations should cease by, inter alia, repeal of the relevant provisions of the 1995 Act.**

6.3 CHILD SUSPECTS

Introduction

- 6.3.1 The previous chapters have considered the right of access to a lawyer once a suspect is in detention and prior to police questioning. Suspects who are vulnerable, whether by age or other reason, require extra protection.
- 6.3.2 There are a number of issues which arise specifically in relation to child suspects. For their rights to be effective, the system must ensure, so far as is practicable, that the child suspect at least understands his/her rights and the form which they take. Careful consideration has to be given to how the child's views are to be ascertained and expressed and how his/her interests are best safeguarded in the context of the particular child's age and maturity and the nature of the offence.
- 6.3.3 Waiver of the right is a particular concern. If the right cannot be adequately understood, it can hardly be waived. On the other hand, a child ought to be able to waive the right if he/she is able to make an informed decision on that matter. But difficulties may arise where a child, or a child's parent, carer or responsible person, consider that the right should be waived, in circumstances in which an objective observer, such as the court, may consider that it should not. If the right is not waived, the particular form in which the legal advice is to be provided may also be a concern.

Current law

6.3.4 For the purposes of the 1995 Act generally, a “child” is defined as: (1) a person under 16; and (2) a person aged 16 or 17 who is subject to a supervision requirement¹. However, the provisions relating to section 14 detention² and other statutes, including the Children’s Hearings (Scotland) Act 2011³ and the Vulnerable Witnesses (Scotland) Act 2004⁴, define a child as “a person under 16 years of age”. The age of majority is 18 years, in terms of section 1(1) of the Age of Majority (Scotland) Act 1969.

6.3.5 The age of criminal responsibility in Scotland remains at 8⁵. However, a person cannot be prosecuted for an offence committed when he/she was under the age of 12⁶. Below this age, any offending behaviour by a child may be dealt with through the Children’s Hearing system. A child under 16 cannot be prosecuted unless the Lord Advocate determines otherwise⁷. Under that age, his/her case will normally also be dealt with by a Children’s Hearing rather than a court, following upon a reference from the Children’s Reporter. The Lord Advocate has supplied the police with Guidelines on crimes which a child may be reported for prosecution, rather than being sent to the Reporter⁸. Children should not be detained at all unless the offence falls into one of the Guideline categories. The offences are, in broad terms, those which, if

¹ within meaning given by Children (Scotland) Act 1995

² 1995 Act s 15(6)

³ s 199

⁴ s 1 inserting s 27 in the 1995 Act

⁵ 1995 Act s 41

⁶ *ibid* section 41A inserted by section 52 of the Criminal Justice and Licensing (Scotland) Act 2010

⁷ *ibid* s 42

⁸ Reporting to procurators fiscal of offences alleged to have been committed by children: Revised Categories of Offences: April 2006

committed by an adult, would normally be proceeded with on indictment, i.e. would be likely to attract a custodial sentence of more than twelve months. Apart from murder and rape, which can only be dealt with by the High Court, these include offences resulting in the death of the victim, serious assaults, fire raising involving significant damage, concern in the supply of drugs and firearms offences.

6.3.6 The Review understands that the modern tendency in relation to child suspects is to address the child's social needs by the use of informal measures⁹ rather than to resort even to a referral to the Children's Reporter, far less to initiate the more formal proceedings of the Children's Hearing, which may require a proof of fact in the Sheriff Court. Where informal measures are the likely outcome of events, there is little concern about the commonly adopted practice of the police speaking to a child in the presence of his/her parents or other carers in the presumed relative comfort of his/her own home or at school. The issue of the admissibility of a statement made by the child in such circumstances is not going to arise, because no prosecution or other legal process is to follow.

6.3.7 There are situations where continuing significant anti-social behaviour by a child will prompt a referral to the Children's Hearing. There are also some offences¹⁰ committed by children under 16, but above the age of 12, which are deemed appropriately dealt with in the adult criminal justice system. In cases where the offence is of such seriousness that the child is likely to be referred

⁹ e.g. the multi-agency Early and Effective Intervention approach

¹⁰ including pleas reserved to the High Court such as murder and rape

to a Hearing or prosecuted in court, and where that in fact happens, the general principles of *Salduz*, *Cadder* and *Ambrose* will apply if any statement made by the child is to be admitted in evidence. The child suspect requires to be cautioned and, in accordance with the general recommendations in this report, he/she would have to be told of his/her right of access to a lawyer, even if not detained in the manner explained in *Ambrose*. Should he/she wish to exercise that right, it is possible that the child and his/her parent or other carer could obtain all required legal advice by a telephone call to a named solicitor made from his/her own home. But that may not be possible for a variety of reasons. It would be almost inevitable at present that the child suspect would be asked to attend at a police station either voluntarily or in detention if he/she were to be interviewed in connection with a crime, likely to lead to a prosecution or other legal process. However, even in borderline cases, if the police sought to interview a child suspect for a crime, which may or may not result in legal proceedings, it is likely that the child would have to attend a police station voluntarily, or otherwise, were there to be a request or requirement that he/she have access to a solicitor and that could not be obtained within a reasonable time in the home environment.

- 6.3.8 The reason for this is, first, that it is only in the police station that there are facilities to record any interview electronically, although this may change in the not too distant future, should the police be issued with devices capable of recording from wherever the police officer may be. Secondly, it is likely to be the most convenient place, for all concerned, at which to secure the services of a solicitor. It is at the police station that there are systems in place to contact

either a nominated or duty solicitor. At present, the Review is unaware of any practicable alternative location at which a child might be interviewed. There are some Family Protection suites in certain police areas used for the interview, and medical examination, of victims of crime. There has been some suggestion that children ought to be interviewed in that type of environment. Although that may be an ideal for consideration, problems of security and those associated with both victim and suspect being present at the same location militate against the use of such facilities for this purpose.

6.3.9 Although the fact that a suspect is a child is a factor to be taken into account by a court in determining the fairness of any interview, there are few additional protections, over and above those available to all suspects, which apply to the questioning of child suspects at a police station. A child suspect, who is arrested or subject to section 14 detention, must have that fact intimated to his/her parent or other responsible person in whose care the child normally rests¹¹. It has to be recognised that many child suspects have come from troubled, if not disturbed, backgrounds in which relations with their parents have deteriorated to such an extent that the presence of the parents at the police station would be unlikely to assist either the child or the investigation. In some instances, a parent may be involved in the offence. In these situations, a different relation, social worker or other responsible person may, at the option of the child, require to be asked to assist. That person has a

¹¹ 1995 Act s 15(4)

right of access to the child, subject to any restrictions required for the purposes of investigation¹².

6.3.10 It is important to note the way in which the statutory provision is phrased. The right of access rests with the parent or carer and not with the child. Yet the primary concern is that the child be provided with appropriate moral support and parental guidance. It is also not specifically said that the access should be afforded prior to, or at, any interview, although that is what normally occurs in practice. The phraseology concerning the right of access is presumably structured in the way it is because, whereas the state might be expected to have in place a scheme providing access to a duty solicitor, it cannot compel a child's parent or carer to attend at a police station nor can it always be expected to find the parent or carer. In that event, the alternative is to provide a duty social worker in all situations where the parent or carer declines to appear or cannot be located. That is what occurs in practice and, at least with a child under 16, an interview without the presence of a parent, carer or responsible person is now almost bound to be regarded by the courts as unfair in Article 6 terms.

6.3.11 If a child is arrested and cannot be brought "forthwith" before a sheriff, a senior police officer must "inquire into the case"¹³. It is unlikely that a child can ever be taken before a sheriff "forthwith"; at least where he/she is detained outwith court hours or if the plan is to interview him/her. In these circumstances, the senior police officer reviewing the case may liberate the

¹² 1995 Act s 15(4) and (5)

¹³ 1995 Act s 43

child on an undertaking of a similar type to those available for adult detainees¹⁴. The child can be liberated unconditionally, pending charges being proffered on complaint or otherwise, or on a written undertaking given and signed by him/her or his/her parent or carer that he/she will attend at a court at on a specified future date. This is not competent where the offending consists of homicide or “other grave crime”, if the detention is necessary to remove the child suspect from the company of criminals or if his/her liberation would defeat the ends of justice.

6.3.12 According to the legislation, a child suspect ought not, if practicable, to be kept in a police station pending any court appearance¹⁵. Rather, he/she ought to be kept in a place of safety¹⁶. This could to be a secure residential establishment run by the local authority or simply a suitable person’s home. There are established Protocols¹⁷ between the police and local authorities about the detention of children. These stress the “last resort” element of such detention and the need to avoid keeping children in police stations, and especially police cells. The Review gained the impression that, especially where the child appears to be under the influence of alcohol or drugs and is acting in an aggressive manner, it may be inevitable that the child is kept in police detention pending appearance in court. Where that occurs, the Protocols stress the need for a multi-agency approach with frequent reviews of the necessity for detention by both the police and the local Social Work Department. There has been a relatively recent review by HM Inspectorate of

¹⁴ 1995 Act s 22

¹⁵ 1995 Act s 43(4)

¹⁶ defined by the Children (Scotland) Act 1995 s 93

¹⁷ e.g. between Lothian and Borders Police and the five relevant local authority areas and Tayside Joint Protocol referred to in Annex A of HM Inspectorate of Constabulary’s Report (*infra*)

Constabulary on the conditions in which children are kept after arrest¹⁸. As with cell conditions generally, the Review does not consider that its remit extends to an exploration of how these conditions might be improved. However, in making its recommendations, it has borne these conditions firmly in mind.

6.3.13 The 2010 Act did not introduce any extra provision for children, who are arrested or subject to section 14 detention, designed to enforce the right of access to a lawyer. Thus an arrested child has the same right as an adult to have a solicitor informed of his/her arrest and of access to a lawyer (other than in exceptional circumstances) when detained. The legislation did not make any special provision regarding waiver of rights by children. The Scottish Government has produced guidance on the approach to be taken when interviewing child witnesses¹⁹ but that does not address, specifically, the questioning of child suspects. As with any police interview, the admissibility of answers obtained at interview is presently subject to the common law fairness test and the overarching Article 6 fair trial provision. What constitutes fairness in interviewing a child will depend on all the circumstances, taking into account the child's age, maturity and other vulnerabilities. It is worth commenting that many of the most celebrated cases in this field, notably *Chalmers*, *Rigg*, *Salduz* and *Cadder*, have all concerned children under 18; reflecting the courts' general concern about the interviewing of young persons in the absence of adequate protections beyond those applicable to the adult suspect.

¹⁸ Report on the Care of Arrested and Detained Children (June 2008)

¹⁹ Guidance On Interviewing Child Witnesses in Scotland, Scottish Executive (2003)

6.3.14 Paragraph 16 of the ACPOS Manual of Guidance on Solicitor Access suggests how the right of access to a lawyer under the 1995 Act should apply to children and vulnerable adults. Its approach is focused on the need to secure access to a lawyer and the support of a parent or other adult.

International Conventions

6.3.15 The United Nations Convention on the Rights of the Child²⁰ defines a child as a human being under the age of 18 years unless, under the law applicable to the child, majority is attained earlier. This Convention advances the affording of a number of rights to children in the current context, some of which are reflected in those provided or implied under Articles 5 and 6 of the European Convention. There is first²¹ a general principle that, in all actions concerning children, the best interests of the child must be regarded as a primary consideration. This does not mean that it is the only consideration or that it is, in all cases, the most important consideration. Clearly the need to protect others and, in that context, to have an effective system for the prosecution and punishment of offenders, may prevail. Secondly, there is a right in the child to express his/her views and for those to be given “due weight in accordance with the age and maturity of the child”²². Thus, the child must have an opportunity to be heard in any proceedings. Thirdly, the arrest and detention of a child should be used only as a last resort and for the shortest appropriate period of time²³. Fourthly, where a child has been deprived of his/her liberty,

²⁰ 1989 Article 1- Ratified by the United Kingdom in December 1991

²¹ Article 3.1

²² Article 12.1

²³ Article 37.1

he/she has a specific right to “prompt access to legal and other appropriate assistance, as well as the right to challenge the legality of the deprivation of his or her liberty before a court or other competent, independent and impartial authority, and to obtain a prompt decision on any such action”²⁴. Fifthly, if he/she is alleged to have committed an offence, the child has the right: “To be informed promptly and directly of the charges against him or her, and, if appropriate, through his or her parents or legal guardians, and to have legal or other appropriate assistance in the preparation and presentation of his or her defence”²⁵.

6.3.16 The Council of Europe has produced Guidelines on “child friendly justice”²⁶ which take into account the UN Convention and several other international instruments, notably the UN Standard Minimum Rules for the Administration of Juvenile Justice (the “Beijing Rules” 1985) and the UN Rules for the Protection of Juveniles Deprived of their Liberty (the “Havana Rules” 1990). Again, a child is defined as a person under 18 years of age²⁷ and in, all proceedings, the child’s best interests are a primary consideration²⁸. Stress is also put on the child’s right to be informed of his/her rights and to be consulted and heard²⁹. Specifically, it is provided that “from their first involvement with the justice system” children and their parents are to be promptly and adequately informed of their rights and of any charges

²⁴ Article 37.1

²⁵ Article 40.1

²⁶ 17 November 2010

²⁷ Article II.a

²⁸ Article III.B.1

²⁹ Article III.A.1

proffered³⁰. If arrested, the child must be told why that has happened and “be provided with access to a lawyer and be given the opportunity to contact their parents or a person whom they trust”³¹. The parent should be asked to attend the police station³². The Guidelines continue³³:

“A child who has been taken into custody should not be questioned in respect of criminal behaviour, or asked to make or sign a statement concerning such involvement, except in the presence of a lawyer or one of the child’s parents or, if no parent is available, another person whom the child trusts. The parent or this person may be excluded if suspected of involvement in the criminal behaviour or if engaging in conduct which amounts to an obstruction of justice”.

There are further provisions regarding the training of lawyers in children’s rights and related matters.

6.3.17 The European Court has stressed that the right of a child to effective participation in his/her criminal trial requires that he/she be dealt with having due regard to his/her vulnerability and capacity from the first stages of his involvement in a criminal investigation and, in particular, during any questioning by the police³⁴. The effect of this is that the police require to ensure that the child has a broad understanding of the nature of the investigation, of what is at stake for him/her and of his/her right to remain silent. This means that he/she, if necessary with the assistance of, for example, an interpreter, lawyer, social worker or friend, must be able to understand the

³⁰ Article IV.A.1

³¹ Article IV.C.28

³² Article IV.C.29

³³ at para 30

³⁴ *Panovits v Cyprus*, 11 December 2008 (no 4268/04) para 67; *Adamkiewicz v Poland*, 2 March 2010 (no 54729/00) (principle extracted from English language press release)

general thrust of what is said by the arresting officer and during his/her questioning by the police³⁵. The Court has stated that, in the case of children, a waiver³⁶:

“can only be accepted where it is expressed in an unequivocal manner after the authorities have taken all reasonable steps to ensure that he or she is fully aware of his rights of defence and can appreciate, as far as possible, the consequence of his conduct”.

6.3.18 This is all very well in theory, but practical difficulties arise as soon as rights to express a view, and for that view to be taken into account, are contrasted and compared with the right to silence and the privilege against self-incrimination.

Other jurisdictions

6.3.19 In some jurisdictions, including for example Finland, a lawyer will be appointed automatically for a suspect who is under the age of 18 years and it may not be possible for this entitlement to be waived. However, many jurisdictions do not have specific statutory provisions regarding a child suspect's right of access to a lawyer. In Canada, in contesting the admissibility of interview evidence, there is just a general onus on the detainee to demonstrate that he/she has not understood the right to retain counsel. In some jurisdictions it is possible for a child suspect's parent to exercise the right of access to a lawyer on his/her behalf. In England and Wales, although

³⁵ *Panovits v Cyprus (supra)*

³⁶ *ibid* para 68

PACE does not provide a different right to legal advice for child suspects, Code C provides³⁷:

“In the case of a juvenile, an appropriate adult should consider whether legal advice from a solicitor is required. If the juvenile indicates that they don’t not want legal advice, the appropriate adult has the right to ask for a solicitor to attend if this would be in the best interests of the person. However, the detained person cannot be forced to see the solicitor if he is adamant that he does not wish to do so”.

6.3.20 In Ireland, if the child or his/her parent or guardian asks for a solicitor, the child must not be asked to make a statement until a reasonable time for the attendance of the solicitor has elapsed. Ireland has adopted much of the wording of the International instruments into its domestic law by stipulating that, in any investigation of offences committed by children, the police require to act with due respect to the child’s personal rights³⁸. The child’s parents or carers require to be informed and asked to attend at the police station. If they cannot, or will not, attend within a reasonable time, the child must be advised that he/she can have another relative or other adult informed and attend³⁹. There are provisions relative to either the child or the parent or other adult requesting legal advice⁴⁰. A child cannot normally be questioned without the presence of a parent or other adult⁴¹. This is also the case in England and Wales⁴².

³⁷ para 6.5A

³⁸ Children Act 2001 s 56

³⁹ ss 57-58

⁴⁰ s 60

⁴¹ s 61

⁴² PACE CODE C para 11.15

6.3.21 In many jurisdictions⁴³ a child suspect's vulnerability is reflected in the need for a person, other than a lawyer, to attend at the place of the child's detention. The role of such a person is not to provide legal advice but simply to assist in communication between the police, any lawyer and the child suspect. In New South Wales, a child cannot waive his/her right to a support person⁴⁴.

Consideration

6.3.22 Given the wording of the UN Convention on the Rights of the Child, it is difficult to see what age, other than up to 18 years, would be appropriate to define a child. It is recognised that persons under this age are entitled to make other important decisions in their own lives without the intervention of a parent or other carer. It is appreciated that there are many 16 and 17 year old persons who have an acute, if tragic, familiarity with their rights in custody. However, 18 is the age of majority and, especially with those 16 and 17 year olds who are not so familiar with the criminal justice system, those under 18 may be sufficiently immature, and thus vulnerable, as to justify added protections to ensure that their rights are effectively guarded. Accordingly, when a child is arrested and detained, the current statutory provisions concerning notification to a parent or other responsible person and permitting these persons to have access to the child should continue to apply (with the same exceptions), but be extended to all persons under 18 years of age.

⁴³ e.g. England and Wales, Ireland and Australia

⁴⁴ Law Enforcement (Powers and Responsibilities) Regulations 2005 reg 29

6.3.23 As has been described earlier, there are many situations in which the particular offence is not one which has any prospect of reaching the courts or a Children's Hearing. In such cases, the child should not be detained at all and, in any event, in practical terms access to a lawyer is unnecessary. The decision to arrest and detain a child suspect should only be taken where there is no reasonable alternative. In taking that decision, the police should be required to apply, as a primary consideration, the best interests of the child, in line with Article 3.1 of the UN Convention. The detained child suspect must have the same right of access to a lawyer as an adult. The regime has to ensure that the child suspect is, so far as is practicable, able to understand his/her right of access to a lawyer and capable, by reason of such understanding, either to exercise that right or to waive it.

6.3.24 It is recognised, even if not express in statute, that the child suspect is entitled to the advice and assistance of his/her parent or other carer in the event of the child's detention. The Review considers that, in relation to the child's conditions of detention, a parent or carer may have a role equally important to that of a lawyer. Prior to any interview, a parent or carer may have some role in providing parental, as distinct from legal, advice to the child on whether to respond to questioning. The Review takes the view that child suspects should have an expressed statutory right of access to a parent, carer or responsible person broadly similar to, and running in parallel with, those in relation to the right of access to a lawyer.

6.3.25 This means that any child suspect should have the right, in the event of detention and before and during any police interview, to request and access both a lawyer and a parent, carer or responsible person. Given the additional difficulties in compelling attendance, the right of access to a parent, carer or responsible person should apply only insofar as it can be achieved within a reasonable time. There will need to be provision for exceptional circumstances whereby the police may deny such access in whole or in part and exclude such a person from an interview, for example where his/her presence may obstruct the course of justice or where his/her behaviour in the interview is disruptive. If a particular parent or carer is denied access or is excluded, alternative arrangements ought to be put in place, as if the parent or carer had not been available at all.

6.3.26 It is important to distinguish the role of the lawyer from that of the parent, carer or responsible person. Whether prior to interview or at the interview itself, the function of the parent, carer or responsible person is, first, to provide any necessary moral support for the child and to provide him/her with appropriate parental guidance. Secondly, it is to aid communication between the child on the one hand and any solicitor and the police on the other. It is not to provide legal advice, although, of course, as already remarked, a parent, carer or responsible person may advise generally on whether a child suspect should respond to the police enquiries. This is so even if the provision of parental guidance on this latter topic may be difficult in the case of someone who is designated as a responsible person, but who is not normally involved in

the child's day to day care. It also follows that any attending lawyer should not perform the different role of responsible person.

6.3.27 There is the overarching principle of fair trial, but, within that, there should be firmer guidance on how to accommodate the needs of child suspects who are to be interviewed. It is appropriate that the general role of the parent, carer or responsible person be defined in statute as set out above. Although the Review is not suggesting that there should be any positive obligation on the police always to explain that role to the parent, carer or responsible person or to ensure that he/she understands that role in advance of any interview, it may usefully be documented on the letter of rights previously referred to.

6.3.28 It is appreciated that there may be practical problems with this regime. A child may refuse to engage with a solicitor and his/her parent, carer, or responsible person. There may come a point when it is impossible for a solicitor to provide legal advice to a child, who point blank refuses to listen or let the solicitor speak. But these situations are likely to be the exception rather than the rule and hopefully the proposed regime, with its definite rules on waiver and access to a lawyer, can be implemented without too much difficulty.

Waiver

6.3.29 It has already been stressed that there are many situations in which it is clear that offending behaviour on the part of a child will not reach either the courts or a Children's Hearing. For that type of situation, the current practice of the

police interviewing a child at his home or in school in the presence of his/her parents or carers ought to remain the norm. This is so even if the child, and/or his/her parents or carers, may decide to seek legal advice. If they do so, no doubt the police may wait for that advice to be provided, whether by telephone or otherwise, or they may invite the child and his/her parent or carer to the police station in order to provide that advice.

6.3.30 The Review is, however, concerned with those more serious cases which are likely to, and do, end up in court or become subject to other formal legal proceedings. In those cases, there are very strong arguments that a child under 16 should not be able to waive the right of access to a lawyer; nor should the child's parents, carer or other responsible person be able to waive that right on behalf of the child. Thus, as a generality, for any answers to be admissible as evidence, a child suspect under 16 must be provided with access to a lawyer prior to being interviewed. Where a child's parent, carer or responsible person is present at the police station, he/she may be allowed to be present during the child's consultation with the solicitor, if that is what the child wants. Of course, the child may refuse to heed, or even listen to, the advice given. If so, it will remain a matter for the court to determine whether what he/she says at interview infringes his/her right to a fair trial.

6.3.31 There is an argument that all children, as statutorily defined, should be treated in the same way. After all, there is a considerable spectrum of maturity. On the other hand, the law already allows persons aged 16 and above added rights and responsibilities in different fields. As a generality, if no more than that,

persons of 16 years of age and over are of greater maturity and ought to have a greater understanding of their rights. They ought to be able, with appropriate assistance, to express fully coherent, informed views; that is to say to exercise their right to participate effectively in the proceedings. Accordingly, on balance, for a child suspect aged 16 or 17, there should be greater latitude, given the greater degree of legal responsibility attached to persons of those ages. There should still, however, be some added safeguards. The balance which the Review thinks it is appropriate to strike is that a 16 or 17 year old should be able to waive the right of access to a lawyer but only if his/her parent, carer or responsible person also agree to the waiver. Put another way, if the child wishes to waive his/her right, that cannot be done without the consent of a parent, carer or responsible person. If a child suspect wants to exercise his/her right to legal advice, the parent, carer or responsible person should not be able to waive that right on behalf of the child.

6.3.32 There will no doubt be situations where a child suspect does not wish the presence of his/her parent or responsible person; in other words, wishes to waive that particular right. As with the right to legal assistance, the Review does not believe that suspects under 16 should be able to waive that right. It should, however, be possible for a 16 or 17 year old to do so and it is not suggested that the consent of any other person is required for this waiver. But it should be made clear to the 16 or 17 year old suspect that if he/she does decline to seek the presence of his/her parent, carer or responsible person, he/she cannot waive the right of access to a lawyer. In that situation, legal advice would be compulsory. It will again be for the child to decide whether

to listen to any advice given. If he/she refuses to do so, the interview can proceed and it will be a matter for the court to determine admissibility should objection be taken.

Recommendations

I therefore recommend that:

- **for the purposes of arrest, detention and questioning, a child should be defined as anyone under the age of 18 years. This means that the current provisions concerning notification to a parent, carer or other responsible person and these persons having access to a child suspect should be extended to all persons under 18 years of age;**
- **there should be a general statutory provision that, in taking any decision regarding the arrest, detention, interview and charging of a child, whether by the police or the procurator fiscal, the best interests of the child shall be a primary consideration;**
- **all children should have the right of access to a parent, carer or responsible person if detained and, in any event, in advance of and during any interview, provided that access can be achieved within a reasonable time. The police should be able to delay or suspend that right in exceptional circumstances;**
- **the general role of the parent, carer or responsible person should be defined in statute as consisting of the provision of any moral support and parental care and guidance to the child and to promote the child's understanding of any communications between him/her, the police and his/her solicitor;**
- **where the child suspect is under 16, he/she must be provided with access to a lawyer, and neither he/she, nor a parent, carer or responsible person can waive that right;**
- **where the child is under 16, he/she must be provided with access to a parent, carer or responsible person, and he/she cannot waive that right;**
- **where the child is 16 or 17 years old he/she may waive his/her right of access to a lawyer but only with the agreement of a parent, carer or responsible person; and**

- where the child is 16 or 17 years old he/she may waive his/her right of access to a parent, carer or responsible person. In such cases he/she must be provided with access to a lawyer.

6.4 VULNERABLE ADULT SUSPECTS

Introduction

6.4.1 When a suspect is arrested and detained, the police must be able to determine, so far as practicable, his/her fitness to be interviewed. A suspect may not be fit to be interviewed because of some temporary state, including intoxication through drink or drugs, injury or short-term illness requiring medical treatment. Each may render the suspect incapable of answering questions, or of doing so intelligibly, in the short term. These problems will be cured by the passage of time. There may equally be barriers to a suspect understanding questions put to him/her because of language or hearing difficulties. These can be overcome by the use of an interpreter or other suitable measures.

6.4.2 This chapter is, however, concerned with a further category of suspect; namely one whose fitness for interview is affected by vulnerabilities of a permanent, or at least semi-permanent, nature. A vulnerable person may not be fit to be interviewed at all or without special measures, such as the presence of an “appropriate adult”¹. As will be seen, there require to be protections for such suspects, analogous to those for child suspects.

¹ this term is used exclusively in connection with vulnerable adults and is distinct from a “responsible person” applicable in the case of children (cf the position in England and Wales)

Current Law

Definition

6.4.3 There is no statutory definition of a vulnerable suspect. Section 271 of the 1995 Act² does, however, make provision for vulnerable witnesses. It identifies vulnerability under reference to whether the quality of a person's evidence would be diminished by reason of two matters. First, there is "mental disorder", which is in turn defined in terms of the mental health legislation³ as meaning: "(a) mental illness; (b) personality disorder; or (c) learning disability, however caused or manifested". It is expressly provided that a person is not "mentally disordered" by reason only of, amongst other things, sexual deviancy, dependence on alcohol or drugs or behaviour that causes, or is likely to cause, harassment, alarm or distress to any other person. Secondly, and essentially entirely separately, there is vulnerability by reason of "fear or distress in connection with giving evidence at the trial". This provision is primarily directed towards victims or intimidated witnesses. Such persons are not normally suspects, although they may be if, for example, they were engaged in crime as a result of exploitation in the course of human trafficking⁴ or are both abuser and abused in the domestic setting.

6.4.4 The vulnerable witness provisions are concerned with providing special measures at the trial diet to protect vulnerable persons when giving evidence. These include giving evidence by live video link from a remote location or

² inserted by the Vulnerable Witnesses (Scotland) Act 2004

³ Mental Health (Care and Treatment)(Scotland) Act 2003 s 328

⁴ see EU Directive 2011/36/EU where Article 2.2 defines a "position of vulnerability" as a situation in which the person concerned has no real or acceptable alternative but to submit to the abuse involved

simply testifying with a screen in place between witness and accused. In such cases, the court has to decide whether the witness is vulnerable and, in order to do so, may take into account a wide range of circumstances, including the social and cultural background and ethnic origins of the person along with any physical disabilities or impairments.

6.4.5 Under section 3 of the Adult Support and Protection (Scotland) Act 2007, “adults at risk” are adults who:

“(a) are unable to safeguard their own well-being, property, rights or other interests, are at risk of harm,

... and

(c) because they are affected by disability, mental disorder, illness or physical or mental infirmity, are more vulnerable to being harmed than adults who are not so affected”.

Procedures

6.4.6 Neither the original, nor the current, section 14 detention provisions or the statutory right of access to a lawyer in detention introduced by the 2010 Act make express provision for vulnerable suspects. However, in order to ensure that a suspect’s rights are effectively protected, it is recognised that the police have to take different or additional steps where a suspect has a particular vulnerability. This is consistent with international conventions⁵ and domestic

⁵ e.g. United Nations Convention on the Rights of Persons With Disabilities Article 13

legislation⁶, both of which stress the need for persons with disabilities to be given equal access to services, including those in the criminal justice system. The need to make appropriate adjustments is reflected in the ACPOS Manual of Guidance for Solicitor Access which provides⁷:

“The test of our approach to the rights of children and vulnerable adults will include if the individual’s rights were fully explained and understood, and if any waiver of rights was an ‘informed waiver’.

...

Where officers have reasonable grounds to believe that an adult suspect may be unable to advise if they wish a private consultation with a solicitor prior to interview, due to mental disorder or lack of capacity, the services of an Appropriate Adult must be sought to assist in explaining the suspect’s rights”.

6.4.7 The current approach to vulnerable adult suspects is thus focused on the need to secure the presence of an appropriate adult prior to interview. The function of an appropriate adult attending upon a vulnerable suspect is to aid communication between the suspect, his/her solicitor and the police. As with the responsible person for a child suspect, it is not to provide legal advice.

6.4.8 Guidance provided by the Scottish Government explains, in detail, the role of the professional appropriate adult thus⁸:

“... to facilitate communication between a mentally disordered person and the police and, as far as is possible, ensure understanding by both parties.

⁶ e.g. Equality Act 2010 s 29 on the provision of services; the Review was also referred to the Parliamentary Joint Committee on Human Rights (HL Paper 40-1. HC 73-1), p 75 on reviewing vulnerable persons in custody

⁷ At paras 16.3 and 16.6

⁸ <http://www.scotland.gov.uk/Topics/Justice/law/victims-witnesses/Appropriate-Adult>

The use of an appropriate adult is extended to all categories of interview - witness, victim, suspect and accused.

Appropriate adults are selected for their experience in the field of mental health, learning disabilities, dementia and/or acquired brain injuries. It is their role to pick up on “clues” and indicators that a person has not fully understood what they are being told or what they are being asked.

One of the most important aspects of this is the caution given to people by officers, which may be followed by an interview and/or charge.

An appropriate adult is allowed to intercede for the purposes of checking understanding and conferring with the interviewee or police officers about their understanding.

It is anticipated that given the background experience of an appropriate adult they would have the communication skills and tools necessary to assist a person with a mental disorder to understand more fully what is being said/asked of them. Further to this it is anticipated that they would lend their experience to the police officers conducting the interview; this may be regarding understanding but could also include opinion about the anxiety levels an interviewee is experiencing and how these may be impacting on the quality of their answers and level of understanding.

The presence of the appropriate adult is about trying to ensure equality for the person being interviewed. It is not about advocacy or speaking on behalf of a person with a mental disorder, rather it is about an independent third party checking that effective communication is taking place and that the person being interviewed is not disadvantaged in any way due to their mental disorder”.

This role is, however, not defined as a matter of law.

Other jurisdictions

6.4.9 The PACE Code of Practice in England and Wales defines a person as mentally vulnerable where, by reason of his/her mental state or capacity,

he/she⁹: “may not understand the significance of what is said, of questions or of their replies”. If there is “any doubt” about this, the suspect should be treated as vulnerable. If the suspect is treated as vulnerable, the custody officer must contact an “appropriate adult”; being a relative or other person responsible for his/her care or a person experienced in dealing with mentally vulnerable people¹⁰. The appropriate adult must be told of the suspect’s right of access to a lawyer and the suspect must be cautioned in his/her presence. The suspect ought to have been told of his/her right of access to a lawyer in advance of this and contact with a solicitor is not to be delayed until the arrival of the appropriate adult. The suspect may have a consultation with the solicitor in the absence of the appropriate adult, if that is what he/she desires¹¹. As a generality, a vulnerable suspect cannot be interviewed in the absence of the appropriate adult, who is advised that his/her role is not simply to act as an observer but to advise the suspect, observe whether the interview is conducted properly and fairly and to facilitate communication with the suspect¹².

6.4.10 In New South Wales, “vulnerable persons” include children, people with impaired or intellectual functioning, Aboriginal persons and persons who are not native English speakers¹³. All are entitled to the presence of a “support person” during the investigative procedures, although this entitlement can be waived. Like the provisions under PACE, the support person is advised that he/she is not restricted to acting as an observer at the interview but may assist

⁹ PACE Code C, Note 1G, Para 1.4, there is also reference to the definition of disorder in the Mental Health Act 1983 s 1(2)

¹⁰ Annex E, paras 2 and 3

¹¹ Note E1

¹² *ibid* para 9

¹³ Law Enforcement (Powers and Responsibilities) Regulations 2005 reg 24

the suspect and identify any problems of communication¹⁴. In Ireland, a vulnerable suspect is treated in a similar manner to children¹⁵.

Consideration

6.4.11 At the heart of this topic is the need to ensure that any suspect who is vulnerable: (i) is promptly identified as such, (ii) understands his/her rights; and (iii) is able to make informed decisions based on that understanding. In Article 6 terms, it is the ability of the vulnerable suspect to understand the nature and potential effect of trial proceedings and to engage in them in a meaningful way that needs to be secured. This includes provision prior to, and at the stage of, a police interview. It is necessary that the suspect understands his/her rights and is able to exercise them. It is essential that he/she understands not only the questions asked and the answers given but also the implications of what is being asked and of what he/she says in response.

6.4.12 While there will be suspects whose vulnerability is patent, possibly already recorded and attributable to a particular condition, there may be some whose vulnerability is latent. Identifying vulnerability requires judgment by the investigating and custody officers. This is important, because it may be a factor to be taken into account in determining the overall fairness of the proceedings. Where an interview is deemed unfair because of inadequate provision to deal with a person's vulnerability, evidence of his/her answers will be excluded as inadmissible, if objected to. However, there are few

¹⁴ *ibid* reg 30

¹⁵ The Criminal Justice Act (Treatment of Persons in Custody in Garda Síochána Stations) Regulations 1987 (SI No 119) regs 22 and 13 (relating to children)

specific statutory rules which make provision for the identification or treatment of the vulnerable suspect at the stage of the police investigation. It should also be borne in mind that the suspect's vulnerability may become apparent only at some point after the initial arrest and detention. Vulnerability may, for example, become evident to the suspect's lawyer during a private consultation. In line with the judgment in *Dayanan*, the lawyer will have a role in bringing this to the relevant police officer's attention in the expectation that an appropriate adult will be contacted. The police officer responsible for the suspect's detention should, in such cases, be ready to revise his/her assessment of vulnerability and make the necessary additional arrangements.

6.4.13 The measures required to safeguard the interests of a vulnerable suspect will vary from case to case. Where there is a significant condition, and thus doubt over the suspect's capacity or fitness to be questioned at all, a medical opinion may well be required. In other instances it may be that the suspect can be interviewed with additional support and assistance from an adult relative or close friend or from a professional experienced in mental health. The Review understands that there may often be practical difficulties in ensuring the prompt attendance of a professional appropriate adult. Such persons will usually be in full time employment and will not always be able to stop their normal work in order to attend at a police station.

6.4.14 It is appreciated that, with someone who does not fully understand his/her rights, there may be questions as to whether he/she is capable of understanding the meaning of waiving a right or indeed the import of a caution. These

problems exist in current practice and are presently dealt with, where necessary, by the court in deciding whether answers should be admitted in terms of common law or Article 6 fairness. In light of the foregoing, it is appropriate to provide some greater statutory definition as to when a suspect should be classified as vulnerable and what should happen thereafter.

6.4.15 The Review does not consider that it is possible to set down rules on the standard of proof which must be reached in the mind of the police officer tasked with deciding the matter. It is sufficient for present purposes that the police officer must decide whether he/she considers that the suspect falls into the category of vulnerable. That term ought to be defined in a far shorter and simpler manner than that used in the vulnerable witness legislation. The minimum requirement thereafter would be the provision of an appropriate adult to enable the suspect to understand his/her rights, if that is possible, and to take a decision on whether access to a lawyer should be waived. Of course, this all proceeds on the assumption that if, even with the assistance of an appropriate adult, the suspect still cannot fully understand the questioning or the significance of the procedure, statements made by him/her in response to questioning will be ruled inadmissible.

Recommendations

I, therefore, recommend that:

- **there should be a statutory definition of a “vulnerable suspect”. This should be, in broad terms, a person who, in the view of the police officer authorising the suspect’s detention, is not able to understand fully the significance of what is said to him/her, of questions posed or**

of his/her replies because of an apparent (a) mental illness; (b) personality disorder; or (c) learning disability;

- statute should define the role of an appropriate adult as being to assist in ensuring that effective communication takes place between the suspect, the police and the suspect's solicitor (if any) and that the suspect is not disadvantaged, relative to the non-vulnerable suspect, in the detention and interview processes by reason of his/her vulnerability;
- statute should provide that a vulnerable suspect must be provided with the services of an appropriate adult as soon as practicable after detention and prior to any questioning. He/she should only be able to waive his/her right of access to a lawyer if the appropriate adult also agrees to this; and
- statute should define, at least in broad terms, the qualifications, professional or otherwise, necessary for a person to be an appropriate adult. The Review has not had sufficient material upon which to form a view on this subject, and the Government should carry out further research in that regard.

7.0 EVIDENCE CHAPTERS OVERVIEW

- 7.0.1 The Evidence section addresses some of the specific issues relating to the law of evidence that have been raised following *Cadder*. Under its Terms of Reference, the Review is required to “consider the criminal law of evidence..., in particular the requirement for corroboration and the suspect’s right to silence”.
- 7.0.2 It has already been made clear that the Review has not taken the inclusion of these issues within its remit to mean that it should seek to “re-balance” the system in the light of a perception that *Cadder* has tilted the advantage too far in favour of the suspect. But the link to *Cadder* is clear. *Cadder* effectively overturned *McLean*. Rather than identify certain rights as pre-requisites for a fair trial, the court in *McLean* had considered the overall fairness of the whole trial procedure, with explicit reference to the requirement for corroboration and the suspect’s right to silence (without adverse inference being drawn from that silence) as contributing to an assessment of that fairness. Although some of the safeguards cited in *McLean* must clearly remain (such as the electronic recording of interviews), others, including corroboration, the lack of ability to draw adverse inferences from pre trial questioning and the prohibition on questioning after charge, which was discussed in detail in the previous section, are open to re-examination in the context of their continuing contribution to a fair, efficient and effective criminal justice system.

7.0.3 Throughout the course of the Review's consultation and roadshows, some contributors stated that issues around: sufficiency of evidence, including corroboration; the suspect's right to not incriminate himself/herself; and the admissibility of statements, were so interlaced within the system that they should not be contemplated without addressing a range of other issues, including other evidential rules or majority jury verdicts. The Review accepts and agrees that the time taken to complete this report has meant that the number of areas which could be examined in detail was limited. However, this does not detract from the fact that the areas that have been explored show that certain elements in the current criminal justice system do not match the requirements of modern society or allow for the flexibility that will be needed in the future.

7.0.4 Before looking at how corroboration fits within the system, the Review felt it was important to understand how corroboration as a requirement evolved through our constantly changing society, up until the present day. Chapter 6.1 – Corroboration – The Origins and Development, looks in detail at the history of the requirement for corroboration in Europe and specifically in Scots law.

7.0.5 Chapter 6.2 – Corroboration, examines how corroboration fits into the criminal law framework and how what is considered by some to be a cornerstone of our system is used as a safeguard of justice. This chapter explores whether the requirement for corroboration may create barriers to, and potentially miscarriages of, justice. It is acknowledged that the recommendation to remove the requirement for corroboration will attract

particular comment and, no doubt, criticism. There may be further consequences of abolition that will need to be worked through, as the criminal justice system is progressively reformed. This is in the nature of law in society. But the initial decision, which has to be taken, is whether, of itself, corroboration continues to contribute more than it detracts from a fair, efficient and effective system.

7.0.6 In order to be able to analyse the issue of whether the requirement for corroboration fits today's society, independent research was commissioned to assess the impact of corroboration in the progress of criminal cases through the system. After thorough consideration of this research alongside all the other information, evidence and submissions on the subject, the Review is able to recommend, with confidence, that the system would best be served by removing the requirement.

7.0.7 The consideration of guidance on what is sufficient evidence for the police to report a case to the procurator fiscal is the responsibility of the Lord Advocate and this report does not make recommendations as to what direction these should take. Chapter 6.3 – Sufficiency of Evidence, does, however, look in detail at the current law on sufficiency of evidence at trial. The Review believes that the current system is both appropriate and robust enough to continue to work effectively and efficiently in today's society, even with the removal of the requirement for corroboration.

7.0.8 The Review looked at the admissibility of certain statements at trial in Chapter 6.4 - Exculpatory and Mixed Statements. It is apparent, from looking at the detail of the current law, that the definitions of incriminatory, exculpatory and mixed statements are unclear and the directions required to be given to a jury are unnecessarily complex and confusing. Recent cases have shown that the interpretations of what is meant by these statements have been inconsistent and have led to convictions being quashed at appeal. In order to achieve clarity and consistency across the system, the Review recommends that all statements, taken fairly from a suspect by the police in the course of an investigation, should be admissible as proof of fact.

7.0.9 The Convention does not expressly provide a right to silence, but such a right has been implied by the European Court as lying “at the heart of the notion of a fair procedure under Article 6”¹. In Chapter 6.5 – Adverse Inference from Silence, the Review looks at the current law of not only Scotland but also those countries that have adopted the concept of drawing an adverse inference from silence. The introduction of an adverse inference may not risk infringing the Article 6 right, but it would require the drafting of a bewildering and complex web of restrictive legal rules. In trying to create a system that is consistent, valuable and robust enough to stand up to future changes in human rights law, and to avoid legal complexity, the Review recommends that there should continue to be no adverse inference drawn if a suspect declines to give a positive account to the police in response to an allegation of criminal conduct.

¹ *Adetoro v United Kingdom*, 20 April 2010 (no 46834/06)

7.0.10 The Review has been concerned to cut through some of the complexities that surround the admission of evidence at trial. In the modern world, the courts, including juries, must be trusted to be sufficiently sophisticated to be able to assess the quality and significance of testimony without the need for intricate exclusionary rules. It is the Review's conclusion that the modern approach, that is required, involves the de-construction of some of the more elaborate rules of evidence. The result of the combined implementation of the recommendations in this section would move Scotland towards a system in which evidence is freely considered by judge or jury on its own merits, and with an emphasis on its relevancy to the crime charged, rather than its admissibility in terms of exclusionary rules drafted in and for a bygone age.

7.1 CORROBORATION – ORIGINS AND DEVELOPMENT

“**corroborate** v [f. L. corrōborāt - ppl. Stem of corrōborāre to strengthen, invigorate, f. cor- together, intensive + rōborāre to make strong...] To strengthen, make strong”¹.

Origins – the need for certainty

7.1.1 The requirement for corroboration in Scottish criminal practice was established in some form by the time that the earliest of the Institutional Writers took up their pens to describe Scots criminal law in earnest². At the end of the seventeenth century, Mackenzie³ described the “singularity” of witnesses, as well as their “contrariety”, as insufficient for proof. Over time, the requirement came to be repeated in one form or another by all the subsequent Writers, notably Hume in his classic statement⁴:

“...no one shall in any case be convicted on the testimony of a single witness”.

7.1.2 Hume explains:

“No matter how trivial the offence, and how high so ever the credit and character of the witness, still our law is averse to rely on his single word, in any inquiry which may affect the person, liberty, or fame of his neighbour; and rather than run the risk of such an error, a risk

¹ Oxford English Dictionary

² see generally Walker: A Legal History of Scotland Vol IV (The Seventeenth Century) chapter 16 pp 605-6

³ Mackenzie: Laws and Customs of Scotland in matters Criminal (2nd (Seton) ed) 1699 (p 269) c 26 para 14, referring to Susanna and the two elders (see Jackson : Essays in Jewish and Comparative Legal History “Susanna and the History of Singular Witnesses; see Gordon: ‘At the Mouth of Two Witnesses’: Some Comments on Corroboration in Hunter ed: Justice and Crime – Essays in Honour of Lord Emslie p 33)

⁴ Hume ii at p 385

which does not hold when there is a concurrence of testimonies, it is willing that the guilty should escape”.

A statement to the same effect appears in Alison⁵.

7.1.3 Up until comparatively recently, the rule applied equally to civil cases. Indeed, historically, as will be seen, its roots in civil cases were stronger than those in crime. Balfour neatly put it in Scots in a marginal note⁶:

“Twa witnessis at the leist makis lauchful probatioun”.

7.1.4 It is useful to trace the source of the requirement because it will provide a context for its utility. In this regard, Mackenzie and Hume deal with it in chapters on proof by witnesses which concentrate mainly on the many exclusionary rules prohibiting a wide range of persons from giving evidence at all. These included, at various times and differing situations: children, lunatics, criminals, relatives and women⁷.

7.1.5 As was noted in the consultation document⁸, the requirement can be traced to Biblical sources. Thus, in the Old Testament, it is stated that:

“Whoso killeth any person, the murderer shall be put to death by the mouth of witnesses; but one witness shall not testify against any person to cause him to die”⁹;

⁵ Principles & Practice of the Criminal Law of Scotland (1833) p 551, para 14

⁶ Practicks 1469 - 1579 (published 1754) p 373, see also Bisset: Rolment of Courts: 200

⁷ see generally the references in Walker: “Evidence”, Stair Society Vol 20, p 306 and for those remaining in the eighteenth century Walker: A Legal History of Scotland Vol V The Eighteenth Century p 556

⁸ para 3.7

⁹ Numbers 35 v 30

“At the mouth of two witnesses, or three witnesses, shall he that is worthy of death be put to death; but at the mouth of one witness he shall not be put to death”¹⁰;

and

“One witness shall not rise up against a man for any iniquity, or for any sin, in any sin that he sinneth: at the mouth of two witnesses, or at the mouth of three witnesses, shall the matter be established”¹¹.

7.1.6 In the New Testament it is phrased as follows:

“But if he will not hear thee, then take with thee one or two more, that in the mouth of two or three witnesses every word may be established”¹²;

and

“In the mouth of two or three witnesses shall every word be established”¹³.

7.1.7 Although it is not likely that Scots lawyers would have derived the legal principle solely from the Bible¹⁴, they would have been heavily influenced, especially in matters of procedure, by the Canon Law¹⁵. Furthermore, their education and training in continental Europe in medieval times and later might have pointed them towards the Civil¹⁶ Law. There, in the Code of Justinian, they would have read¹⁷:

“The Emperor Constantine to Julian, Governor

¹⁰ Deuteronomy 17 v 6

¹¹ Deuteronomy 19 v 15

¹² Matthew 18 v 16

¹³ 2 Corinthians 13 v 1

¹⁴ cf Stair : Institutions of the Law of Scotland IV.43.1 stating the rule in the civil context was “confirmed by the word of GOD” and founding on Deuteronomy, Matthew and Corinthians

¹⁵ Which formed the basis for Court of Session procedure from inception in 1532

¹⁶ i.e. Roman

¹⁷ Book IV Title XX Concerning Witnesses. The instruction is dated 334 AD

We have already directed that witnesses should testify after having been sworn, and that the preference should be given to those of honourable reputation.

In like manner, We have ordered that no judge shall in any case readily accept the testimony of only one witness; and now We plainly order that the evidence of only one witness shall not be taken. Even though he should be distinguished by senatorial rank”.

The same constitution appears in the Theodosian Code¹⁸:

“We have previously commanded that before they give their testimony, witnesses shall be bound by the sanctity of an oath, and that greater trust shall be placed in witnesses of more honourable status.

In a similar manner, we sanctioned that no judge should easily allow the testimony of only one person to be admitted in any case whatever. We now manifestly sanction that the testimony of only one witness shall not be heard at all, even though such witness should be resplendent with the honour of the glorious Senate”.

This corresponds to Hume’s treatment and, in the Civil Law, the requirement is also set in the context of a judicial system which contained many separate rules excluding large categories of persons as witnesses altogether. How then did Romano-canonical rules of evidence come to continue to permeate Scots criminal procedure whilst the form of trial in serious criminal cases, by way of the verdict of a jury, came from Norman England, where these rules did not hold sway?

- 7.1.8 The early church¹⁹ courts developed as a consequence of the delegation of the Bishops’ authority to decide disputes to legally trained officials. In determining cases, these officials would have been familiar with the Romano-

¹⁸ 11.39 The Trustworthiness of Witnesses and of Instruments (*De Fide Testium et instrumentorum*). Interestingly, the testimony of a single Bishop might be in a different category! (see Sirmondian Constitution 333)

¹⁹ consistory

canonical rule on the need for proof by two or more sworn witnesses²⁰. Proof by such methods continued in relation to what might now be categorised as civil cases. In serious criminal cases, which were dealt with by the secular authorities, although such proof appears to have been required at one time, there seems to have been a growth, during the 10th to 12th centuries, in trial by ordeal, that is, for example, by hot iron or water. This became a prevalent method of proof of guilt itself, rather than purely a method of establishing innocence in the face of such proof²¹. This may have been an Anglo-Norman influence²². At all events, the results of an ordeal were regarded as a determination by God and proof by this method was thought, at least by many, to be stronger than by testimony given under oath. However, it came to be realised that an ordeal was not the most reliable method by which to secure sound convictions²³.

7.1.9 In 1215 the Fourth Lateran Council effectively abolished trial by the two ordeals of iron and water²⁴ by prohibiting the necessary involvement of priests in the relative rituals²⁵. This was followed in Scotland by a statute of Alexander II in 1230²⁶. In future, at least in most systems influenced by the *ius commune*²⁷, proof of guilt would revert to the determination of a human judge. It was important for any proof to be the equivalent of the judgment of God. Certainty, or something very akin to it, was required in order to

²⁰ see generally Brundage: Medieval Canon Law p 132

²¹ see generally Bartlett: Trial by Fire and Water p 69

²² *ibid* p 48-49

²³ see Walker: "Evidence" in Stair Society Vol 20, p 302

²⁴ see Bartlett pp 100 et seq for an analysis of the reasons

²⁵ trial by battle appears to have survived for some time

²⁶ c 6, APS: 400 "of challenge of thyt or of reyflake" abolishing, at least for theft or robbery, the ordeals of "dykpot na yrn"

²⁷ the general Romano-canonical law applicable, subject to municipal variations, in most of Christendom

persuade the populace of the validity of the system. The Romano-canonical rules of proof did this by insisting, for proof of guilt, that there be either a confession or the testimony of two witnesses speaking to the deed alleged. Such a system, which did not permit proof by circumstantial evidence alone, eliminated, to a substantial degree, subjective decision making in favour of the judicial application of objective criteria²⁸.

7.1.10 It has been suggested that the requirement, along with the exclusionary rules relative to categories of witness, was based on a distrust of juries²⁹. But, in most systems where the rule applied, it was mistrust of the professional judge rather than the jury which was the concern. Yet in Scotland, unusually, it was not a judge but the jury that superseded the ordeal in cases of serious crime³⁰. Nevertheless, as distinct from the position in England and Wales, where there were no formal rules on sufficiency of evidence, because the jury would decide guilt from their own local knowledge³¹, corroboration, as a formal requirement of proof, took root.

7.1.11 The function of the requirement is well summarised by Langbein³²:

“The Roman-canon law of proof developed in the Middle Ages to serve the needs of the relatively weak governments then emerging. ...the system of statutory proofs was, for all its rigidity, a great advance in its day ... It permitted the officialization and rationalization of criminal procedure. In place of the ordeals that purported to invoke the judgment of God, the Roman-canon procedure

²⁸ see Langbein: *Torture and the Law of Proof* p 6

²⁹ Gordon: “At the Mouth of Two Witnesses’: Some comments on corroboration” at p 39

³⁰ see Cameron: *Argyll Justiciary Records Vol 1*, 12 *Stair Society*, p xvii; see generally Willock: *The Origins and Development of the Jury in Scotland*, 23 *Stair Society*

³¹ this appears also to have been the case in Scotland at one time

³² (*supra*) p 55

legitimated fact-finding and adjudication by public officials, judges. The great and ultimately self-defeating safeguards of the Roman-canon law of proof were concessions made in order to implement this radical reorganisation of criminal procedure. By forbidding judges to draw inferences of guilt from circumstantial evidence and by limiting the judges' power of condemnation to cases where there were two eyewitness or confession, the medieval law laid claim to certainty. Because the law of proof made judgment rest upon certainty, there would be less objection that mere mortals were displacing God from the judgment seat".

Development – Towards Flexibility

7.1.12 In continental Europe, where the requirement for corroboration remained in place for centuries, practical considerations dictated that there developed a system whereby half proofs, such as one eye witness or circumstantial evidence, would entitle the judge to order the suspect to be tortured. That might produce a confession³³; the truth of which could be objectively determined³⁴ and which sufficed on its own under the original formulation of the requirement but which, under this scheme, would be combined with other testimony. But it appears that some persons were not inclined to admit guilt even under torture. The law therefore progressed whereby these half proofs would be enough to merit punishments short of death or other serious bodily impairment.

7.1.13 The law in Scotland initially developed along similar lines. Thus, despite the general statement in Mackenzie³⁵, Hume describes cases in the early part of the 18th century where evidence was accepted as sufficient to justify lesser

³³ Constitutio Criminalis Carolina (1532) Article 22, referred to in Langbein (*supra*) p 49

³⁴ i.e. special knowledge

³⁵ *supra* see para 7.1.1

punishments than those exigible on full proof³⁶. The continuing influence in Scotland of Romano-canonical rules of evidence remained considerable at that time³⁷. In Europe, with society no longer regarding torture as acceptable, and it becoming recognised that the requirements of proof were too high in difficult cases, the half proofs became sufficient on their own for convictions in all but capital crimes³⁸. For reasons which are not entirely clear, Scotland did not follow this route. Rather it seems to have become stuck, so far as the generality is concerned, with the law as stated by Hume at the end of the eighteenth century.

7.1.14 The modern systems of Europe in the 18th and 19th centuries developed further. Instead of expecting the judge to apply the objective criteria of the *ius commune* as an automaton, advances in thinking changed the approach entirely. Provided society could ensure that its judges were learned, reasonable and impartial, the essence of proof of guilt would involve the subjective persuasion of the trier of fact. The test would become, in French, “l’intime conviction” and, in German, “freie Beweiswürdigung”. This is the antithesis of a system with formal rules of evidence, including a requirement for corroboration. Instead, there are no rules of proof and conviction depends upon the view of the judge, or subsequently a jury³⁹, having heard all relevant evidence placed before the court.

³⁶ Hume ii 383 referring to *Bisset and Currier*, July 1705 and *Clarke*, June and July 1705

³⁷ see Jackson : The Memorials in Haggart and HM Advocate v Hogg and Soutar, 1738 in 35 Stair Society 221, memorial for Hogg at p 250 under reference to Julius Clarus at p 254, and Prosper Farinatus at p 255

³⁸ *Constitutio Criminalis Theresiana* (1769), also referred to in Langbein (supra) p 50

³⁹ see, e.g. the direction to a Belgian jury about being “inwardly convinced” in *Taxquet v Belgium* 16 November 2010 (no. 926/5) para 29

7.1.15 In England and Wales, juries were already content to base their verdicts upon a subjective consideration of whatever the evidence, as it appeared to their members, demonstrated. Convictions could follow from what the *ius commune* would regard as half proofs or even less. Yet the Scots system neither followed its continental neighbours and their systemic antecedents, nor did it adopt the English liberal approach to sufficiency. The Review has not been able to ascertain whether this was as a result of lack of considered reform following the Treaty of Union in 1707 or for some other reason. Perhaps mistrust of judges was a factor. But the reality is that Scots law retained the Romano-canonical rules, when all around had either abandoned them as unsuitable for use in prevailing social conditions or had never had them in the first place.

7.1.16 Instead, as Scots law came to recognise the problems of strict proof, the requirement in its original Romano-canonical form was adjusted or, put more crudely, stretched or bent by the courts over time in an attempt to permit those, against whom there was strong but technically insufficient evidence, to be convicted. As will be seen, the alterations to what was at first a simple but inflexible requirement led to a situation in which the modern law of corroboration became difficult to understand by anyone not schooled in the law of evidence. Its growing complexity led to a situation in which many within the criminal justice system came to have a slender appreciation of its

tenets. Indeed, even the judiciary may disagree on what it means and how it is to be applied in an individual case⁴⁰.

7.1.17 It has long been recognised that the requirement for corroboration is a significant hurdle of proof for the Crown to overcome in criminal cases. This is especially so for relatively minor offences, including simple assaults or thefts, where there may either be simply no witnesses other than the complainer or the nature of the offence does not justify a thorough investigation in police resource and operational terms. Because of these difficulties, the courts began to adopt, what might generously be described as a, “flexible approach”⁴¹ to corroboration. This could alternatively be called judicial undermining of the strict requirement. The classic example is the Full Bench⁴² decision in *Gillespie v Macmillan*⁴³, wherein proof of a driver’s excessive speed was established by two police officers timing a car at the start and at the end of a measured stretch a road, each officer using a synchronised watch as the driver passed him. Neither timing was corroborated, yet the evidence was deemed sufficient.

7.1.18 The views of the two senior Scottish judges provide a useful insight into judicial thinking at the time (1957). Such thinking was, after all, heavily influenced by the need for corroboration as proof in both civil and criminal

⁴⁰ for recent examples see *Mackintosh v HM Advocate* 2010 SCCR 168; *CJLS v HM Advocate* 2009 JC 326; *O’Hara v HM Advocate* 2009 SCCR 624; and *Thomson v HM Advocate* 2009 SCCR 415

⁴¹ Gordon (*supra*) p 38

⁴² five judges

⁴³ 1957 JC 31 and see now *Cox v PF Aberdeen* 2011 SCCR 265

cases. The Lord Justice General (Clyde) summarised the general law in a single paragraph which is worth revisiting⁴⁴:

“Upon this branch of the law two matters at least can be said to be definitely established. In the first place... it is well settled that no conviction in Scotland will stand if it is based upon the evidence of only a single witness, however credible he or she may be⁴⁵... In the second place, it is equally well settled that two witnesses are not required to prove every fact in a case⁴⁶... In between these two extremes there is an infinite variety of possible situations in which the question of sufficiency of evidence can arise, and no single test of sufficiency which will solve every such situation has ever been or indeed can be laid down. The matter must depend in the last resort upon whether the evidence is sufficient to carry the case beyond mere suspicion and into the sphere where it satisfied the tribunal that the case is proved beyond reasonable doubt”.

7.1.19 The last sentence is one which may be said to define the rule of sufficiency which a modern legal system ought to have. But it does not encapsulate the requirement for corroboration as it might traditionally have been understood. Yet it is interesting that it should be so stated in a criminal case in the 1950s. The Lord Justice General continued with the issue of sufficiency in connection with proof of the commission of a crime⁴⁷:

“Firstly (*sic*), the evidence of a single witness to the commission of the crime may be sufficiently corroborated by surrounding facts and circumstances, so as to establish the necessary degree of certainty⁴⁸... Secondly, in the case of circumstantial evidence, two witnesses are not necessary to each circumstance⁴⁹... It is to be observed that in a case of circumstantial evidence it is not a matter of one witness corroborating another, for each may be speaking to a quite separate and independent fact. It is the mutual interlacing and coincidence of these separate facts which can establish the case against the accused”.

⁴⁴ At 35-36

⁴⁵ Alison ii, 551; Hume ii 383; Dickson ii para 1807

⁴⁶ Hume ii 384; Alison ii 552, Dickson ii para 1811

⁴⁷ at 36

⁴⁸ Hume ii, 384

⁴⁹ Alison i 323; Hume ii 384; compare Dickson ii para 1811 and Alison ii, 551

He concluded⁵⁰:

“Although two witnesses are needed to incriminate an accused, a single witness to each fact in a chain of circumstantial evidence can be sufficient in law to warrant a conviction”.

If the latter statement were the law, then it is not one grounded upon the requirement of corroboration, at least strictly.

7.1.20 The contention, that having only one police officer to speak to each fact was insufficient, was specifically commented upon by the Lord Justice-Clerk (Thomson) as follows⁵¹:

“If law were an exact science or even a department of logic, there might be something to be said for this argument. By relying on the disparate qualities of space and time the logician can prove that in a race the hare can never overtake the tortoise. But law is a practical affair and one has to approach its problems in a mundane common sense way. We cannot expect always to have a tidy and interrelated picture, in real life a surrealistic element is apt to creep in, and the picture, although untidy and unharmonious, may be a picture all the same... The analytical approach to the problem is over subtle and over-simplifies the problem. When one views that problem as a practical issue, the only risk is that the knob was not pressed at the precise moment; in other words that the presser was unreliable for some reason or another. The safeguard against this risk is whether the tribunal believes the witness, and that is the safeguard which may operate whenever a link in the chain or a tile in the mosaic or a piece in the jigsaw is spoken to by one witness only”.

⁵⁰ at 38

⁵¹ at p 40

7.1.21 The chain analogy⁵² is not consistent with the traditional view of the requirement and the *dicta* in *Gillespie* has been strongly criticised as inconsistent with it⁵³. The criticism can be simply stated⁵⁴:

“...whereas Hume insisted on *concurrence* of testimonies the Court in *Gillespie’s* case relied on testimonies which were only set out consecutively. Whereas Hume regarded the testimonies in parallel, the Court in *Gillespie* regarded them in series. Whereas two testimonies in parallel confirm one another, two testimonies in series do not. Whereas two testimonies in parallel reduce the risk of error, two testimonies in series (as in *Gillespie’s* case) may increase that risk”.

That criticism is well made, in so far as it argues that *Gillespie* is out of kilter with the requirement for corroboration as understood in Romano-canonical terms. This is so even although the reasoning in *Gillespie* was effectively regularly followed in the context of circumstantial cases⁵⁵. But it should not be assumed that the judges in that case were not aware of the implications of their analyses and that they had fallen into some form of academic or theoretical error. Given their backgrounds as lawyers well versed in the subject in both the civil and criminal spheres, it is more likely that they knew exactly what they were doing, which was engaging in the continuing process of altering, or bending, the requirement for corroboration to meet the needs of modern society. Thus, the criticism is sound if it is presupposed that Scots law must remain thirled to the requirement in its Romano-canonical sense. If it

⁵² see *Scott v Jameson* 1914 JC 187

⁵³ see Macphail: Revised Research Paper on Evidence para 23.04, Walker & Walker : Evidence (1st ed) para 387, references in fn 74; Wilson: The Logic of Corroboration (1960) 76 Sc Law Rev 101 contrasting the “old” preferred theory with the “new” *Gillespie* theory founded on *Lees v Macdonald* (1893) 3 White 468

⁵⁴ 1958 SLT (news) 137

⁵⁵ see e.g. *Little v HM Advocate* 1983 JC 16, LJG (Emslie) at 20, under reference to *Morton v HM Advocate* 1938 JC 50, LJ-C (Aitchison) at 52; *Al Megrahi v HM Advocate* 2002 JC 99, LJG (Cullen) at para 31 under reference to Hume ii, 383-4; *Mack v HM Advocate* 1999 SCCR 181, LJG (Rodger) at 185

does then, in each individual case, the judge is the games master and the lawyers are the players pressing complex contentions on sufficiency which may not only be incapable of accommodation within the Lord Justice-Clerk's view that law "is a practical affair" but also which, if sustained, may ensure that Scots criminal law remains deeply steeped in what is essentially late medieval jurisprudence.

7.2 CORROBORATION

Introduction

7.2.1 The requirement for corroboration was cited in *McLean* as one of several elements in the criminal justice system that contributed to the overall fairness of the trial procedure. The Review's Terms of Reference expressly set out that this is an area which must be examined. It is one of the issues that has attracted most comment in the consultation responses, workshops and other meetings. It has also been the focus of considerable media attention. More than any other feature of the criminal justice system, it is seen by many as a defining and distinctive characteristic of the Scots Law of evidence in criminal cases.

7.2.2 The Review has no doubt that a majority of persons, especially lawyers, practising in criminal law, regard corroboration of testimony as an important aspect of their professional lives¹. Many see it as an important tool, which helps them to make decisions at various stages in the investigative and trial processes. The police officer has regard to it in deciding whether to report a case to the procurator fiscal. The procurator fiscal looks to see if there is corroborated evidence before drafting a complaint or moving for full committal on a petition. The defence solicitor or advocate has to examine the prosecution case in order to form a view on whether there is sufficient corroborated evidence before advising his/her client on how to plead. He/she

¹ see Crowe: A case for the abolition of corroboration in criminal cases 2011 SLT (news) 179

will look at the evidence at trial and an absence of corroboration will justify a “no case to answer” submission at the conclusion of the Crown case. The judge will respectively either acquit the accused or direct the jury to do so where no corroboration exists at the stage of the submission or at the conclusion of all the evidence. The whole matter may be reviewed at appeal, when a lack of corroboration will inevitably result in the quashing of a conviction. It is so much part of the daily decision making process that it has come to be seen as a, if not the, pillar of the system.

7.2.3 The necessity of having corroborated evidence has, as will be clear from the previous chapter, lain at the heart of the criminal justice system since time immemorial and has been, and still is, regarded by many as an “invaluable safeguard” against the occurrence of miscarriages of justice². Its stated purpose, in criminal cases, is to prevent an accused from being wrongly convicted on the basis of a single witness, who may be either fallible or dishonest. This is, as noted above, the reasoning of Hume³. Burnett states that the rule is founded “both in reason and humanity”⁴. Professor Gordon⁵ neatly sums up the point, describing it as an example of “rule-utilitarianism”, as follows⁶:

“we accept that sometimes a single witness can be reliable and that by refusing to believe him we may be doing injustice in the particular case; but we cannot always be sure about our judgments of reliability, and indeed we are so likely to be wrong, and the results of our error

² *Morton v HM Advocate* 1938 JC 50, LJ-C (Aitchison) at 55; MacPhail: “Evidence”, Stair Memorial Encyclopaedia para 766

³ Hume ii, 383

⁴ Criminal Law (1811) p 509; quoted by the LJG (Rodger) in *Fox v HM Advocate* 1998 JC 94 at 98

⁵ now Sir Gerald Gordon

⁶ Gordon: “At the mouth of two witnesses...” (*supra*) p 35

are likely to be so serious, that it is better to make it a rule that we shall never rely on only one witness, because, on the whole, that will lead to less injustice than will reliance on our ability to detect unreliability”.

7.2.4 It must be recognised that criminal law, including the rules of evidence and procedure, has advanced some distance since the days of Hume and Burnett. Capital punishment no longer exists in time of peace. Prosecutors and judges are, for the most part, well educated in the law and procedure and, so far as is known, not readily susceptible to corrupt practices. There is a legal aid system providing effective representation for the defence. Scientific proof is a regular feature in trials. Persons convicted in the High Court have a right of appeal. Almost all persons, including the accused, are acceptable as competent witnesses. It is an altogether different legal and social world from that of the early or late eighteenth century.

7.2.5 The question, which the Review has asked itself, is whether the requirement is a useful tool for achieving Professor Gordon’s stated purpose in the modern world or whether it is an artificial construct that actually contributes to miscarriages of justice in the broad, rather than appellate, sense. Is corroboration merely a comfort blanket for decision makers; that is, something which does not really assist in making a decision the correct one, but which can be used to justify that decision in objective terms?

Current Law

7.2.6 According to the requirement, there must first be at least one source of evidence (i.e. the testimony of one witness) that points to the guilt of the

accused as the perpetrator of the crime. That evidence may be direct⁷ or circumstantial⁸. Secondly, each “essential” or “crucial” fact⁹, requiring to be proved, must be corroborated by other direct or circumstantial evidence (i.e. the testimony of at least one other witness).

7.2.7 Generally, there are two crucial facts requiring proof in every crime: (1) that the offence was committed; and (2) that the accused committed it. *Dicta* to the effect that “*mens rea*” is a fact which requires to be corroborated are widely regarded as erroneous¹⁰ even if this view continues to be advanced, especially in sexual offences cases¹¹. Intention is a fact which may be inferred from proof by corroborated evidence of the crucial facts. In relation to proof of the crime, not every element requires corroboration. Thus, in an assault, if one part of the attack is established, that may be sufficient, at least where the assault is all of one type¹².

7.2.8 There are some limited statutory exceptions to the requirement for evidence to be corroborated¹³. These exceptions, which tend to relate to minor crimes, do not attract any substantial adverse criticism.

⁷ e.g. eye witness evidence identifying the accused as the perpetrator of the offence

⁸ otherwise known as “indirect”, i.e. evidence of a fact (e.g. fingerprint) or facts from which another fact (e.g. presence of accused at the scene) may be inferred

⁹ Walker & Walker: Evidence (1st ed) para 380, p 402 et seq; (3rd ed) para 5.2.2

¹⁰ *Spendiff v HM Advocate* 2005 JC 338 analysing *Lord Advocate’s Reference (No 1 of 2001)* 2002 SCCR 435; *Mackintosh v HM Advocate* 2010 SCCR 168; see generally Chalmers: Distress as corroboration of Mens Rea 2004 SLT (news) 141

¹¹ *Adamson v HM Advocate* 2011 SCCR 271, although this now refers to “corroborated proof of distress”, see LJG (Hamilton) at para 26

¹² *Campbell v Vannet* 1998 SCCR 207; it may be different if proof of the use of a weapon is required

¹³ e.g. Road Traffic Offenders Act 1988 s 21, parking and related offences

7.2.9 Where then has the law reached? What was, at least until recently, regarded as the classic statement on the requirement for corroboration in modern terms came from a civil case, namely *O'Hara v Central SMT*¹⁴, which pre-dates *Gillespie v MacMillan*. The *dictum* is from the then Lord President (Normand) and is as follows¹⁵:

“Corroboration may be by facts and circumstances proved by other evidence than that of a single witness who is to be corroborated. There is sufficient corroboration if the facts and circumstances proved are not only consistent with the evidence of the single witness, but more consistent with it than with any competing account of the events spoken to by him. Accordingly, if the facts and circumstances proved by other witnesses fit in to his narrative so as to make it the most probable account of the events, the requirements of legal proof are satisfied”.

7.2.10 It can be seen immediately that what is being described as corroborative evidence is not evidence which, of itself, points towards guilt. When one witness speaks to seeing a person committing a particular crime, the potential corroboration is not testimony that necessarily also describes the crime. Rather it is testimony which covers facts which are consistent with the first witness's account and appears to confirm that testimony, as distinct from confirming the facts, or events spoken to, as accurate or true. This is, as described in the last chapter, the law bending in the face of a requirement which, if strictly applied, cannot operate satisfactorily in practical terms in the modern world of criminal justice, since it would result in very few convictions despite the existence of strong circumstantial, or even direct, evidence.

¹⁴ 1941 SC 363

¹⁵ at 379

7.2.11 After what might be described as a period during which the requirement appeared to be strengthened, or perhaps changed, following *Mackie v HM Advocate*¹⁶, it was re-affirmed in the criminal case of *Fox v HM Advocate* in the following, rather different, terms¹⁷:

“Corroborative evidence is... evidence which supports or confirms the direct evidence of a witness... The starting-point is that the jury have accepted the evidence of the direct witness as credible and reliable. The law requires that, even when they have reached that stage, they must still find confirmation of the direct evidence from other independent direct or circumstantial evidence... The evidence is properly described as being corroborative because of its relation to the direct evidence: it is corroborative because it confirms or supports the direct evidence. The starting point is the direct evidence. So long as the circumstantial evidence is independent and confirms or supports the direct evidence on the crucial facts, it provides corroboration and the requirements of legal proof are met”.

7.2.12 Evidence can thus be corroborative even if, taken on its own, it does not point conclusively, or even at all, towards an accused’s guilt. In a case where identification is in issue, a positive identification by one witness may be corroborated by a resemblance identification by another¹⁸ which, on its own, would not have been sufficient for what might be called the first source. It is capable of corroborating a first source but, itself, would not amount to sufficient evidence if supported only by another resemblance identification.

7.2.13 Put another way, the law does not require two witnesses in the original Romano-canonical law sense of two testimonies, each confirming guilt. It requires one such testimony and another witness speaking to facts which make the truth or accuracy of the first witness’s evidence more likely. Whether

¹⁶ 1995 SLT 110, LJG (Hope) at 119

¹⁷ 1998 JC 94, LJG (Rodger) at 100-101

¹⁸ *Ralston v HM Advocate* 1987 SCCR 467

these facts do make the first witness's evidence more likely to be true is a matter of judgment, upon which there can be disagreement, even amongst the judiciary. Even then, it is not every fact which the law imbues with this corroborative characteristic. Although a statement made by a witness to a third party immediately after an incident¹⁹ may, if proved, lend support to that witness's veracity, a jury would be directed that, even so, it does not provide corroboration as it emanates from the same source (i.e. the same witness).

Basic Principles

7.2.14 The requirement for corroboration permeates the whole criminal justice process from suspicion to conviction. It is not just a test adopted in court. Its existence means that, in respect of all crimes, however trivial, the prosecution, and hence the police, need to find corroboration unless the requirement is excluded by statute. If corroboration is not found, except where the case is a particularly serious one, it will not normally be reported to the procurator fiscal and the case will therefore not be progressed. Of course, even when corroboration is found, the investigative process does not suddenly stop. It is accepted that, within reason and depending to a degree on the seriousness of the offence, the police will, or at least ought to, seek to find further relevant evidence. Once the case is reported and it is agreed that there is sufficient corroboration in a technical sense, the procurator fiscal or Advocate Depute still requires to consider whether it is in the public interest to proceed. This will involve an additional element, notably the question of whether there is a realistic prospect of a conviction.

¹⁹ "*de recenti*"

Practical Considerations

7.2.15 How does the requirement work in practice? How do these rules within rules actually operate in the courts? The best clue to understanding how corroboration works is to grasp that, however the requirement is phrased in theory, it is about the number of witnesses speaking to a fact or facts and not about the number of different, or separate, facts necessary to prove a case. When reference is made, in the context of the requirement, to a “source of evidence”, it is to the testimony of a single witness and not to a particular fact. Thus, as an easy example, two closely related witnesses standing at a street corner may each identify a particular individual as someone who assaulted a victim. They will each corroborate the other, even if they are brother and sister, husband and wife or members of the same gang. Another example is where there is CCTV involved. Provided that the recovered recording is proved by two witnesses to show the scene of a crime, two witnesses each identifying a person from the recording as the assailant will suffice, even if they are both police officers viewing the recording later. The CCTV recording is not the “source of evidence”. The corroborating sources are the two witnesses speaking to the recording and the two (possibly the same) witnesses identifying the person shown.

7.2.16 Similar considerations apply to forensic evidence, such as a fingerprint recovered or found at the scene or the discovery of a person’s DNA on an object at the locus. The finding of a fingerprint or DNA at the scene of a crime does not constitute a single source of evidence which requires to be corroborated for guilt to be established. It is a solitary fact, but one which, if

proved by corroborated testimony, may of itself be sufficient to prove guilt. This may occur where, for example, the print or DNA is found at the scene of a housebreaking or on a murder weapon. In that event, the fact of finding the print or DNA will be sufficient for a conviction if it, and its successful comparison to samples taken from the accused, are each spoken to by two witnesses.

7.2.17 It is in this type of area that misunderstandings can occur especially, but by no means exclusively, by those not trained in the criminal law. If the finding of a fingerprint or DNA sample is one fact amongst several others in a case pointing towards guilt, there is no need for that finding to be spoken to by two witnesses. One is sufficient where there is other testimony proving the other facts. It is only where the finding is the only fact incriminating the accused that the finding of the print or DNA, the provenance of the sample taken from the accused and the comparison of the two, require to be proved by corroborated evidence; i.e. the testimony of two witnesses. The problem with this is that it may well not be known, at the time of the finding or the comparison of the finding, whether this is the only piece of incriminating material. Thus, it is the common and accepted practice for there to be two witnesses²⁰ to speak to the finding of any print or DNA, two witnesses²¹ to speak to the taking of samples from the then suspect and two witnesses²² to speak to the comparison. There is little doubt that this leads to considerable, unnecessary and costly duplication of effort and sometimes testimony²³.

²⁰ e.g. scenes of crime officers

²¹ e.g. police officers or a combination of doctor and police officer

²² e.g. fingerprint experts or forensic scientists

²³ dual testimony is not normally required; 1995 Act ss 280-281

7.2.18 It may seem immediately apparent that, were modern legislators seeking to devise a model for sufficiency of proof in the today's sophisticated world of information and communications technology, corroboration would not be at the forefront of their thinking. If a crime is shown happening on a CCTV recording, it hardly seems necessary for proof that the recording be spoken to by two witnesses, even if the camera does sometimes "lie". If a person's body is examined by a recognised pathologist and he assures the court that the person was dead, it hardly seems necessary to insist that another doctor give evidence to prove that death. There are many more examples, even if there are also situations, including certain instances of eye-witness identification, where a fact finder may be advised not to rely on the evidence of one witness alone. However, in order to deal with the problems of the requirement in the twentieth and twenty first centuries, the courts developed a series of subsidiary rules all of which, like the *dicta* in *Gillespie v Macmillan*, were ultimately designed to create a sufficiency of proof, where none would exist were the requirement to be enforced in its traditional Romano-canonical guise.

Moorov

7.2.19 The most complex aspect of the law of corroboration in modern times is mutual corroboration, or corroboration by similar facts, highlighted in, although not strictly created by, the celebrated case of *Moorov*²⁴ in 1930. *Moorov* itself was concerned with the sufficiency of identification evidence where each of a number of complainers, who were all assistants in a draper's shop, spoke to the appellant as the perpetrator of indecent assaults on her. No

²⁴ *Moorov v HM Advocate* 1930 JC 68

single act of indecency was corroborated by the testimony of any other witness, yet it was held that each separate act, spoken to by one complainer, could be corroborated by the testimony of another complainer speaking to another such act. The use of the principle was expanded over time to cover other aspects of proof, including the facts of the crime itself and situations where there was no eye-witness identification at all of the perpetrator in respect of one or more of several charges²⁵. This form of corroboration was always available at least in theory, whereby one complainer's testimony about a particular attack could corroborate another complainer's testimony of a different attack; provided both incidents were sufficiently closely connected in time, character and circumstances. In that situation, what are separate acts are treated as a single course of conduct. It is that course of conduct, if demonstrably perpetrated by the same person, that requires to be proved by corroborated evidence and not each separate incident²⁶.

7.2.20 This area of the law is fraught with dangers in relation to both what amounts to a sufficiency of evidence and how to direct juries in the event of one or more complainers, in respect of several charges, being believed or disbelieved²⁷. There are frequent arguments about what might, or might not, amount to corroboration especially where two or more incidents are separated by significant time gaps²⁸.

²⁵ *Howden v HM Advocate* 2009 JC 308 and *Townsley v Lees* 1996 SLT 1182

²⁶ see The Scottish Law Commission "Similar Fact Evidence and the Moorov Doctrine"

²⁷ *Dodds v HM Advocate* 2003 JC 8

²⁸ see even in the last two years: *M v HM Advocate* [2011] HCJAC 6 doubting *Cannell v HM Advocate* 2009 SCCR 207; *Pringle v PF (Dumbarton)* 2011 SCCR 97; *ANM v HM Advocate* 2011 SCCR 47; *Hussain v HM Advocate* 2010 SCCR 124 and *CAB v HM Advocate* 2009 SCCR 216

Distress

7.2.21 Similar considerations apply to the use of a complainer's distress, as observed by a third party after an alleged sexual offence, to corroborate the use of force²⁹, or lack of consent in the course of that offence³⁰, even where there is an alternative explanation for the particular emotional response. The reasoning behind this is that the complainer's distress, spoken to by a third party, is a physical manifestation or reaction, akin to but not the same as a *de recenti* statement. Independent proof of the reaction can lead to an inference that whatever happened did so against the will of the complainer and was therefore something brought about by violence or, now, at least without the complainer's consent. This development has in turn led to new problems, since the courts have also held that, whilst distress can corroborate lack of consent³¹, it cannot be used as corroboration of the facts in the libel, such as intercourse or particular acts of violence or indecency³². There is, of course, little problem with using this type of distress as a bolster to a complainer's credibility. It is its use, as something emanating from a single source (i.e. the complainer in the form of her oral testimony and demonstrable distress) that concerns corroboration purists on the issue of sufficiency.

Confessions

7.2.22 A confession, whether corroborated or not, is regarded as just one source of evidence pointing towards guilt. It too, like the testimony of an eye witness

²⁹ as the law stood pre *Lord Advocate's Reference (No 1 of 2001)* 2002 SCCR 435

³⁰ *Yates v HM Advocate* 1990 JC 378n, 1977 SLT (notes) 42; *Smith v Lees* 1997 JC 73

³¹ Which a *de recenti* statement cannot

³² *Smith v Lees* (*supra*)

(of which it is a variant) needs to be corroborated³³. How is that to be achieved? On a strict view, there ought either to be evidence from another source which points to the guilt of the accused or at least testimony confirming the truth of a fact or facts in the confession, such as the location of the body, which could only have been known to a guilty person (a “special knowledge” confession)³⁴. However, so far as the former is concerned, the general view is that the corroborating testimony need only be such as to make the truth of the confession more likely³⁵, not that it points to a fact demonstrating the accused’s guilt. In relation to the latter, the Crown do not need to prove that the accused was the only person who knew of the fact spoken to. Proof that other persons, such as the police, were aware of the fact does not prevent it being used as corroboration³⁶. As an addendum to this area, where a “special knowledge” confession is the only evidence against the accused, it is necessary for the confession itself to be proved by corroborated evidence. This means that, even if the confession is recorded on video or audio tape, two persons, usually police officers, require to speak to the interview and the special knowledge adminicles. This is not the case with an admission, the truth of which is supported by other testimony. In that event, the evidence about the admission need not be corroborated. However, intricate problems may then occur when directing a jury, where the other testimony may be rejected by a jury as incredible or unreliable.

³³ cf the Romano-canonical law *supra*

³⁴ *Manuel v HM Advocate* 1958 JC 41 following Alison (*supra*), p 580

³⁵ *Hartley v HM Advocate* 1979 SLT 26, Lord Dunpark at 33; see also the *dicta* in *O’Hara v Central SMT* and *Fox v HM Advocate* (*supra*)

³⁶ *McAvoy v HM Advocate* 1982 SCCR 263

The Convention

7.2.23 Article 6 of the Convention does not require a state to insist that evidence be corroborated in order for a person to be convicted. It does, of course, provide a right to a fair trial. There have been cases in which the European Court has expressed some willingness to consider the way in which evidence has been obtained in determining whether a trial as a whole has been fair³⁷. In the context of hearsay, for example, it has made some pronouncements which have had a bearing on what evidence might be regarded as sufficient, even if this area is approached from the angle of fairness, in the sense of the ability of a person to test whatever evidence is adduced against him/her. Since the requirement for corroboration does not exist in any other jurisdiction, it is reasonable to assume that, were it to be removed, there would be no basis for arguing that this would result in the trial process as a whole infringing Article 6. However, the fact that the removal of the requirement for corroboration would not result in an infringement of Article 6 is not, of itself, a sufficient reason for its abolition. It would, of course, be ironic if Scotland were to remove the requirement for corroboration just as the European Court decided that, following the hearsay example³⁸, it was unfair for a person to be convicted solely on the evidence of one witness. There appears to be no immediate prospect of that becoming its jurisprudence³⁹.

³⁷ e.g. *Edwards and Lewis v United Kingdom* (2005) 40 EHRR 24 on entrapment and disclosure

³⁸ *N v HM Advocate* 2003 JC 140

³⁹ *Gafgen* at para 164

Other Jurisdictions

7.2.24 Common law jurisdictions may have a requirement for corroboration in certain cases. In England and Wales, for example, by statute, it is still required in cases of perjury⁴⁰ and, curiously, speeding⁴¹. But generally it is not an absolute requirement. As one legal historian put it⁴²:

“...English law did not adopt the general principle of merely counting witnesses”.

However, in jury trials it became obligatory to give the jury a special warning⁴³ about the dangers of accepting uncorroborated evidence in certain classes of case. These were trials where the evidence against an accused came solely from a child⁴⁴, the complainer⁴⁵ in a sexual offences case or an accomplice⁴⁶. The warning was to the effect that it was dangerous to convict without corroboration, but that the jury could do so if they were nevertheless satisfied of the truth of the testimony⁴⁷. There are other situations where warnings of a similar type could be given, including where a witness might have an improper motive for lying or where the evidence against an accused was in the form of a fleeting eye witness identification.

⁴⁰ Perjury Act 1911 s 13

⁴¹ Road Traffic Regulation Act 1984 s 89; cf *Gillespie v McMillan* (*supra*)

⁴² Plucknett: Concise History of the Common Law p 387

⁴³ a “care warning”, or what would be described as a “*cum nota*” warning in Scotland

⁴⁴ whose testimony would not have been on oath

⁴⁵ whether male or female

⁴⁶ *socius criminis*

⁴⁷ see generally Archbold 2011 para 4-404b; Blackstone 2011 para F5.1 et seq

7.2.25 The rules concerning the need to give warnings have largely been abolished in England and Wales⁴⁸ and elsewhere⁴⁹. The reason given for abolition in England and Wales was that the rules concerning corroboration were deemed to be inflexible, complex and anomalous⁵⁰. This was so despite firm pronouncements at the highest level in earlier cases about the utility and desirability of their application⁵¹. The thinking was that the rules had been developed⁵²:

“for the protection of accused persons against the possibly unsophisticated reasoning processes of juries and lay magistrates--against the failure of lay people to take account of the motives which accomplices may have for lying, or the alleged propensity of the victims of sex offences to fantasise and fabricate”.

But, as outlined above, there were many cases, outwith the rigid categories described, where a judge might be expected to give a warning and many within these categories where no warning was appropriate. It is now a matter for the discretion of the trial judge whether to give a warning to a jury in respect of unsupported evidence⁵³. The terms of any warning will depend on the circumstances of each case, the issues raised and the content and quality of the witness's evidence. For a warning to be given, there has to be evidence that the witness may be unreliable. Assertion or suggestion in cross-examination is not sufficient.

⁴⁸ Criminal Justice and Public Order Act 1994 s 32

⁴⁹ see recently in India: *State of Madhya Pradesh v Ramesh and Anr*, Supreme Court, 18 March 2011, Dr BS Chaunun J at paras 11 and 13 on the lack of any rule of law requiring corroboration of a child's evidence

⁵⁰ Law Commission Report: Corroboration of Evidence in Criminal Trials (Cmnd 1620) (1991)

⁵¹ see e.g. *R v Spencer* [1987] 1 AC 128, Lord Ackner at 141; *R v Hester* [1973] AC 296, Lord Morris at 315

⁵² Ashworth: “Corroboration”: in place of formalism [1992] Crim L R 1

⁵³ *R v Muncaster* [1999] Crim LR 409 and *R v Makanjuola* [1995] 1 WLR 1348, Lord Taylor CJ at 1351

7.2.26 Some other common law jurisdictions also continue to allow warnings to be given if justified in the circumstances. On the other hand, in Australia and Canada, judges are specifically prohibited in sexual offence cases from warning juries of the dangers of convicting an accused on the basis of the uncorroborated evidence of the complainer⁵⁴. Otherwise, where the prosecution is relying on a single witness, the judge may warn the jury to scrutinise the evidence of that witness with great care⁵⁵.

7.2.27 The position in Ireland is similar to that in England and Wales and other common law jurisdictions. McGrath explains that the drawback of a corroboration requirement in certain categories of case was thought to be that⁵⁶:

“it had the potential to lead to unmeritorious acquittals in circumstances where the evidence of a potentially unreliable witness was considered to be reliable in the particular case by the tribunal of fact but no corroborative evidence could be adduced”.

In emphasising that the common law eschews any quantitative requirements in favour of qualitative assessments, he quotes from *Weiller v United States* where Black J said⁵⁷:

“Our system of justice rests on the general assumption that the truth is not to be determined merely by the number of witnesses on each side of a controversy. In gauging the truth of conflicting evidence, a jury has no simple formulation of weights and measures upon which to rely. The touchstone is always credibility; the ultimate measure of testimonial worth is quality and not quantity. Triers of fact in our fact-

⁵⁴ Australia’s Criminal Procedure Act 1986 s 294AA; Canada: Criminal Code RSC 1985 s 274

⁵⁵ this is referred to as a “Murray” direction, *R v Murray* (1987) 11 NSWLR 12

⁵⁶ McGrath: Evidence para 4-02

⁵⁷ (1945) 323 US 606 at 608

finding tribunals are, with rare exceptions, free in the exercise of their honest judgement, to prefer the testimony of a single witness to that of many”.

7.2.28 Ireland requires corroboration in cases of perjury, procuration of females⁵⁸ and speeding⁵⁹. There is no rule requiring corroboration in cases of accomplices, but a warning must be given of the dangers of accepting their evidence uncritically⁶⁰. The jurisprudence on the nature of the warning is extensive⁶¹. A warning has been required in sexual offences cases, but this came to be criticised as not only technical and complex but also “misogynistic in conception and application”⁶². It has been abolished⁶³ in favour of permitting the judge a discretion to give a warning. The position in relation to children is not dissimilar. Although originally corroboration of the unsworn testimony of children was mandatory on the basis of fears concerning their reliability, research demonstrated these fears to be “based upon untested and unfounded assumptions”⁶⁴. The requirement was therefore also abolished⁶⁵ in favour of a discretion in the judge to give a warning.

⁵⁸ Criminal Law Amendment Act 1885 s 2 (as amended)

⁵⁹ Road Traffic Act 1961 s 105

⁶⁰ *Dental Board v O’Callaghan* [1969] IR 181, Butler J at 183

⁶¹ McGrath: Evidence at para 4-18 to 4-109

⁶² McGrath: Evidence at para 4-112 under reference to Temkin: “Towards a Modern Law of Rape” (1982) 45 MLR 399

⁶³ Criminal Law (Rape) (Amendment) Act 1990 s 7

⁶⁴ McGrath: Evidence at para 4-130 under reference to the Report of the Committee on Sexual Offences Against Children and Youths published in Canada (1984)

⁶⁵ Criminal Evidence Act 1992 s 28

Empirical Research

7.2.29 In February 2011 the Crown Office announced⁶⁶ that 867 live cases were no longer to be progressed because the police interview was not *Cadder* compliant. Fifty-one of these cases had been indicted in the Sheriff Court and nine in the High Court. The vast majority were therefore summary prosecutions. In addition, the Crown Office had to concede 3 summary appeals.

7.2.30 It is the Review's perception that, although these abandonments occurred as a direct result of *Cadder*, it was the requirement for corroboration that prevented the majority of the cases proceeding rather than the Article 6 issue. Without the requirement for corroboration, a significant number of these cases may very well still have had a sufficient quality of evidence to have justified continued proceedings, even though evidence of the police interview would be inadmissible. They would have met the test of a "realistic prospect of conviction". Although, when compared to the totality of prosecutions in Scotland, this number may be perceived as small, it is still numerically significant. On one view it means that, in the broad sense, miscarriages of justice may have occurred in a number of these cases because of the requirement for corroboration. With no prosecution, evidence suggesting that a crime had been committed was not tested and witnesses, including victims, may have been left seeing the person, whom they regarded as perpetrating a significant crime, go free. This, of course, is in the context of a sample of

⁶⁶ <http://www.copfs.gov.uk/News/Releases/2011/02/Crown-review-cases-after-Cadder-V-HMA>

cases which had been instructed for prosecution because corroboration existed in the form of non *Cadder* compliant statements to the police. A far greater number can be assumed to exist where no such statements existed and the complaints made are not reported to procurator fiscal in the first place.

7.2.31 In order to explore this issue further and to give some empirical underpinning to the arguments being advanced, the Review commissioned research from COPFS. The research looked at two sets of cases: (1) for the entire calendar year 2010, all cases that were put on petition, but marked as ‘no further proceedings due to insufficient evidence’ (458 cases identified); and (2) for the six month period July to December 2010, all cases reported to the National Sexual Crimes Unit where the accused was not placed on petition due to lack of evidence (141 cases identified).

7.2.32 These cases were examined by experienced procurators fiscal using a two stage test. First, consideration was given to whether there was sufficient evidence to proceed if the requirement for corroboration did not apply. Secondly, of those cases that passed this threshold, a calculation was made of the number which would have further survived the test applied by the Crown Prosecution Service in England and Wales in deciding whether to prosecute. That test is whether there is a reasonable prospect of conviction.

7.2.33 The results of this work were quite striking, raising serious questions as the extent to which the requirement for corroboration may be preventing the prosecution of cases that could result in convictions. For the first set, it was

judged that 268 of the 458 cases considered (58.5%) would have been prosecuted on the two-stage test applied. For the second set, it was considered that 95 of the 141 cases examined (67%) would have been prosecuted. It should also be noted that the cases considered in the first set covered a number of categories of crime. Most predominant were crimes of violence, but crimes of dishonesty and drugs offences also featured. Across the categories, a substantial proportion of the cases considered were judged to have had a reasonable prospect of conviction if prosecuted. The full research report can be seen at Annex A.

7.2.34 The Review has no reason to believe that these figures are not reasonably indicative of what might happen in the absence of the requirement for corroboration. They suggest that a substantial proportion of cases, which are currently not prosecuted because they fail the corroboration test, could be prosecuted with the reasonable prospect of securing a conviction. If that is the case, it is hard to avoid the conclusion that the requirement for corroboration is an impediment to justice, rather than a safeguard, in a significant number of cases.

Consideration

7.2.35 In considering the utility of the requirement, the Review is not starting from a blank sheet of paper. The Review is not considering whether or not to recommend introducing such a requirement. Rather, it is acutely conscious that the requirement not only exists but is also perceived as a key element in

the criminal justice system. Removing the requirement would require significant changes in perception for the police, the Crown, defence agents and counsel and the courts⁶⁷. Such a change should only be recommended if it is demonstrated to have a positive aspect.

The case for retaining corroboration

7.2.36 The principal justification for retaining the requirement for corroboration is clear. It is the same as that stated by Hume⁶⁸; that it provides some protection against miscarriages of justice. The requirement, it is argued, reduces the prospect of miscarriages of justice occurring as a result of a judge or jury convicting an accused on the basis of a single piece of testimony that is untrue or unreliable. Evidence can be fallible in a number of ways. A witness may be deliberately lying. Contrary to some popular belief, or at least expectation, witnesses do frequently lie in the criminal courts. Their motives for doing so will vary but at least some will be anxious, for reasons perceived by them to be sound, to see that the accused is convicted. That may be because of malice or, more likely, because they are convinced, from information received or otherwise, that the accused committed the crime. Such witnesses may therefore come to court prepared to lie, either on their own or in combination with others. Despite skilful cross-examination, the lies may remain undetected by the judge or jury.

7.2.37 Even more problematic can be the witness who is attempting to tell the truth, and perhaps trying to be as helpful as possible to the court, but is simply

⁶⁷ see Crowe, *supra*

⁶⁸ see para 7.1.2

wrong. A witness can be unreliable, even if manifestly credible. In particular, eye-witness identification evidence is often regarded as being potentially unreliable⁶⁹. It must therefore be recognised immediately and clearly that it is quite possible for a judge or jury simply to err in the assessment of a single witness⁷⁰.

7.2.38 The requirement for corroboration can only prevent a miscarriage of justice occurring in cases where there is only a single witness providing incriminating evidence of the commission of the crime or the identity of the perpetrator. It cannot do so in the many cases where there is a technical sufficiency. Theoretically, all miscarriage cases identified after the appeal process has been completed in Scotland ought to have had such a technical sufficiency since otherwise the trial judge ought to have sustained a no case to answer submission or, if he/she erred in that regard, the conviction ought to have been quashed on appeal.

7.2.39 The requirement must, at least in theory, prevent miscarriages occurring in the single witness situation as, almost by definition, it eliminates that category of case. As Lord Morris said in the context of a case requiring corroboration of child evidence in England⁷¹:

“Any risk of the conviction of an innocent person is lessened if conviction is based upon the testimony of more than one acceptable witness. Corroborative evidence in the sense of some other material evidence in support implicating the accused furnishes a safeguard which makes a conclusion more sure than it would be without such evidence”.

⁶⁹ Identification Procedure under Scottish Criminal Law (the Bryden Report) Cmnd 7096 (1978)

⁷⁰ Macphail: Revised Research Paper on Evidence para 23.02 under reference to “Anon:

“Corroboration of Evidence in Scottish Criminal Law” 1958 SLT (news) 137

⁷¹ *DPP v Hester* [1973] AC 296 at 315

The more difficult issue, however, is the measure of protection that corroboration provides.

7.2.40 If the requirement were removed, prosecutors would need to decide whether cases should be prosecuted on the evidence of one witness alone. It is not disputed that prosecutors could make such decisions. They do so everywhere else in the United Kingdom, Europe and the Commonwealth. However, if a broad test such as “likelihood of conviction” or “interests of justice” were used, this could lead to inconsistencies in decision making, at least in cases lacking corroborated evidence. Similarly, Justices of the Peace and sheriffs may, whilst continuing to adhere to the universal standard of beyond reasonable doubt, tend to apply their personal views, perhaps even more divergent, on what constitutes adequate evidence to merit a finding of guilt ‘beyond reasonable doubt’.

The case for abolishing corroboration

7.2.41 A principal argument for abolishing the requirement for corroboration is that it does not, in practice, serve its stated purpose of preventing miscarriages of justice. The real protection against miscarriages of justice at first instance is the standard of proof required; that the judge or jury must not convict unless convinced of guilt beyond reasonable doubt. It is the need to satisfy this test that makes the existence of supporting evidence, whether currently classified as corroboration or not, important. Removing the formal requirement for corroboration may not result in significant changes to conviction rates, at least

in cases of the type currently prosecuted. It is also highly unlikely that, at least in serious cases, the abolition of the requirement would reduce the standard of police investigations. It is, after all, not enough for the police to find *some* evidence. Rather, they need to find evidence that will be sufficient to convince first the prosecutor to proceed and secondly a judge or jury to convict.

7.2.42 A second, quite separate, argument is that abolishing the requirement may prevent miscarriages of justice occurring, if by that it is also meant that convictions could be achieved in cases where the evidence of perpetration or identification comes from only one witness. If there is a single witness to an offence, and that witness is credible and reliable, why should the suspect not be prosecuted? If the judge or jury is satisfied beyond reasonable doubt of his/her guilt, why should a conviction not follow? A requirement that prevents such a conviction is creating an injustice. It is preventing a person, who may in fact be guilty of a serious or a minor offence, from being prosecuted and convicted. In the modern world, judges and juries ought to be regarded as quite capable of deciding what weight to give to a witness's evidence. An absence of corroboration, especially in circumstances where it would be unlikely that there could ever have been corroboration, should not prevent a judge or jury from deciding that the evidence of a complainer or other witness is believable and sufficient to establish guilt.

7.2.43 Corroboration concerns the quantity and not the quality of testimony. Yet, there are many circumstances where the testimony of a single witness is much

more persuasive than a multiplicity of witnesses. The obvious example is when the judge or jury is considering the testimony of a single independent or impartial eye-witness, whose character cannot be impugned, as distinct from listening to members of a rival gang in a street fight or feuding neighbours in a public order debacle.

7.2.44 A third argument is that requirement for corroboration is frequently misunderstood by lay persons and lawyers, not least judges. It is an artificial bar to prosecution and conviction because of its restrictive method of looking at the quantity of the evidence without reference to its quality. The system is skewed by prioritising quantity over quality.

7.2.45 As outlined above, elaborate legal theories, unique to Scotland, have been devised over recent years in an attempt to fit an archaic requirement into today's reality. These have included the division of facts into different categories, viz.: crucial or essential, evidential and procedural so that only the former require to be corroborated. They include the idea that distress is corroborative of the use of force or a lack of consent in sexual offences. This is not only difficult to explain clearly to a jury in the context of a real case, it is highly doubtful whether a jury, even with its collective intelligence, can fully grasp the legal nuances of the judge's directions.

7.2.46 The application of the principle in *Moorov* is yet another example of where the law has become stretched. It becomes highly artificial where the events are

years apart⁷². Furthermore, especially where there are several different incidents involving different complainers and, quite possibly, different categories of crime over prolonged periods, it is very difficult to give a jury directions which are both comprehensible and comprehensive. This is particularly so where an acquittal on one or more charges must result, as a matter of law, in acquittal on some but not all others.

7.2.47 Different judges have different approaches to corroboration. This problem may have become particularly acute since the abolition of corroboration in civil cases. Since most judges and sheriffs are appointed after many years of practice as advocates or solicitors, they may, if they practised solely in the civil law, be applying a rule of law of which they have had little or no experience and little knowledge at all beyond the content of long forgotten lectures at University or newly read academic texts and precedents.

7.2.48 It is by no means apparent that the requirement provides any more consistency than an alternative approach, based on quality, would bring. Although corroboration can provide an objective minimum “baseline” for judges considering whether to sustain a “no case to answer” submission, at the risk of unnecessary repetition, it remains the position that judges can have very different views on what constitutes corroboration or sufficiency in general in a particular case⁷³.

⁷² *AK v HM Advocate* [2011] HCJAC 52

⁷³ hence the introduction of Crown appeals in the Criminal Procedure (Scotland) Act 1995 ss 97A *et seq* and 107A *et seq* following the “World’s End” murder trial (*HM Advocate v Sinclair*, unreported, High Court, 10 September 2007; on the criticism of which see Di Rollo: “Legitimate Inference v Illegitimate Speculation” 2008 SCL 151) and *Mackintosh v HM Advocate* 2010 SCCR 168 and *O’Hara v HM Advocate* 2009 SCCR 629

7.2.49 Corroboration is more likely to exist in relation to some offences than others.

This is exactly the same consideration as prompted reform of the civil law. Where crimes are usually committed in private, the only potential evidence may be from the testimony of a complainer. There may be nothing else, or very little, in the absence of statements made by suspects at interview. Equally, with minor assaults or thefts, where there may also be little evidence other than that of the complainer, it may simply not be cost effective to put the level of effort into investigating such cases, and thereby finding corroboration, as is appropriate to more serious offences.

7.2.50 Finally, it is of some note to recognise the role which the requirement of corroboration has in the advice given to suspects. There is little doubt that in Scotland it plays a major part in the solicitor's decision to advise his/her client to say nothing for fear of his/her inadvertently corroborating other evidence and thereby creating a sufficiency, which would otherwise not exist. The situation is, in all cases and in itself, an oddity because it may mean in practice that whether a person is prosecuted for and convicted of an offence, which would be inevitable in other jurisdictions, is actually entirely dependent on whether he/she elects to respond to questioning. Be that as it may, the advice tendered can place a suspect in a difficult position. It may be felt that a judge or jury would be more likely to accept his/her account as credible if it were raised at the earliest opportunity. Yet, the suspect would almost always be well advised not to speak, at least in situations where there was no obvious sufficiency of evidence.

Corroboration and the civil law

7.2.51 Until relatively recently, the requirement for corroboration was an equally significant cornerstone of the civil law. It was one of many rules of evidence, including the requirement of proof by writ or oath, hearsay and various prescriptions concerning the need for writing, which have almost all been swept away in recent years. Its demise began with its abolition in personal injuries litigation⁷⁴. In that class of case, the requirement came to be regarded, at least by some, as a bar to justice, especially in cases where an employee had been alone, or in darkness, when he/she suffered his/her injury⁷⁵. Abolition was met with considerable resistance within the senior judiciary⁷⁶. This took the form of pronouncements concerning the importance of corroboration in the establishment of fact, despite the statutory abolition. Thus, it was said, a fact could only be found on the basis of uncorroborated testimony if it were demonstrated that no corroboration could have been made available⁷⁷.

7.2.52 Abolition was ultimately, and this time successfully, extended to all civil cases in 1988⁷⁸. At that time, the Civil Evidence (Scotland) Act eradicated many of the other prescriptive rules and the Requirements of Writing (Scotland) Act 1995 abolished several others. The Scottish Law Commission had expressed

⁷⁴ Law Reform (Miscellaneous Provisions) (Scotland) Act 1968 s 9

⁷⁵ Scottish Law Commission: "Proposals for Reform of the Law of Evidence Relating to Corroboration" para 5; this paper recommended abolition in all civil cases but that recommendation was not then adopted

⁷⁶ *Morrison v J Kelly and Sons* 1970 SC 65; See Macphail: Revised Research Paper on Evidence para 23.13 et seq

⁷⁷ *McGowan v Lord Advocate* 1972 SC 68; cf *McLaren v Caldwell's Paper Mill Co* 1973 SLT 158

⁷⁸ Civil Evidence (Scotland) Act 1988 s 1

two “guiding principles” which it considered ought to be followed in relation to the reform of the law of evidence⁷⁹:

“(1) The law should be simplified to the greatest degree consistent with the proper functioning of a law of evidence;

(2) As a general rule all evidence should be admissible unless there is good reason for it to be treated as inadmissible”.

7.2.53 This view is consistent with that of this Review and with modern thinking that it is a hindrance, rather than an advantage, to have to apply rules which prohibit a judge or jury from reaching a just conclusion based upon a liberal consideration of all relevant testimony. Were that thinking to be transferred to criminal cases, it would amount to an endorsement of Professor Wilkinson’s opinion that the need for corroboration⁸⁰:

“is at odds with the rejection of other safeguards formerly employed and goes against the modern emphasis on the free assessment of evidence unencumbered by restrictive rules”.

7.2.54 It is worthy of comment that the ultimate abolition of the requirement for corroboration in all civil cases, along with the general admission of hearsay evidence *quantum valeat*, has not met with any substantial adverse comment.

Conclusion

7.2.55 The Review is in no doubt that the requirement of corroboration should be entirely abolished for all categories of crime. It is an archaic rule that has no place in a modern legal system where judges and juries should be free to

⁷⁹ 100th Report para 1.3

⁸⁰ Wilkinson: Evidence 204 referring to the precept “*testimonia ponderanda non numeranda sunt*”; and see Gordon: “At the mouth of two witnesses...” (*supra*) p 39

consider all relevant evidence and to answer the single question of whether they are satisfied beyond reasonable doubt that the accused person committed the offence libelled. The argument is not that such a reform would bring Scotland into line with the rest of Europe and the Commonwealth. It is that it would bring Scots law into line with modern, and almost universal, thinking on how to approach evidence in criminal, and indeed all other, cases.

7.2.56 The particular arguments in favour of abolition are set out above and it is not necessary to repeat them. However, there are certain highlights. First, in practice, there is no evidence or even anecdote to support the idea that the formal requirement for corroboration reduces miscarriages of justice. In particular, there is nothing to suggest that Scotland has a lower miscarriage of justice rate than any other jurisdiction in the civilised world. Secondly, the requirement creates miscarriages of justice by preventing cases, where there is only one witness to speak to the crime being committed or the suspect committing it, from being prosecuted. This is unjust. If a person is the victim of a criminal act and is capable of identifying the perpetrator, that person's case should be judged on the quality of the testimony and its progress should not depend on a formal requirement, compliance with which is often matter of chance. Similarly, it may be that the complainer can speak to none of these matters by reason of the effects of the crime upon him/her, yet there is a single credible and reliable witness who can. A system of justice, which does not permit the prosecution of the alleged offender in such circumstances is, putting the matter mildly, an imperfect one. Thirdly, the requirement has developed into a series of rules which, realistically, are not capable of being understood

by many outside the world of criminal legal practice. They are applied differently by courts, depending upon their own experience in that practice.

7.2.57 If corroboration were to be abolished, it might reasonably be anticipated that there will be some judicial resistance in line with that experienced when it ceased to be a requirement in personal injuries cases. This may take the form of the court taking the view that, in certain categories of case, or in all cases where there is no corroboration, a special warning requires to be given to juries about the dangers of conviction. Such a warning would be similar to that currently given in cases of eye witness identification. It will be important, following especially the experience in the other jurisdictions referred to, to make it clear that, although a trial judge may, at his/her discretion in a particular case, give a jury such assistance, by way of warning or otherwise, as is appropriate in relation to the assessment of the credibility and reliability of witnesses⁸¹, the law does not require that a warning be given in any case simply on the basis that there is a lack of corroboration.

Recommendation

I therefore recommend that:

- the current requirement for corroboration in criminal cases be abolished; and**
- in solemn prosecutions where there is no corroboration of testimony, there should be no requirement on the judge to warn the jury of any dangers perceived purely as a consequence of the absence of such corroboration.**

⁸¹ see Practice Note, 18 February 1977, issued by LJG (Emslie)

7.3 SUFFICIENCY OF EVIDENCE

Introduction

7.3.1 The test of what amounts to “sufficient evidence” for a person to be convicted of a crime is a matter of law. It is not concerned directly with whether testimony is truthful or reliable. There may be sufficient evidence, yet the judge or jury may elect to acquit an accused because of the quality of that evidence. In Scotland, sufficiency is intimately, if not quite exclusively, bound up with the requirement for corroboration. As has already been noted, because it is a legal requirement in almost all cases, corroboration is considered by police officers as essential before deciding whether to report all but the most serious of cases. It is considered by the procurators fiscal in determining whether to serve a complaint or to request the sheriff to commit a person to prison on petition. It is assessed by the Advocates Depute in deciding whether to authorise an indictment. However, none of these procedures normally involve any judicial scrutiny. The first decision which a court is likely to take in relation to corroboration occurs when a submission is made to it, at the end of the Crown case in either summary or solemn proceedings, that there is “no case to answer” because of a lack of sufficiency of evidence in a formal sense¹.

7.3.2 Were the requirement for corroboration to be abolished, the considerations to be taken into account by the police officer and the Crown authorities may be

¹ 1995 Act ss 97 and 160

different. They may tend to focus more on the quality, rather than the quantity, of testimony available. The considerations to be applied in advance of prosecution are for the Lord Advocate to determine². They are not directly the concern of this Review. If the Review's recommendation to abolish the requirement for corroboration is implemented, the Lord Advocate may decide to alter the guidelines on when cases should be reported by the police and/or prosecuted. The abolition of the requirement would not preclude the Lord Advocate from insisting that in certain, or all, categories of case, some supporting evidence beyond that of a single witness is desirable or necessary. It would also not detract from the need for the police to follow up all reasonable lines of investigation³, including detecting corroboration if it can reasonably be found.

Current law

Submissions at Trial

7.3.3 At common law, an accused in solemn proceedings is entitled to ask the judge to direct the jury to acquit on the ground of insufficiency of evidence. Such a submission can only be made once all the evidence has been heard. It cannot be made at the end of the Crown case. Thus, at common law, the defence can only make a submission after the accused has elected to give, or to refrain from giving, testimony and all his/her witnesses have been heard. Because the Crown can always insist on addressing the jury, originally the submission would be made in, or immediately before, the defence speech. If the judge

² see Crowe (*supra*) at 183

³ *Gordon v HM Advocate* 2010 SCCR 589 at para 99

agreed, he/she would accede to the submission, but the jury would still have to return an acquittal verdict⁴. In practice, since the Crown would otherwise be *functus* once the Advocate Depute or a procurator fiscal had addressed the jury, it is usually agreed, tacitly at least, by the parties that the defence can make a submission at the end of the evidence and before any speeches. If the judge, having heard both parties, indicates that he/she intends to give the jury the direction to acquit, such a direction is given, and complied with, without the Crown insisting nevertheless in addressing the jury. In summary cases, the accused can also make a submission to the sheriff, or Justice of the Peace, that there is insufficient evidence to convict. There is less of a procedural guddle⁵ in such cases and any such “common law” submission on sufficiency should be combined with any arguments upon the quality of the evidence when the defence come to address the court at the end of the case and immediately before the verdict.

7.3.4 Following the recommendations of the Thomson Committee⁶, statutory provision was made for the accused to make a submission of “no case to answer” in respect of an offence at the conclusion of the Crown case⁷. In a solemn case the judge may now, after hearing both parties, acquit the accused himself/herself if he/she is satisfied that the evidence led by the prosecution is insufficient in law⁸. In a summary case, the submission can also now be made and sustained at the end of the Crown case⁹. It is important to note that

⁴ *Kent v HM Advocate* 1950 JC 38

⁵ cf *Wallace v Thomson* 2009 SCCR 21 at para 16

⁶ at chapter 48

⁷ Criminal Justice (Scotland) Act 1980 s 19

⁸ 1995 Act s 97

⁹ 1995 Act s 160

neither a statutory nor a common law submission is concerned with the quality of the evidence (e.g. the credibility and reliability of witnesses). Both are concerned solely with whether there is corroborated evidence available, whatever its quality, to prove the case¹⁰. Despite the efforts of some defence counsel and agents, and the apparent belief of some judges and sheriffs, it has never been competent at common law or under the statute to argue that a case should be withdrawn from a jury on the basis that no reasonable jury could convict on the evidence. The contrary view developed from an uncharacteristically loose *ex tempore dictum* from the Lord Justice General (Emslie) in *Reilly v HM Advocate*¹¹ to the effect that evidence of identification can be insufficient in law to corroborate if it did not reach a certain level of character, quality and strength. The *dictum* was rapidly departed from¹². The position has now been made clear in statute, whereby¹³:

“A judge has no power to direct the jury to return a not guilty verdict on any charge on the ground that no reasonable jury, properly directed on the evidence, could convict on the charge”.

This is in contrast to the powers of the High Court in its appellate capacity to quash a conviction on the basis of “unreasonable verdict”¹⁴.

7.3.5 At present, therefore, the law is that, in solemn cases, if there is sufficient, that is to say corroborated, evidence that a crime has been committed and the

¹⁰ *Williamson v Wither* 1981 SCCR 241

¹¹ 1981 SCCR 201, LJG (Emslie) at 204

¹² “explained” in *Rubin v HM Advocate* 1984 SLT 369, Lord Cameron at 373, approved in *Robertson v HM Advocate* 1990 SCCR 142

¹³ 1995 Act s 97D, introduced by the Criminal Justice and Licensing (Scotland) Act 2010 s 73; the view of Orr: “No reasonable jury” 2011 SLT (news) 9 is correct

¹⁴ 1995 Act s 106, see *AJE v HM Advocate* 2002 JC 215, see below

perpetrator was the accused, the decision on guilt or innocence must be left to the jury. It does not matter that the trial judge's own view of the quality of the evidence is such that he/she does not believe that a conviction should follow. This type of approach adopts the line of reasoning that decisions on the quality of evidence should not, at least in serious cases, be left to the subjective decision of one person; even a professionally trained and experienced judge, although this is what happens in major civil cases, which may have significant effects, short of deprivation of liberty, on large numbers of people. Of course, in summary criminal cases, the sheriff or Justice of the Peace will ultimately be required to form a view on the quality of the evidence, but his/her view on that matter, as on sufficiency, is subject to review on an appeal by the procurator fiscal as well as the accused. There is then a coherence in the system at present whereby decisions on sufficiency of evidence can be taken by a single judge but these decisions are objective in nature. Where the decision is to be subjective, the decision of the single judge to acquit or convict is subject to review by a panel of three judges of the High Court. There is now a right of appeal also in decisions on sufficiency in solemn cases¹⁵, a feature previously only available at summary level.

Appeals

- 7.3.6 There is some, but not an equivalent, correspondence between what is required at first instance as sufficient evidence for a conviction and the test for allowing an appeal against conviction on the basis of lack of adequate evidence. The two should not be confused. There is, advisedly, a different test applied by the

¹⁵ 1995 Act s 107 A-F

trial judge, in determining whether a case should be left to a jury, and that of a three (or more) judge appellate court, when reviewing the adequacy of the evidence upon which a conviction has been based. The High Court, in its appellate capacity, has, for almost a century, been able to allow an appeal against conviction where it has considered that no *reasonable* jury could have reached a guilty verdict, even if a technical sufficiency did exist.

7.3.7 When it came to look at the test for the allowance of conviction appeals, the Sutherland Committee¹⁶ recommended maintaining, as a single ground of appeal, a test of whether there has been a miscarriage of justice, rather than that used in England and Wales of whether the conviction was “unsafe”. The Committee did not consider that the “miscarriage of justice” test would be less restrictive than the “unsafe” test, but it concluded that an “unsafe” test could create problems of interpretation. Reference¹⁷ was made by the Committee to the Australian case of *M v The Queen*¹⁸ where the court was applying a test of whether a conviction was “unsafe”. The Australian High Court concluded that such a test was not a speculative or an intuitive one, such as the “lurking doubt” test in English law. Rather¹⁹:

“The question, in Australia, is one of fact which the court decides, making its own independent assessment of the evidence: in doing so it assesses whether, upon the whole of the evidence, it was open to the jury to be satisfied beyond reasonable doubt that the accused was guilty. The court will not allow itself to substitute trial by court of appeal for trial by jury, for the ultimate question must always go back

¹⁶ Report by the Committee on Criminal Appeals and Miscarriages of Justice Procedures (Cmnd 3245) (1996)

¹⁷ p 9

¹⁸ (1994) 181 CLR 487

¹⁹ Mason CJ at 493

to determining whether the jury could have been satisfied beyond reasonable doubt”.

7.3.8 The Sutherland Committee considered that the High Court, in its appellate capacity, should be able to overturn a jury’s verdict where that verdict was unreasonable and had resulted in a miscarriage of justice. Even allowing for the jury’s advantage over an appeal court in having seen and heard the witnesses, there could, it was reasoned, be exceptional cases where it would be difficult to understand how “any reasonable jury could not have entertained at least a reasonable doubt”²⁰. Following the Committee’s recommendations, the legislation was amended to provide that, although the single ground for appeal would be that there had been a miscarriage of justice, this would occur where the jury had returned a verdict which no reasonable jury, properly directed, could have returned.

7.3.9 The High Court has generally been cautious before allowing appeals on the basis of a jury’s verdict being deemed unreasonable. It has stressed that it is not sufficient that the court itself may have entertained a reasonable doubt²¹. This is consistent with the view that an appeal court, consisting of three or more lawyers, however wise they may perceive themselves to be, should be slow to reverse a decision of fact taken by a fifteen person jury, with all its collective experience of life, especially in its own locality.

²⁰ para 2.67

²¹ *King v HM Advocate* 1999 JC 226; *McDonald v HM Advocate* 2010 SCCR 619

Other Jurisdictions

Submissions at Trial

7.3.10 In England and Wales, a trial judge can acquit a defendant if he/she is satisfied that no jury, properly directed, could convict²². The precise test is set out in *R v Galbraith*²³ where Lord Lane said²⁴:

“How then should the judge approach a submission of ‘no case’? (1) If there is no evidence that the crime alleged has been committed by the defendant, there is no difficulty. The judge will, of course, stop the case. (2) The difficulty arises where there is some evidence but it is of a tenuous character, for example because of inherent weakness or vagueness or because it is inconsistent with other evidence. (a) Where the judge comes to the conclusion that the prosecution evidence, taken at its highest, is such that a jury properly directed could not properly convict upon it, it is his duty, upon a submission being made, to stop the case. (b) Where however the prosecution evidence is such that its strength or weakness depends on the view to be taken of a witness’s reliability, or other matters which generally speaking are within the province of the jury and where on one possible view of the facts there is evidence upon which a jury could properly come to the conclusion that the defendant is guilty, then the judge should allow the matter to be tried by the jury...

There will of course, as always in this branch of the law, be borderline cases. They can safely be left to the discretion of the judge”.

7.3.11 It is important to note that this statement of the law was designed to discourage submissions made at trial about the safety of a potential verdict; the province of the Court of Appeal. The first leg of the test appears straightforward and means that the submission has to be sustained if there has been no evidence to prove an essential fact. The second leg is more problematic. Although it makes it clear that a submission that it would be

²² Archbold: Criminal Pleading etc. 2011 para 4-293/4; Blackstone’s Criminal Practice 2011 para D15.51 *et seq*

²³ [1981] 1 WLR 1039

²⁴ at 1042

“unsafe” to convict is not a tenable one at such a stage of the proceedings, it leaves the trial judge with some kind of “residual role”²⁵ involving a consideration of whether the evidence is inherently too weak or tenuous to be relied upon. Thus, if a witness has contradicted himself/herself or his/her testimony defies reason, there may be some room for sustaining a submission. This was the approach taken in *Shippey*²⁶, in which Turner J sustained a submission on the basis that the evidence was inherently inconsistent. The Court of Appeal may have shied away from this approach, but the last sentence of Lord Lane’s *dictum* concerning borderline cases does support it to a degree²⁷. It may be difficult, however, for a Scots criminal lawyer to grasp how a question of sufficiency can be answered by the application of a discretion.

7.3.12 The courts in Ireland have followed the principles in *Galbraith* in the sense that inconsistencies, which simply affect credibility or reliability, are matters for the jury’s assessment. However, if they are such as to render it “unfair” to proceed, the judge “in the exercise of his or her discretion should stop the trial”²⁸.

²⁵ see Blackstone 2011 para D15.54 et seq

²⁶ [1988] Criminal LR 767

²⁷ Blackstone 2011 para D15.55 under reference to *Pryer* [2004] EWCA Crim 1163 and *Silcock* [2007] EWCA Crim 2176

²⁸ *People (DPP) v M*, unreported, Court of Criminal Appeal, 15 February 2001 quoted in McGrath: Evidence at para 2-60

7.3.13 In Australia²⁹:

“...if there is evidence (even if tenuous or inherently weak or vague) which can be taken into account by the jury in its deliberations and that evidence is capable of supporting a verdict of guilty, the matter must be left to the jury for its decision. Or, to put the matter in more usual terms, a verdict of not guilty may be directed only if there is a defect in the evidence such that, taken at its highest, it will not sustain a verdict of guilty”.

7.3.14 The position in continental European jurisdictions, where cases are decided either without a jury or with the judge sitting with the jury, is not directly comparable.

Appeals

7.3.15 In England and Wales, the Court of Appeal is tasked with allowing an appeal against conviction if “they think that the conviction is unsafe”³⁰. This replaced an earlier test of “unsafe or unsatisfactory” or when there was an error of law or material irregularity in procedure³¹. Nevertheless, the classic case on the Court of Appeal’s powers is that of Lord Widgery, under the old regime, in *Cooper* where he referred to the Court asking itself a subjective question of³²:

“whether there is not some lurking doubt in our minds which makes us wonder whether an injustice has been done. This is a reaction which may not be based strictly on the evidence as such; it is a reaction which can be produced by the general feel of the case as the court experiences it”.

²⁹ *Doney v The Queen* (1990) 171 CLR 207 at 214-215; cf the reference to a “reasonable jury” in *The Queen v Bilick and Starke* (1984) 36 SASR 321, King CJ at 335 and 337 followed in *Parker v The Queen* [2007] NT CCA 11, Martin CJ at para 37

³⁰ Criminal Appeal Act 1968 s 2

³¹ the changes being made by the Criminal Appeal Act 1995 s 2

³² [1969] 1 QB 267, at 271

7.3.16 The “lurking doubt” test has been doubted in subsequent cases³³ and the Review formed the view that, although *Cooper* has not been disapproved, the Court of Appeal takes a more reasoned view than the *dictum* of Lord Widgery promotes. The Review understands that the position in Ireland is similar.

7.3.17 The approach of the Australian High Court is that, normally, if a panel of judges has a reasonable doubt, the jury ought also to have experienced it too unless there was some particular benefit in seeing and hearing the witnesses³⁴. However, there are now compelling *dicta* from both Canada³⁵ and New Zealand³⁶ articulating an appellate court’s task in reviewing the reasonableness of a jury’s verdict. It is clear that the assessment of the reasonableness of a verdict is a question of law. A decision that the verdict of a properly directed jury has been unreasonable must be capable of articulation by the judicially trained and experienced assessor and not just be based on a “lurking doubt”. The judge must use his/her legal knowledge and experience and not his/her personal views. The court’s function is analytical and not instinctive.

³³ *F* [1998] Crim LR 307, cf *Litchfield* [1998] Crim LR 507

³⁴ See *Parker v The Queen* (*supra*) at para 43 quoting from *MFA v The Queen* (2002) 213 CLR 606 at para 56 and also referring back to *M v The Queen* (*supra*)

³⁵ *R v Biniaris* [2000] 1 SCR 381, Arbour J at paras 36-42, see also *AJE v HM Advocate* 2002 JC 215, LJ-C (Gill) at para 35

³⁶ *Owen v R* [2007] NZSC 102

Consideration

7.3.18 There is a view that a judge at first instance should be entitled to acquit an accused in a solemn case if he/she considers that it would be “unreasonable” for a jury to return a verdict of guilty on the evidence adduced at trial. This is a paternalistic, perhaps even patrician, approach to the criminal justice system. It pre-supposes, erroneously in the Review’s mind, the superiority of the single judge over the fifteen person jury in the skill of converting evidence into findings of fact. If the system is to continue to put its faith in juries, as the primary finders of fact in serious cases, it should not permit a single judge to override, *ab ante*, the conclusion of a jury on the crucial facts in situations where there is some evidence, no matter its perceived quality, describing those facts. On that basis, it is appropriate that, at trial level, the test for the statutory “no case to answer” and common law “insufficiency” submissions should remain that of pure legal sufficiency.

7.3.19 If the requirement for corroboration were to be abolished, there is no need for any further change to the existing law on sufficiency of evidence at the trial stage. The issue for the trial judge would be the same as it is at present, except that there would be no need for corroboration. The trial judge should not be permitted to sustain a “no case to answer” submission or a submission made at the conclusion of all the evidence on the basis that he/she does not consider it “reasonable” for the jury to return a verdict of guilt because of the quality of the testimony adduced. It should be enough, therefore, that there has been

some testimony that (i) the crime charged has been committed; and (ii) the accused was the perpetrator.

7.3.20 The High Court, sitting in its appellate capacity, should equally, with its quorum of three, retain the power to quash a conviction if, with its collective judicial experience, it considers that the verdict was one that no reasonable jury could have reached. This is in keeping with modern thinking on the appropriate function of an appellate court within an adversarial jury system as described in the Canadian and New Zealand jurisprudence.

Recommendation

I recommend that:

- **the test for sufficiency of evidence at trial and on appeal should remain as it is now, other than that, as already recommended, the requirement for corroboration should no longer apply.**

7.4 EXCULPATORY AND MIXED STATEMENTS

Introduction

7.4.1 At the core of *Cadder* was the issue of the admissibility of statements made by a suspect to the police without the advantage of prior legal advice. One concern is that there is too great an emphasis in the conduct of police investigations on suspect interviews. In particular, there is a view that, traditionally, the police have relied too heavily on seeking a confession as the quickest and surest way to secure the required sufficiency of evidence. The Review is not in a position to make such an assessment and acknowledges that the contrary view has also been forcefully expressed. Clearly, however, statements made by a suspect will still, in many cases, be an important element in a police investigation and any subsequent prosecution.

7.4.2 Subject to the existence of any exclusionary rules, such as that in *Cadder*, and the general requirements of spontaneity and fairness, confessions made in the course of police interviews do not normally pose a problem evidentially. They are regarded as an exception to the rule against hearsay; not because an accused is not a compellable (and in former times not a competent) witness, but because they are “statements against interest”. It is reasoned in law that, they are more likely to be true than not¹. This is not the place to conduct a review of the entire law of hearsay generally². That was done not so long ago,

¹ Dickson: Evidence (3rd ed) paras 297 and 343

² accurately said to be eclipsed in civil cases and eviscerated in criminal trials: Davidson: Evidence para 12.01

at least in connection with witnesses³, although the effect of the legislation may require revisiting. What does merit examination is the treatment of those statements which do not amount to a full confession. What rules apply to the admissibility of statements by a suspect which are partly incriminating and partly exculpatory (so called “mixed statements”) and to those wholly exculpatory?

Current law

7.4.3 There is a perception that there is a problem in an accused being able to lead evidence at his/her trial of exculpatory statements, or even partly exculpatory statements, as a substitute for giving evidence. This was a feature of the celebrated case of *Meehan*⁴, in which the accused wished to undergo an interrogation under the influence of a “truth drug” with a view to leading evidence of what he might then say. The court held that it was not competent for an accused to lead evidence from friends, relatives or others to the effect that he had told them that he had not committed the crime⁵. There is practical force in this principle, since otherwise it would be an obvious expedient for an accused to provide an innocent narrative, possibly well prepared and in written form, to a generally credible person shortly before his/her trial, lead evidence from that person and thus potentially avoid cross-examination and the risk, albeit remote, of a charge of perjury.

³ Scottish Law Commission Report No 149 (1995)

⁴ *Meehan v HM Advocate* 1970 JC 11

⁵ LJG (Clyde) at 13, approved in *Morrison v HM Advocate* 1990 JC 299, LJ-C (Ross) at 312 and in *McCutcheon v HM Advocate* 2002 SLT 27, LJG (Cullen) at 34

7.4.4 The concerns about using exculpatory or partially exculpatory statements as a substitute for testimony reached their zenith in *Hendry*⁶, following the attempted re-birth of judicial examination. The accused had not given evidence in support of his plea of self defence. However, the Crown had already led evidence of his judicial examination, at which he had admitted striking the relevant blow but had explained that he had done so in self defence. The court reached the somewhat peculiar decision, at least to a modern reader, that the trial judge had been correct to direct the members of the jury that they could use the incriminatory elements of the judicial examination as proof of fact against the accused but could not do the same with the exculpatory parts as proof in his favour. Following precedents relative to the use of judicial declarations in the days when an accused was not a competent witness, the court said that matters may have been different if there had been testimony in support of the self defence. The background to the case was the court's perception that there was an increasing tendency for the defence to use the new judicial examination procedure as a method of putting an exculpatory version of events before the jury without the accused having to testify⁷.

7.4.5 Not surprisingly, the matter had to be revisited soon afterwards. The Full Bench⁸ decision in *Morrison*⁹ did not concern judicial examination but statements made by a suspect to the police in an interview about an allegation of rape. The suspect had admitted intercourse but maintained that it had been

⁶ *Hendry v HM Advocate* 1985 JC 105

⁷ LJ-C (Wheatley) at 109 considered that this should be "stamped out"

⁸ seven judges

⁹ *Morrison v HM Advocate* 1990 JC 299

with the complainer's consent. By this time the court had gained the benefit of a definitive statement from the House of Lords¹⁰ on the English law of evidence on how to treat a "mixed statement". The court in *Morrison* adopted that term to mean statements which are "capable of being both incriminatory and exculpatory"¹¹ and it appears to have stuck ever since. The Crown conceded, and the court agreed, that *Hendry*: (i) had been wrongly decided; (ii) was difficult to understand; and (iii) was unworkable in practice. Its principles were, it was held, obviously unfair. The court treated a "mixed statement" as a "qualified admission" capable of being used as proof of fact, whether led either by the Crown or by the accused in the absence of an objection. But the court remained of the view that an exculpatory statement was inadmissible as proof of fact¹² although it could be adduced in evidence, again if led by the Crown or otherwise without objection¹³:

"for the limited purpose of proving that the statement was made, and of the attitude or reaction of the accused at the time when it was made which is part of the general picture which the jury have to consider".

An accused could competently lead evidence of a mixed statement or a wholly exculpatory statement if he had given evidence¹⁴ and his credibility or reliability were challenged. The court cautioned against the English approach of a judge commenting adversely upon the situation where the accused had not testified but had adduced evidence of a mixed or exculpatory statement.

¹⁰ *R v Sharp* [1988] 1 WLR 7

¹¹ LJC (Ross) at 307

¹² at 312

¹³ at 313

¹⁴ or, presumably, if the court were assured that he was to do so. It is not clear if this is the only circumstance in which it can be led

7.4.6 A decade later yet further revision was required, by a larger Full Bench¹⁵ in *McCutcheon*¹⁶. This case involved an accused who had not given evidence, but who had sought to lead testimony from a police officer of a “mixed statement” interview given by him to the police in the course of their enquiries. The need to have regard to fairness and to be able to give a jury comprehensible directions was emphasised¹⁷. Nevertheless it was held that *Morrison* had been broadly correct, except that whether the statement had been led by the defence without objection did not affect its admissibility as proof of fact. The principles were restated as follows¹⁸:

“(i) It is a general rule that hearsay, that is evidence of what another person has said, is not admissible as evidence of the truth of what was said.

(ii) Thus evidence of what an accused has been heard to say is, in general, not admissible in his exculpation, and accordingly the defence are not entitled to rely on it for this purpose. Such evidence can only be relied upon by the defence only for the proving that the statement was made, or of showing his attitude or reaction at the time when it was made, as part of the general picture which the jury have to consider.

(iii) There is, however, an exception where the Crown have led evidence of a statement, part of which is capable of incriminating the accused. The defence are entitled to elicit and rely upon any part of that statement as qualifying, explaining or excusing the admission against interest”.

A trial judge is, of course, expected to explain this to a jury.

¹⁵ nine judges

¹⁶ *McCutcheon v HM Advocate* 2002 SLT 27

¹⁷ LJG (Cullen) at 35

¹⁸ LJG (Cullen) at 36

Other jurisdictions

7.4.7 The position in England and Wales is not too dissimilar from that in Scotland and there are strong indications that Scotland may have adopted much of its thinking from the English precedents. Confessions are, as already noted, admissible as against interest and thus an exception to the hearsay rule. There is a specific provision regarding confessions in PACE¹⁹. It defines a confession as “any statement wholly or partly adverse to the person who made it”²⁰. However, there is a distinction between statements which are “entirely self serving and those which are only partly adverse to the accused”²¹. The latter are “mixed”²². The editors of Archbold comment that a “substantial body of case law” has built up on this subject in recent years. This is not at all surprising. The importance of what is a mixed statement, as distinct from an exculpatory one, looms large. It is tested by reference to whether it contains any admission of fact which adds to the weight of the prosecution case²³ and not by reference to the purpose of the Crown when adducing it²⁴. An exculpatory statement is not a “confession”²⁵ and thus not admissible under PACE. However, it is admissible to show the attitude of the accused when the statement was made²⁶. It is also admissible, even if it is a complete denial, if it is inconsistent with another denial²⁷. However, a judge should “plainly”

¹⁹ s 76

²⁰ s 82

²¹ Archbold 2011 para 15-400; see also Blackstone 2011 para 17.61 et seq

²² *R v Sharp (supra)*, *R v Aziz* [1996] 1 AC 41 following *R v Duncan* (1981) 73 Cr App Rep 359, Lord Lane CJ at 365

²³ *R v Garrod* [1997] Criminal Law Review 445

²⁴ *Western v DPP* (1997) 1 Cr App Rep 474

²⁵ *R v Z* [2005] 2 AC 467

²⁶ *R v Pearce* (1979) 69 Cr App R 365 at 368, 370; *Storey* (1968) 52 Cr App R 334, Widgery LJ at 337-338

²⁷ *R v Pearce (supra)* at 369-370

exclude a prepared exculpatory written statement produced and read at police interview²⁸.

7.4.8 In Ireland, similar common law principles apply. If the Crown seek to adduce evidence of a statement, the whole of that statement may be used as proof of fact by either party²⁹. A wholly exculpatory statement is not admissible. But the Irish courts too have recognised that the dividing line between what is incriminating and what is exculpatory can be a fine one³⁰.

7.4.9 Canada has generally followed the English common law rules on statements; admitting those against interest as “probably true”³¹; excluding those which are entirely self serving³²; and admitting the whole of a mixed statement³³. The Review understands that if the prosecution adduce a statement in evidence, it will in practice always be regarded as at least “mixed”. However, the Supreme Court has recently³⁴ disapproved of the practice in England and Wales³⁵ whereby juries are directed that less weight might be attached to the exculpatory elements of a mixed statement. A similar situation exists in Australia³⁶.

7.4.10 In New Zealand, the matter has been codified whereby, if the prosecution lead evidence of any statement made by an accused then it is admissible as

²⁸ *ibid* and *R v Newsome* (1980) 71 Cr App R 325

²⁹ *People (DPP) v Clarke* [1995] ILRM 355, O’Flaherty J at 363

³⁰ see generally McGrath: Evidence 8-181 *et seq* under reference to *AG v McCabe* [1927] IR 129, Kennedy CJ at 133

³¹ *R v Hodgson* [1998] 2 SCR 449, Cory J at para 17

³² *R v Simpson* [1988] 1 SCR 3, McIntyre J at 22

³³ *R v Hughes* [1942] SCR 517 at 521

³⁴ *R v Rochas* [2008] 3 SCR 111

³⁵ suggested by Lord Lane CJ in *Duncan* (*supra*) at 365

³⁶ *Mule v The Queen* (2005) 221 ALR 85

evidence against him (i.e. presumably, as proof of fact)³⁷. However, an accused cannot adduce evidence of a statement made by him if he is not going to testify³⁸.

Consideration

7.4.11 It is not unreasonable to comment that this area of the law, and in particular the form of the necessary directions to the jury, is unsatisfactory. This is especially so when it is realised that in practice over recent years (until *Cadder*), it had become almost routine for the Crown to lead evidence of an accused's interview even if it did not involve him/her saying anything incriminating or, indeed, in some cases, anything at all beyond "no comment". If questioned about why this was being done, an Advocate Depute might reply that it was: "a matter of fairness" to put all the evidence before the jury; to show the accused's reaction or attitude at the time (for what that might be worth); or even simply that it was because the Crown had been asked by the defence to do it.

7.4.12 The practical problems that are thrown up in this arena were amply demonstrated recently in the case of *Jamieson*³⁹. The charge was murder of a baby, whose care had been left to the appellant. In statements and interviews, the appellant had denied any involvement in the child's death, which involved substantial violence causing skull and other fractures. He did, however, accept that he had been in charge of the baby at the relevant time. The trial judge

³⁷ Evidence Act 2006 s 27

³⁸ *ibid* s 21

³⁹ *Jamieson v HM Advocate* [2011] HCJAC 58

considered that his statements were exculpatory, since they made no admissions at all concerning the causes of the death. However, at appeal, the High Court quashed the conviction on the basis that the statements were “mixed”. Thus a murder conviction was jeopardised by directions on the classification of whether a statement contained something which might be regarded as incriminatory⁴⁰. Curiously, a similar problem arose in Canada but this time the trial judge had directed the jury that the statements in question were mixed and the appellate court held that they were exculpatory. By giving the jury a mixed statement direction, the trial judge had erroneously suggested that part of the statements amounted to admissions⁴¹.

7.4.13 Despite the *dicta* in *McCutcheon*, which is understandable to a criminal lawyer in terms of the development of existing common law principles, the position remains that, at least so far as proof of fact is concerned, a mixed statement is admissible at the instance of the Crown but not the defence. That is a very odd, perhaps unique, position relative to the admission of evidence. On one view, and certainly if the courts were to adopt an approach focused more on relevancy than on the need for corroboration, the evidence is either relevant, and thus admissible, as demonstrating the likelihood or otherwise of the accused committing the crime, or it is not. It is certainly doubtful whether a jury can be expected to understand and to apply the distinction between using a statement to test credibility and reliability on the one hand and as proof of

⁴⁰ e.g. even mere presence at the scene, see *McIntosh v HM Advocate* 2003 SCCR 137

⁴¹ *R v Illes* [2008] SCC 57

fact on the other. This is especially so where directions relating to different parts of a mixed statement are given⁴².

7.4.14 The direction given to juries by some judges, in accordance with the case law, that a statement cannot be used to prove fact but is “part of the general picture which the jury have to consider” might be said to be both baffling and meaningless. In relation to wholly exculpatory statements, it is not entirely clear when they are actually admissible in practice, other than when the accused gives evidence and his/her credibility and reliability is challenged. It would seem that, following old judicial declaration cases, they can be used at least to bolster the credibility or reliability of witnesses who have given evidence in support of an accused’s position. How this would actually operate in practice is not always clear.

7.4.15 There is therefore a strong case to be made that the current law, which makes a distinction between incriminatory, exculpatory and mixed statements, should be clarified so that no distinction is drawn between them in terms of admissibility. One approach would be to provide that all statements, which are made by accused persons after the crime, should be admissible in evidence for all generally competent purposes, including proof of fact. That, however, could, as already commented, result in the creation of carefully prepared statements being read over to credible third parties for reiteration in court, thus presenting an account incapable of being tested by cross-examination or courtroom impression. This danger would exist also if, in a structured

⁴² *R v Duncan (1981)* 73 Cr App Rep 359, Lane CJ at 365

investigation, a suspect appeared at a pre-arranged interview with such a statement. However, a judge or jury ought to be trusted to be able to assess such a statement for what it is worth, without requiring a formal direction on its value or the weight to be attached to separate elements of it, depending upon whether they might be regarded as “against interest”.

7.4.16 Reference has been made elsewhere in this report to the view of the Scottish Law Commission that⁴³:

“(1) the law should be simplified to the greatest degree consistent with the proper functioning of a law of evidence”; and

“(2) as a general rule all evidence should be admissible unless there is good reason for it to be treated as inadmissible”.

These guidelines are particularly important in jury cases. It is neither helpful nor realistic, in the context of a modern democratic legal system involving the use of lay jurors, to attempt to make fine distinctions, based on outdated legal theory: (i) between a “mixed” statement and a wholly incriminatory or exculpatory statement; and (ii) on what is admissible and what is not and for what purpose. In particular, telling a jury that they can use some parts of an accused’s statement, but not others, as proof of fact is expecting too much, even if, no doubt, the principle that juries do follow legal directions must remain extant.

⁴³ Scottish Law Commission 100th Report para 1.3 see Chapter 7.3 - Sufficiency of Evidence

7.4.17 The common law can certainly be understood in the context of an adversarial system where rules of evidence were designed to exclude unreliable testimony entirely from consideration by a jury. Furthermore, in such a system, what a suspect says in a police interview might be excluded in order to ensure that such statements are not created as substitutions for testimony at the trial diet. However, where a system must be Convention compliant, it has to be remembered that the police interview may be regarded as part of the trial process. In these circumstances, it is difficult to justify the exclusion of answers given in a process initiated by the police and continued by the Crown. Thus it should at least be the case that, where a person has been made the subject of a formal police investigation and has been interviewed in the course of that enquiry, any replies which he/she makes in the course of that process ought to be admissible for all competent purposes, including proof of fact.

7.4.18 As already commented, it would be simpler if there were a general rule that all statements made by accused persons were admissible, unless objectionable had they been made in the witness box. In that event, it would be for a judge or jury to assess the credibility and reliability of statements in all the circumstances in which they came to be made. This would again be in keeping with the “modern emphasis on the free assessment of evidence unencumbered by restrictive rules”⁴⁴. In the event of the accused attempting to use a carefully prepared statement instead of giving evidence, the judge or prosecutor would be well entitled to comment on that fact. Once more, if, in a modern society, judges and juries are to be trusted to be able to consider and

⁴⁴ Wilkinson: Evidence 204 quoted at para 7.2.57

analyse evidence properly, they ought to be capable of giving such a statement appropriate weight. However, that may be a step too far at present. Furthermore, it could not be justified on the same basis as statements at interview since those outwith that context would not be being made as potentially part of the trial, as defined by the Convention jurisprudence.

Conclusion

7.4.19 The current law on the admissibility of “mixed” and “exculpatory” statements made by a suspect during a police interview is not based on a rational and balanced approach to the relevance of statements. It is highly complex and potentially confusing to juries and others in the criminal justice system. It is at odds with the principle of the free assessment of evidence unencumbered by restrictive rules; and it fails to take account of the role of the police interview as part of the trial process.

Recommendations

I therefore recommend that:

- the distinction between incriminatory, exculpatory and mixed statements should be clarified so that, so far as statements made to the police or other officials in the course of an investigation are concerned, no distinction is drawn between them in terms of admissibility. All statements made by accused persons to such persons in that context should be admissible in evidence for all generally competent purposes, including proof of fact, in the case against that accused except where the content of a statement would otherwise be objectionable; and**
- further consideration should, in due course, be given to whether this rule should be applied to all pre trial statements by accused persons.**

7.5 ADVERSE INFERENCE FROM SILENCE

Introduction

7.5.1 The “right to silence” is derived from one of the most readily understood and fundamental facets of criminal justice systems throughout the democratic world; that an accused is presumed innocent until proven guilty. As it is for the prosecution to demonstrate the guilt of the accused, there is no obligation on the accused to establish his/her innocence, or to take an active part in the trial proceedings at all, particularly in a way that might aid the prosecution case.

7.5.2 This translates into two related and overlapping elements: first, there is the right of a suspect to remain silent when asked questions by the police in the investigative phase; and secondly, there is the privilege of an accused against self-incrimination at trial (which extends to statements at interview¹). Although there is no explicit reference to either of these in the Convention, they are clearly understood as essential, if implied, elements of the Article 6 right to a fair trial².

7.5.3 The decision of an accused to exercise these rights can have a significant effect on the trial. A cunning and sophisticated accused may, for example, attempt to manipulate the trial process by remaining silent at police interview and then later springing an “ambush”, perhaps fabricated, defence at the trial

¹ *Funke v France* (1993) 16 ECHR 297

² see Chapter 3.0 – Convention Considerations

diet. Alternatively, a court may regard a failure to provide an exculpatory explanation at interview as an indication that, in relation to what was said by the accused in evidence, no truthful explanation exists. The Review has therefore considered what significance, if any, can be attached by a judge or jury to the failure of a suspect to answer questions prior to the trial diet. Put in the interrogative, what significance can be attached to the fact that an important line of defence, subsequently advanced at trial, was not stated from the outset, at police interview? Although no-one can be compelled to answer a question prior to trial or to incriminate himself/herself at trial, should the court be entitled to interpret silence in either situation as, some would say, common sense permits?

Current Law

7.5.4 As a generality, silence of an accused, at any time, cannot amount to a source of evidence capable of proving, or assisting to prove, a fact. Furthermore, it cannot be used as corroboration of other testimony so as to provide a sufficiency of evidence.

7.5.5 In relation to police questioning prior to trial, no adverse inference at all can be drawn from a failure to respond³. This is also the law in several Commonwealth countries, including Canada⁴ and Australia. This prohibition applies particularly because of the antecedent caution, which expressly warns the suspect of his/her right not to answer questions. It is different if a person

³ *Robertson v Maxwell* 1951 JC 11

⁴ *R v Chamber* (1990) 780 CR (3d) 235, (*infra*)

states something positive in response to an allegation and his/her answer, though not directly incriminating, implies some degree of involvement. What is not said in a response might be taken as meaning that the suspect accepts the allegation, or part of it, even although he/she does not say so expressly⁵.

7.5.6 There is some *ex tempore* authority⁶ which has been interpreted as meaning that a failure to react to an allegation made by a co-accused may be construed as an admission, but it is far from clear that this is what was really meant. As a proposition of law, it must be regarded as highly dubious and the real essence of the decision may simply be that a statement by a co-accused in the presence of the accused is admissible as evidence, but only in order to show the reaction of the accused to it.

7.5.7 Silence by an accused at trial is not treated in the same way as a suspect making no comment at interview. The two situations are markedly different. In a police interview the suspect is free to answer, or to decline to answer, any questions he/she wishes. No reasons for refusing to respond⁷, whatever they may be, need be given. At trial, an accused can elect not to give evidence and, again, he/she need not explain his/her decision. However, if he/she elects to give evidence, he/she must then answer all the questions put to him/her under pain of being found in contempt. He/she cannot testify on some matters but not others and he/she cannot refuse to answer on the grounds that the answer might incriminate him/her.

⁵ *Kay v Allan* 1978 SCCR Supp 188, i.e. a partially answered question

⁶ *Buchan v HM Advocate* 1993 SCCR 1076, LJ-C (Ross) approving a passage in Renton & Brown: Criminal Procedure (5th ed), para 18-41a; see now 6th ed para 24-56

⁷ such as one that a reply might incriminate him

7.5.8 If an accused does not give evidence, his/her silence cannot be used to prove, or assist to prove, fact, and, in that regard, to provide corroboration⁸. But the failure of an accused to testify, in circumstances where the evidence “cries out” for an explanation, is a relevant factor which can be taken into account by a judge or jury when reaching a verdict⁹. The judge or jury can draw inferences from the testimony given which are most favourable to the Crown and adverse to the defence in the absence of a contrary explanation. If there is no such explanation proffered in the face of incriminating evidence, the judge or jury can infer that the Crown evidence is indeed incriminating. Thus, a judge may comment on the failure of the accused to give evidence where the facts established by the evidence, if accepted, raise a *prima facie* inference of guilt¹⁰. However, it has been made very clear by the courts that any such comment should be made with restraint and only in exceptional circumstances¹¹. For this reason, it is very seldom done.

7.5.9 Since 1995 there has been no express prohibition on the prosecutor from commenting adversely on an accused’s failure to give evidence. When the repeal of the prohibition on comment by the prosecutor was debated in the House of Lords, Lord McCluskey argued in favour of the prosecutor’s ability to comment thus¹²:

⁸ cf *Maguire v HM Advocate* 2003 SCCR 758

⁹ *Donaghy v Normand* 1991 SCCR 877

¹⁰ *Brown v Macpherson* 1918 JC 3, LJG (Strathclyde) at 8; *HM Advocate v Hardy* 1938 JC 144, LJ-C (Aitchison) at 147

¹¹ *Scott v HM Advocate* 1946 JC 90 per LJG (Normand) at 98; Lord Moncrieff was not at all happy with even that idea given the history of the procedure which allowed, but did not compel, an accused to give evidence (see p 97), see also *McLean v HM Advocate* 1993 SCCR 605

¹² see *Hansard supra*

“There is nothing more obvious to a jury when they have sat in a criminal court for two or three days or two or three weeks and observed the evidence being given against the accused person. They reach the stage when the accused has the opportunity to go into the box and give evidence. If he does not do so, then of course the jury observe that. They do not need to be told by judges or by others, but in certain cases the very absence of that evidence might be of some significance in determining what inferences should be drawn from the other evidence. Silence cannot add to the evidence which is available to the jury, but the absence of evidence from the accused to explain facts which he ought to be able to explain should be a matter on which the prosecutor can comment”.

But again, in practice, such comment is widely regarded as contrary to the spirit of the fair trial requirement and is very rarely made. Indeed, in defence speeches, it is not uncommon for counsel or agents to explain as a generality that an accused will testify, or not, upon the basis of advice given to him/her by his/her legal representatives. It is difficult to contradict such an assertion other than to comment that the decision is ultimately not that of counsel or agent but the accused.

7.5.10 There is one further use of adverse inference; that is in relation to the rarely used procedure of judicial examination. The 1995 Act provides that, at a judicial examination¹³:

“An accused may decline to answer a question; and, where he is subsequently tried..., his having so declined may be commented upon by the prosecutor, the judge presiding at the trial, or any co-accused, only where and in so far as the accused (or any witness called on his behalf) in evidence avers something which could have been stated appropriately in answer to that question”.

¹³ s 36(4)

If the accused does not give evidence at his/her trial, no adverse inference can be drawn from his/her silence at judicial examination¹⁴. If he/she does testify, a comment can be made at trial on his/her earlier failure to answer questions *quantum valeat*. In practice, such comment is equally rarely, if ever, made. Both the Crown and the court appear to regard it as unfair, especially where the accused has stated that, in declining to comment, he/she was acting upon legal advice.

The Convention

7.5.11 It bears repeating that the Convention does not expressly provide a right to silence, but such a right has been implied by the European Court as central to the concept of a fair trial¹⁵. As to the extent of the right, the Court, under reference to a trilogy of cases¹⁶, recently explained in *Adetoro v United Kingdom* that¹⁷:

“The Court recalls at the outset that the right to silence is not an absolute right... The fact that a trial judge leaves a jury with the option of drawing an adverse inference from an accused's silence during police interview cannot of itself be considered incompatible with the requirements of a fair trial. However, as the Court has previously emphasised, the right to silence lies at the heart of the notion of a fair procedure under Article 6 and particular caution is required before a domestic court can invoke an accused's silence against him¹⁸.

It would be incompatible with the right to silence to base a conviction solely or mainly on the accused's silence or on a refusal to answer

¹⁴ *Dempsey v HM Advocate* 1995 SCCR 431

¹⁵ *Saunders v United Kingdom* (1996) 23 EHRR 313 and *Murray v United Kingdom* (1996) 26 EHRR 29

¹⁶ *Murray (supra)* at para 47; *Condron v United Kingdom* (2001) 31 EHRR 1 at para 56; and *Beckles v United Kingdom* (2003) 6 EHRR 162 at para 57)

¹⁷ 20 April 2010 (no 46834/06) at para 47 - 49

¹⁸ the Court referred to *Beckles*, (supra), at para 58; *Condron* (supra), at para 56)

questions. However, it is obvious that the right cannot and should not prevent that the accused's silence, in situations which clearly call for an explanation from him, be taken into account in assessing the persuasiveness of the evidence adduced by the prosecution...

Whether the drawing of adverse inferences from an accused's silence infringes Article 6 is a matter to be determined in the light of all the circumstances of the case, having regard to the situations where inferences may be drawn, the weight attached to them by the national courts in their assessment of the evidence and the degree of compulsion inherent in the situation... In practice, adequate safeguards must be in place to ensure that any adverse inferences do not go beyond what is permitted under Article 6 § 1 of the Convention. Of particular relevance are the terms of the trial judge's direction to the jury on the issue of adverse inferences..."

7.5.12 As it had done earlier in *Murray v United Kingdom*¹⁹, the Court cited a number of safeguards, which ensured that the overall scheme under consideration operated fairly, notably that: the accused was under no obligation to answer questions²⁰; he/she had been cautioned; and the conviction was not based solely upon inference from silence. The decision is in contrast to *Condron v United Kingdom*²¹, where a violation of the right to a fair trial was established because the Court considered that the jury had to be told that no adverse inference ought to be drawn if they were satisfied that the accused had reasonably relied on legal advice not to answer questions.

Other jurisdictions

7.5.13 Most European and Commonwealth²² jurisdictions do not draw adverse inferences at trial from an accused's earlier silence or failure to mention a relevant fact. But they are permitted to do so in limited circumstances in

¹⁹ para 51

²⁰ cf *Funke v France* (1993) 16 EHRR 297

²¹ (2001) 31 EHRR 1

²² e.g. Canada and Australia. This also extends to silence at trial: *Weissenteiner* (1993) 178 CLR 217

England and Wales, Ireland, South Africa and Singapore. In particular, in England and Wales there are statutory provisions permitting an inference to be drawn at trial from a suspect's silence, whether at interview, at the point of charge or during trial. Similar provisions apply to a failure by a suspect to account for marks on a suspect's body or his/her presence at a particular place (e.g. the locus)²³. These provisions are complex and have been subject to considerable judicial scrutiny, resulting in a substantial restriction in the circumstances in which any adverse inference can be drawn.

7.5.14 Silence during a police interview does not, of itself, permit an adverse inference to be drawn at trial in England and Wales. It is necessary that the accused seeks to rely on a fact which he/she did not mention when questioned by the police or when charged with the offence. The inference can be drawn by the judge or jury when determining guilt or by the judge when determining whether there is a case to answer²⁴. In *R v Argent*²⁵, Lord Bingham summarised no less than six conditions that must be satisfied before an adverse inference can be drawn. The English jurisprudence has developed further so that no inference can be drawn from silence if: (a) at the time the police had already made up their mind to charge the suspect²⁶; (b) the allegations were complex or old and no sensible immediate response was appropriate²⁷; (c) the facts in question were not known to the defendant at the

²³ Criminal Justice and Public Order Act 1994 ss 34, 35, 36 and 37

²⁴ *ibid* s 34

²⁵ [1997] 2 Cr App R 27; following *R v Cowan* [1996] QB 373, Taylor CJ at 379

²⁶ PACE Code C para 11.6 & CPS Guidance at:

http://www.cps.gov.uk/legal/a_to_c/adverse_inferences/#a02

²⁷ CPS Guidance (*supra*)

time when he/she failed to disclose them²⁸; or (d) the charge at trial is for a different offence from that with which the defendant was charged, cautioned or arrested²⁹. An inference cannot be drawn if the suspect was not afforded access to legal advice prior to the questions being put to him/her³⁰.

7.5.15 A court in England and Wales is required to look at the context in which the suspect declined to answer. It applies a two stage test³¹: (1) a subjective test of whether the defendant genuinely relied on the advice; and (2) an objective test of whether it was reasonable for the defendant to rely on the advice. Following the Convention jurisprudence, the jury must be directed that, if they consider that the defendant was silent because he/she was genuinely and reasonably following legal advice, no adverse inference can be drawn. A further restriction applies where the defendant's silence was maintained because he/she, or his/her solicitor, knew little or nothing about the case against him/her. It is recognised that, where only minimal information is provided by the police, the proper advice from the solicitor to the suspect may be to remain silent, in which case no inference can be drawn³².

7.5.16 Although adverse inference cannot be the sole evidence on which a conviction is based³³, it can be taken into account when determining whether there is a case to answer³⁴. Accordingly, an inference from silence may, in England and

²⁸ *Nickolson* [1999] Crim LR 61; see also *Betts and Hall* [2001] 2 Cr App Rep 16

²⁹ CPS Guidance (*supra*)

³⁰ *Murray v United Kingdom* (1996) 22 EHRR 29

³¹ *R v Beckles* [2005] 1 WLR 2829

³² *R v Argent* [1997] 2 Cr App R 27, *R v Imran and Hussain* [1997] Crim LR 754 CA and *R v Roble* [1997] Crim LR 449

³³ Criminal Justice and Public Order Act 1994 s 38(3)

³⁴ *ibid* s 34(2)(c)

Wales, be regarded at least as an adminicle of evidence. Finally, as in Scotland, an adverse inference may be drawn from silence at trial³⁵. But the accused is given a warning to that effect by the judge at the conclusion of the Crown case. The inference is not restricted to cases in which the evidence “cries out” for an explanation.

7.5.17 The Supreme Court in Ireland determined that the right to silence was a corollary of the freedom of expression contained in Article 40 of the Irish Constitution³⁶. However, in terms of the Criminal Justice Act 1984³⁷, which applies to most offences, where a suspect fails to account to a police officer for his/her presence at a particular place or for an object, substance or mark found on him/her, the court:

“...may draw such inferences from the failure or refusal as appear proper; and the failure or refusal may, on the basis of such inferences, be treated as, or as capable of amounting to, corroboration of any evidence in relation to which the failure or refusal is material”.

7.5.18 There must be an appropriate caution given in these circumstances. In terms of the 1984 Act³⁸, the Court may also draw adverse inferences where an accused has failed to mention a fact, later relied on in his/her defence at trial, while being questioned. The fact must be one which, in the circumstances existing at the time, “clearly called for an explanation”. An accused may not be convicted on the inference alone.

³⁵ *ibid* s 35(1)

³⁶ *Heaney v Ireland* [1994] 1 IR 580

³⁷ ss 18 and 19 as amended by the Criminal Justice Act 2007

³⁸ s 19A as inserted by the 2007 Act

7.5.19 It has already been noted that most Commonwealth jurisdictions do not permit inferences from silence. But it is perhaps worthy of remark that, in their Report on the Right to Silence³⁹, the Australian Northern Territories Law Reform Committee made what they described as the shortest recommendation ever recorded by any Law Reform Agency in Australia in dismissing the idea of introducing adverse inference⁴⁰.

Consideration

7.5.20 There are two principal questions to be answered in deciding whether to introduce a rule permitting adverse inference. First, and perhaps most important, can it be reconciled in principle with the proper application of a person's right to silence, in the context of the presumption of innocence and the overall fairness of the trial process? Secondly, if it can be so reconciled, would it make a positive contribution to an efficient and effective system for the investigation and prosecution of crime?

7.5.21 The primary consequence of allowing an adverse inference is that, with appropriate adjustments to the caution, it may provoke responses at police interview. It is thought to do this in England and Wales, at least in cases where the solicitor advising is persuaded that there is a sufficiency of evidence and that a prosecution is likely to follow. In that situation, where the suspect has a colourable defence or strong mitigation, the advice might well be that the suspect should state that defence or mitigation at the earliest opportunity. This

³⁹ Report No 25, 2002

⁴⁰ see also New South Wales Law Reform Commission Report No 95, 2000

is so even if seasoned offenders may still elect to say nothing. The secondary effect is the obvious one; that silence at interview will entitle a prosecutor to cross-examine on the failure to mention the relevant fact and will invite the judge or jury to draw the inference at trial. But the Review discovered, through its investigations, that inviting the jury to do this is not a regular feature of trials in England and Wales or elsewhere. The two effects are, of course, mutually exclusive. If the object of adverse inference is attained and the suspect does speak at interview, there is no silence and no adverse inference can be drawn.

7.5.22 The introduction of a near absolute right of access to a lawyer in advance of police interview is likely, if exercised, to promote an increase in those electing to remain silent. This will certainly be the case if the requirement of corroboration is retained. Adverse inference has, it has been argued, the capacity to balance this perceived effect of legal advice in the context of the need for effective investigation and prosecution of crime. Its proponents maintain that it is reasonable to expect a suspect to answer certain fundamental questions, such as where he/she was at a particular time or whom he/she was with or why he/she was carrying a particular thing or how his/her clothing came to be stained or marked in a particular fashion. These are admittedly all questions which a suspect ought usually to be in a position to answer.

7.5.23 The main argument against adverse inference is that it encroaches on the right to silence and the privilege against self-incrimination. Put simply, if an adverse inference can be drawn from silence, a suspect may feel compelled to

speaking. His/her right to be silent is thereby compromised, indirectly at least. The idea that a failure to answer a question should permit an adverse inference to be drawn is, presumably, rooted in the intuitive response that the most likely explanation for a failure to give an account is that there is no good account to give. But there are many other reasons for a suspect choosing to exercise his/her right to say nothing. He/she may not want to incriminate others from whom he/she is at risk or to whom he/she has a degree of familial or social loyalty, however misplaced. He/she may not think that he/she will be able to articulate his/her defence effectively. He/she may not understand that he/she has a defence.

7.5.24 On the point of principle, it can be said with force that current Convention jurisprudence permits a statutory scheme in which adverse inference can operate. However, judging from the experience in England and Wales, the scheme would have to be of labyrinthine complexity. For it to have any utility, there would require to be a system whereby, in advance of interview, the suspect were provided with far more information on the case against him/her than is presently given or capable of being given in many cases, if the maximum period for questioning is to be as recommended. Solicitors would require to be afforded sufficient time to consider that information. This is unlikely to be a feasible option, at least in custody cases, without further extension of time limits. It also harks back to what has already been alluded to; that this type of system is effectively moving part of the trial out of the court room and into the police station. Rather, as appears to be the position in some

inquisitorial systems, what occurs in the police station becomes almost determinative of the case.

7.5.25 Finally, it is worth noting that adverse inference was previously promoted for Scotland by the Thomson Committee. The Committee did not consider it right to draw an adverse inference from silence in response to police questioning, but it did recommend that it could legitimately be done were the questioning to take place in a controlled judicial forum. The falling into practical desuetude of the judicial examination procedure, and the reluctance of the Crown or the court to invite the drawing of such an inference even when such a procedure had occurred, suggest that this is not an idea worth reviving. It is, in any case, recommended elsewhere in this report that the judicial examination procedure be abolished.

7.5.26 In summary and in answer to the two questions, the introduction of adverse inference would not fit well with the presumption of innocence, the right to silence and the privilege against self-incrimination as understood and applied in Scotland. Instead of promoting efficiency and effectiveness, it would bring unnecessary complexity to the criminal justice system.

Recommendation

I therefore recommend that:

- **no change is made to the current law of evidence that prevents inferences being drawn at trial from an accused's failure to answer questions during the police investigation.**

8.0 APPEALS OVERVIEW

8.0.1 The 2010 Act covered three main areas of the criminal justice system: legal assistance; detention; and appeals. The Review's Terms of Reference require that it consider "the extent to which issues raised during the passage of the 2010 Act may need further consideration, and the extent to which the provisions of the Act may need amendment or replacement". Previous sections of this report have dealt with the first two areas raised in the Act. In this section the Review looks at two key areas of the appeal process.

8.0.2 First, Chapter 8.1 – Appeal procedures, looks at the current law, including sections 5 and 6 of the 2010 Act which deal, respectively, with extensions of time for late appeals and time limits for Bills of Advocation and Suspension. The Review ultimately recommends that all archaic forms of appeal should be discontinued or at least severely restricted in their availability. There should be a more consistent approach across the whole appellate jurisdiction. The lodging of Notices of Intention to Appeal and Notes of Appeals should be bound, as they are presently, by timelines, but exceptions to the statutory periods should be allowed only in defined circumstances. However, the Review also advises the creation of a general right of appeal, with leave, from all first instance decisions.

8.0.3 Secondly, Chapter 8.2 – Finality and Certainty, explores section 7 of the 2010 Act, which makes provision to ensure that the need for "finality and certainty" is considered prior to, and in appeals following upon, references from the

SCCRC. The Review believes that, in order to maintain the integrity and stability of, and public confidence in, the criminal justice system, it is essential that the High Court should not have the right to refuse to consider a reference from the SCCRC. However, in order to ensure future consistency in the making and determination of references, the test for the High Court's determining of an appeal following upon a reference should be whether: (a) there has been a miscarriage of justice; and (b) if so, it is in the interests of justice that the appeal be allowed.

8.0.4 It is the purpose of the recommendations in this section to promote an efficient system of appeal suitable for the 21st century. This means introducing a package of measures that will reduce the scope for unnecessary delays, make the appellate system simpler and more streamlined and have in place channels by which parties can challenge all first instance court decisions where that is deemed appropriate by a court.

8.0.5 In formulating these proposals, account has been taken not only of the rights of convicted persons to have a fair system for appeal but also of the need for others affected by the criminal justice system, notably the victims and witnesses of crime, to achieve emotional closure in consequence of the completion of the criminal process.

8.1 APPEAL PROCEDURES

“Justice delayed is Justice denied”¹

Introduction

8.1.1 It has been a singular aspect of the Scottish criminal justice system that it has strict time limits within which an accused person must be brought to trial. In custody cases, the law was laid down as early as 1701 in an Act of the Scottish Parliament² requiring diets of trial to be set down within 60 days of a request to do so, which failing the prisoner would be free forever of the charge. By the beginning of the last century, the period had extended to 110 days after first appearance on petition³. It is now 140 days⁴. Where an accused is not in custody, the period within which to start the trial in solemn cases is twelve months from that first appearance⁵. In summary cases, the time limit for custody cases is 40 days from the service of the complaint⁶. Traditionally, Scotland has taken a pride in these time limits even although, in the modern era, they are very often extended, at the discretion of the court, especially where the defence wish further time to prepare.

8.1.2 If procedures for an appeal are to be regarded as part of the overall trial process, which they must be seen to be in terms of the Convention

¹ attr. W E Gladstone

² Act Anent Wrongous Imprisonment 1701

³ Criminal Procedure (Scotland) Act 1887 s 43

⁴ 1995 Act s 65(4)(aa)(ii)

⁵ *ibid* s 65(1)(b)

⁶ *ibid* s 147(1)

jurisprudence, it must be recognised that the reasonable time requirement of Article 6 applies to appeals⁷. Although there are several time limits stipulating periods for the lodging of appeals and related documents, there are no time limits within which the court must hear and determine an appeal. It is not unreasonable to observe that, in recent years, the reputation of the system has been tarnished by the lengths of time which it has taken to progress some appeals⁸. This has been particularly worrying in the cases where the appellant has ultimately been successful.

8.1.3 It has not been possible to conduct an in-depth analysis of all the reasons for the delay in individual cases. These will be varied, although the ultimate responsibility lies in practical terms with the court. However, it was disturbing to note, during the course of the Review, that some practitioners did not see it as part of their responsibility to progress appeals with due speed and diligence. Rather, the approach taken by a few of those practitioners was that it was for the court, and the court alone, to do so. The legal responsibility in terms of Article 6 rests with the United Kingdom Government, but it is, or at least ought to be, the ethical obligation of everyone in the legal profession engaged in appellate work to assist the court in ensuring that cases are progressed efficiently.

8.1.4 One peculiarity of the system is that, even in the most serious cases, it is unusual for trial counsel to appear to argue the appeal. Indeed, it appears

⁷ *Gillespie v HM Advocate* 2003 SLT 210

⁸ see e.g. *Coubrough's Exrx v HM Advocate* 2010 SCCR 473 which took four years from a SCCRC reference in respect of a murder conviction in 1971. The appellant had died by the time of the final hearing

common for solicitors, who may or may not have been the trial solicitors, to instruct different counsel to frame the grounds of appeal and/or to conduct the appeal at the final hearing. The effect of this is unfortunate, especially in an appellate process which does not normally, without cause, proceed upon a transcription of the first instance proceedings but upon reports from the trial court. The peculiarity, first, deprives the appellate court of immediate access to trial counsel's knowledge of what occurred at the trial diet and, often of greater importance, why it occurred. Secondly, it involves a significant duplication of work, since the new counsel will have little knowledge of the issues before and at the trial beyond what is contained in the reports. Such circumstances make it almost inevitable that the new counsel will seek to obtain a picture of events already known to his predecessor. This is often reflected in applications for a transcription of the first instance proceedings or the disclosure of evidence already made available. The Review has ascertained that this is not a common feature of other Commonwealth or European appellate systems. The Review has been unable to discover the reason for what is a significant problem and a major cause of unnecessary delays. It is something which ought to be addressed by the courts and the legal profession, but the Review does not consider that it is an area where it has sufficient information upon which to recommend any positive changes.

Current Law

8.1.5 A person convicted on indictment⁹ or summary complaint¹⁰ may be permitted to appeal against conviction and/or sentence on the ground that a miscarriage of justice has occurred. A miscarriage of justice in relation to a conviction may occur in a number of ways, notably where there has been insufficient evidence or a misdirection of the jury. It can also occur because of the discovery of “fresh” evidence. A miscarriage of justice in a sentence appeal usually involves a first instance disposal which can be classified as incompetent, inappropriate or excessive¹¹. The High Court is empowered to interfere with a sentence simply if it considers that, having regard to all the circumstances, a different sentence ought to have been passed¹². This is assessed at the time of the appeal hearing and new information can be taken into account.

Solemn Appeals

8.1.6 The starting point in an appeal against conviction or conviction and sentence in solemn cases is the lodging of a Notice of Intention to Appeal. There is a short time span of two weeks¹³ for doing this; the Notice being only a formal document stating that intention¹⁴ and no more. The Notice does not specify any grounds of appeal. The time runs from the date of final determination of the case (i.e. the sentence) and that is very often, where reports have been

⁹ 1995 Act s 106(3)

¹⁰ 1995 Act s 175(5)

¹¹ *Donaldson v HM Advocate* 1983 SCCR 216, LJ-C (Wheatley) at 218; *Addison v Mackinnon* 1983 SCCR 52, LJ-C (Wheatley) at 55

¹² 1995 Act ss 118(4) and 189

¹³ 1995 Act s 109

¹⁴ Act of Adjournal (Criminal Procedure Rules) 1996, Form 15-2A

called for, four weeks after the jury's verdict. After lodging the Notice, there is a further eight week period¹⁵ during which the applicant for leave to appeal, as the potential appellant then is, must lodge his/her Note of Appeal. It is this document¹⁶ which is supposed to contain a "full statement of all the grounds of appeal"¹⁷. Appeals against sentence proceed on the basis of a Note of Appeal lodged within two weeks of the sentence¹⁸.

8.1.7 All appeals against conviction and/or sentence require leave from a single judge of the High Court or, if that is refused, the Court itself sitting with a *quorum* of at least three (conviction) or two (sentence) judges. The test for the grant of leave is whether the stated ground is "arguable"¹⁹. The requirement for leave to appeal had been abolished following recommendations of the Thomson Committee²⁰. Thereafter, a convicted person had an automatic right of appeal against conviction and/or sentence. In practice, "unstateable" appeals were largely eliminated from the system because counsel, who had exclusive rights of audience in the High Court at that time, were ethically bound not to present cases which had no basis in fact or law. Counsel required to advise accordingly and an appellant with no "stateable" case would either have to abandon his/her appeal or present it himself/herself without further legal assistance. Following the successful challenge to that practice before the European Court²¹, the requirement that all cases must have leave was

¹⁵ 1995 Act s 110(1)

¹⁶ Act of Adjournment (Criminal Procedure Rules) 1996, Form 15-2B

¹⁷ 1995 Act s 110(3)(b)

¹⁸ 1995 Act s 110(1)

¹⁹ 1995 Act ss 107(1) and 180(1)

²⁰ Third Report (Cmnd 7005) (1977) para 2.09

²¹ *Boner v United Kingdom* 1995 SCCR 1, the appeal being resisted by the Lord Advocate (Lord Rodger)

introduced. Thus, as had been indicated was the Government's intention²², the automatic right of appeal was abolished.

8.1.8 Appeals against preliminary rulings, made during the first instance process but in advance of a trial diet, proceed by way of Note of Appeal, but leave of the court of first instance (not the appellate court) must be obtained²³. The time limit for appealing is seven days²⁴. This period cannot be extended. If leave to appeal is refused, or no appeal is timeously marked, any person subsequently convicted can attack a preliminary ruling in the context of an appeal against conviction, if the ruling caused a miscarriage of justice.

8.1.9 Once a Note of Appeal is lodged, whether allowed late or timeous, the trial judge is required²⁵ to write a report on the case generally and on the specific grounds of appeal "as soon as is reasonably practicable". The papers are placed before a single judge to determine whether to grant leave to appeal²⁶. This is commonly known as the "first sift". There are no specific time limits for the completion of any of these processes. The determination is made in chambers without any oral hearing²⁷. If leave to appeal is refused, the applicant may, within fourteen days²⁸, require the High Court to reconsider the issue²⁹. This is also done in chambers without an oral hearing. If leave to appeal against conviction is granted, the appellant has forty-two days in which

²² *ibid* para 42

²³ 1995 Act s 74

²⁴ *ibid* s 74(2)(b) as amended prospectively by the Criminal Justice and Licensing Act 2010 s 72

²⁵ 1995 Act s 113

²⁶ *ibid* s 106-107

²⁷ *Ibid* s 107(6)

²⁸ *ibid* s 107(4A)

²⁹ although this is not an appeal, it is often called one to the "second sift"

to lodge his/her written case and argument³⁰. Thereafter, the appeal will normally be rolled for a procedural hearing, at which it ought to be appointed to a full hearing. At the full hearing, the appellant's written argument is treated as his/her principal submission without being read over.

8.1.10 In sentence appeals, the case will be rolled for a full hearing after the grant of leave. Not later than 21 days before the hearing, the appellant must lodge a written case and argument³¹, which is taken as the appellant's submission at the hearing³². In recent times, it has become common in sentence appeals for the written submission not to be lodged timeously. Sometimes they are lodged on the eve of the hearing and, occasionally, on the day of the hearing. This disadvantages appellants, in that the court may not have had adequate notice of the full argument in advance of the oral hearing. The court has no effective sanction to deal with such failures or with those in the rarer, but not uncommon, situation of a late case and argument in a conviction appeal.

8.1.11 Bills of Suspension are not competent in solemn procedure³³, but the Crown can use the Bill of Advocation procedure to appeal decisions taken prior to the jury's verdict³⁴. This might be used, for example, where a judge has refused to adjourn a trial, thus effectively bringing the case to a premature end.

³⁰ Act of Adjournal (Criminal Procedure Rules) 1996, rule 15.15A(4)

³¹ *ibid* 15.16(3)(a)

³² *ibid* rule 15.16(5)(a)-(b)

³³ 1995 Act s 130

³⁴ *ibid* s 131

Late Appeals (solemn cases)

8.1.12 An applicant can apply to the court, at any time, for an extension of either of the periods³⁵ for lodging a Notice of Intention to Appeal and a Note of Appeal against conviction and/or sentence. This does not apply to appeals against decisions at preliminary hearings. There is no long stop provision beyond which no application for permission to lodge a late Notice or Note can be made. Accordingly, an appellant can apply for an extension of time years, and in some cases many years, after conviction or sentence. This does happen. It is of note in this context that the SCCRC will usually, quite correctly, be reluctant to deal with a case in which the applicant has failed to exhaust the appeal procedures.

8.1.13 Where an application to lodge a Notice or Note late is made, there is no statutory or other defined test that has to be satisfied. An overall “interests of justice” requirement ought to apply, balancing the need to remedy miscarriages of justice in individual cases with the wider need for finality and certainty in the criminal process. However, in the recent past, there has been considerable indulgence in this area in favour of tardy applicants³⁶. This is in contrast to earlier decisions³⁷ suggesting that “special grounds” ought to be present to justify an exception to the limits laid down by Parliament.

8.1.14 The 2010 Act went some distance towards remedying some of the problems in this area by providing that, in the case of an application to allow a late Notice

³⁵ *ibid* s 111

³⁶ *Birrell v HM Advocate* 1993 SCCR 812, LJG (Hope) at 817

³⁷ *Spence v HM Advocate* 1945 JC 59, LJ-C (Cooper) at 61, following *Cockerell v HM Advocate* 1943 JC 69, LJG (Normand) at 63-64

of Intention to Appeal, the applicant must now: (a) specify why he/she failed to comply with the time limit; and (b) state what his/her grounds of appeal are³⁸. However, there is no statutory guidance on the basis upon which the court should grant such an application. There is also a minor problem in that the legislation does not provide an equivalent procedure, where the applicant has lodged a formal Notice but has not followed that up with a timeous Note of Appeal. In this latter event, the court administration normally treats the process of appeal as abandoned, but there is no statutory provision to that effect.

8.1.15 Applications for late appeals are normally dealt with on paper, initially by a single judge of the High Court in chambers³⁹. An unsuccessful applicant may apply to the High Court (i.e. sitting with a *quorum* of three) to have the decision reconsidered⁴⁰. For reasons which are not immediately clear, this is done at an oral hearing. At either stage, the Court may be given a variety of reasons for the applicant's failure to appeal in time. These are normally: (i) administrative errors by his/her agents in marking an appeal; (ii) failure on the part of his/her former (trial) agents to comply with instructions to mark an appeal; (iii) the applicant's error in being unaware of the time limits or the existence of a ground of appeal; and (iv) the applicant's confused mental state following conviction and/or sentence. The Court seldom has the time or resources to examine the accuracy of these contentions, even if it is almost always prepared to accept solicitors' accounts of administrative error.

³⁸ s 5 (2) inserting s 111(2A) into the 1995 Act

³⁹ 1995 Act s 103(5)

⁴⁰ *ibid* s 103(6), Act of Adjournal (Criminal Procedural Rules) 1996 Form 15-3B

Summary cases

8.1.16 In summary proceedings, there are no less than four potential modes of appeal:

stated case (appeal against conviction), section 174 (preliminary rulings), Bill of Suspension and Bill of Advocation. Bills of Suspension can normally only be employed to challenge final judgments⁴¹, i.e. at the conclusion of a summary trial⁴². They have traditionally been used in cases where the facts are not in dispute and there is a crisp issue of competency⁴³. Advocation, although usually resorted to by the procurator fiscal, is available generally to review decisions other than final judgments, again on the basis of some exceptional procedural irregularity⁴⁴ which cannot be remedied by an appeal by stated case at the end of the trial process. It can, for example, be used to appeal against the grant or refusal of adjournments at trial diets.

8.1.17 The applicant for leave to appeal against conviction requires to request a stated case within one week of the final determination of the case⁴⁵. Thereafter there are a variety of time limits designed to expedite the summary stated case process. The High Court may extend the time periods “as it may think proper”⁴⁶ and these applications are normally dealt with on paper by a single judge of the High Court in chambers. There is no appeal to a three judge bench against a refusal to extend a time limit in summary cases⁴⁷.

⁴¹ it can also be used to suspend warrants, a procedure outwith the scope of the Review

⁴² *Morton v Macleod* 1981 SCCR 159

⁴³ *Fairley v Muir* 1951 JC 56, i.e. where the stated case procedure would be unnecessarily cumbersome

⁴⁴ see generally Renton & Brown : Criminal Procedure paras 33-19 et seq, especially 32-22 under reference to *MacLeod v Levitt* 1969 JC 16 and *Durant v Lockhart* 1985 SCCR 72

⁴⁵ 1995 Act s 176

⁴⁶ 1995 Act s 181

⁴⁷ *ibid* s181(3)

8.1.18 In relation to preliminary rulings in the summary courts, there is a statutory right of appeal, but only with leave of the court of first instance, within seven days of the decision taken⁴⁸. There is no power to extend this time limit. However, as in solemn cases, in the event of a conviction, the applicant can re-raise any matter dealt with by a preliminary ruling even although he/she did not exercise his/her right of appeal, or was refused leave to do so, at the earlier stage. Accordingly, there is a right of appeal against conviction, which can be exercised late if the court deems that appropriate, and there is a right of appeal, with leave, in relation to preliminary rulings.

Nobile Officium

8.1.19 There have, over recent years, been several causes of delay in the progress of appeals despite what ought to be a straightforward process. These can be prompted by late attempts to amend grounds of appeal and by late changes of agency. These matters are primarily for the High Court to regulate in practice, provided that it is confident that it has the statutory powers to do so. What is of more concern is the invocation of the *nobile officium* of the High Court to challenge decisions of that Court before, during and after the completion of the appeal process.

8.1.20 Without indulging in an academic essay on the subject, the *nobile officium* is an ancient power of superintendence available to the High Court to deal with circumstances which are “extraordinary or unforeseen and where no other

⁴⁸ *ibid* s 174 as amended prospectively by The Criminal Justice and Licensing (Scotland) Act 2010 s72

remedy is provided for by law”⁴⁹. Despite some authority to the contrary, it was not until recently regarded as a remedy available to review interlocutors of the High Court, whether at appellate or first instance level⁵⁰. It is very much a remnant from a bygone age before criminal procedures were regulated by the detailed statutory provisions which exist today. Indeed, it comes from an era before the creation of the right of appeal from first instance High Court verdicts in 1926⁵¹ and the introduction of the SCCRC in 1997.

8.1.21 The 1995 Act provides⁵², in relation to appeals in solemn proceedings, that:

“every interlocutor and sentence pronounced by the High Court... shall be final and conclusive and not subject to review by any court whatsoever...”.

It might have been thought that this was quite clear. A decision of the High Court (i.e. one with a *quorum* of at least three) cannot be overturned by another decision of the same court. It is final. But in *Hoekstra*⁵³ the court appeared to overturn one of its own decisions. Although the facts there were very special, this was, and is, in some quarters perceived as authority to use this procedure to challenge any decision of the High Court in solemn appeals. Attempts to discourage this have been made⁵⁴, but applications for the use of the power continue to be lodged; designed to challenge the merits of final decisions of the Court, whether directly or under the guise of identifying some

⁴⁹ *Anderson v HM Advocate* 1974 SLT 239, LJG (Emslie) at 240

⁵⁰ Hume ii 508; Alison: Practice of the Criminal Law i. 23 referring to inferior courts

⁵¹ now including a right to appeal from preliminary rulings with leave under the 1995 Act s 74

⁵² s 124 see *Mitchell v HM Advocate* [2011] HCJAC 35, LJG (Hamilton) at para 12

⁵³ *Hoekstra v HM Advocate* (No 2) 2000 JC 387

⁵⁴ *Beck Petitioner* 2010 SCCR 222

fundamental nullity, after the refusal of an appeal or leave to appeal⁵⁵. This undermines the finality of decisions taken by the High Court at appellate level.

8.1.22 A petition to the *nobile officium* is an additional potential avenue of appeal in summary cases. There is no equivalent of the finality provision⁵⁶ for summary procedure. This is, no doubt, because it was previously accepted that a decision on an appeal to the High Court from an inferior court was final. Nevertheless, its absence has been used to permit the High Court to review its own decisions in summary appeals⁵⁷. Thus, for example, where leave to appeal has been refused by the High Court itself, an unsuccessful applicant may try to have that decision reversed by an identically composed court (i.e. with the same *quorum*). This has actually been achieved in one case⁵⁸, albeit in circumstances widely regarded as incompetent⁵⁹. Indeed, it is not unknown for a party, who has been refused leave to appeal by stated case, to attempt to circumvent that decision by lodging a Bill of Suspension and a petition to the *nobile officium*⁶⁰.

⁵⁵ *Uttley v HM Advocate* [2009] HCJAC 95

⁵⁶ 1995 Act s 124

⁵⁷ *Allan, Petnr* 1993 SCCR 686, dealing with an admittedly incompetent sentence imposed by the High Court on appeal

⁵⁸ *Akram v HM Advocate* 2010 SCCR 30

⁵⁹ *Beck (supra)* para 42

⁶⁰ see the extraordinary proceedings in *Shepherd v PF (Dornoch)* [2010] HCJAC 114, cf 1995 Act s 184

Consideration

Solemn Appeals

8.1.23 The High Court has, in recent years, attempted to introduce procedures which ensure that appeals, in which leave has been given, are pursued to a conclusion with suitable vigour. Nevertheless, perhaps especially in cases where the appellant has been allowed interim liberation, there may be little incentive to progress an appeal when the prospects of a possible refusal and a return to custody beckon. The court has set down some timetables for the pursuit of appeals, notably the forty-two day period for the written case and argument. It can, and in many cases does, attempt to set out advisory *ad hoc* timetables for particular appeals by appointing a party to complete a particular procedural step, to do a specific thing by way of investigation or to lodge documents, by a certain date. Yet there are no specific statutory sanctions, as there are in civil procedure, which can be applied in the event of a party failing to comply with any time limits or other procedural order set by the Court. This leads to a degree of laxity in such compliance. It seems appropriate to provide the Court with a clear statutory power to introduce sanctions, including that to dismiss an appeal, or hold it to be abandoned, or to order that particular steps should not be paid for out of public funds⁶¹, in order to enforce procedural time limits and decisions and to ensure the efficient running of the system of appeals in general as well as the orderly progress of individual cases.

⁶¹ see e.g. Prosecution of Offences Act 1985 s 19A and the Costs in Criminal Cases (General) Regulations 1986

Late Appeals (solemn cases)

8.1.24 Where an application for leave to appeal comes outwith the timescales set by statute, there is a balance to be achieved. On the one hand, if an appeal clearly has merit and a refusal to allow an application for leave to be received late would make a reference from the SCCRC inevitable⁶², the appeal should be allowed to proceed. On the other hand, if statutory timetables are to have any purpose, a late applicant should be required to show greater cause than the mere “arguability” of grounds needed for leave to appeal in timeous applications⁶³.

8.1.25 Late appeals present substantial practical problems. The trial judge may have difficulty reporting accurately on matters which occurred months, and perhaps years, previously. The productions may have been returned to their owners or destroyed. Other notes or papers may have gone missing.

8.1.26 Late appeals undermine the principles of finality and certainty, which a statutory time table is designed to promote. Yet there is no test laid down in the 1995 Act for allowing a late Notice or Note. It is not said that any cause or special cause is required⁶⁴. In England and Wales, where the time limit for lodging an appeal is only twenty-eight days from the conviction⁶⁵, there is also no statutory guidance on the reasons required for a late appeal. However, there are *dicta* to the effect that “substantial” reasons must be advanced as to

⁶² *R v King* (2000) Crim L R 835

⁶³ 1995 Act s 107(1)(a)

⁶⁴ although there is authority to that effect under earlier similar legislation: *Spence v HM Advocate* 1945 JC 59 following *Cockerell v HM Advocate* 1943 JC 62

⁶⁵ Criminal Appeal Act 1968 s 18

why the application is late⁶⁶. Furthermore, at that stage the applicant requires to show that there are “such merits that the appeal would probably succeed”⁶⁷.

8.1.27 In order to clarify the position, it is recommended that the 1995 Act be further amended to provide that: (i) where an applicant fails to lodge a Note of Appeal timeously, having lodged a Notice of Intention to Appeal, his/her appeal will be deemed to be abandoned; (ii) where an applicant seeks to lodge a Notice of Intention to Appeal late or seeks to have his/her abandoned appeal revived by lodging a Note of Appeal, having earlier failed to do so, the court may allow this but only if: (a) specific cause is shown why a late Notice or Note should be allowed; and (b) the grounds of appeal are such as disclose that, were the appeal to be received late, it would probably succeed on the grounds stated. Put another way, the Court would have to apply a similar test as that employed by the SCCRC; that it is satisfied that a miscarriage of justice may have occurred.

8.1.28 It is important that the victims of crime, including the relatives of the deceased in homicide cases, be told why an appeal is being allowed to proceed late. After all, finality and certainty play a significant part in their need for closure. The potential for a sense of despair, which may be engendered in victims, when an appeal is lodged after they had thought that the time in which to do so had expired, should not be ignored. Accordingly, where a judge decides to allow an appeal to proceed out of time, reasons for that decision must be given and be capable of communication to the relevant victims or relatives.

⁶⁶ *R v Rigby* (1923) 17 Cr App R 111

⁶⁷ *R v Marsh* (1935) 25 Cr App R 49

8.1.29 If the application for leave to appeal late is refused by a single judge, then any further application to the High Court should be dealt with on paper in chambers⁶⁸ without an oral hearing unless the court otherwise directs. As is required with other provisions in the 1995 Act, it should be made clear, if it is not already⁶⁹, that the decision of the High Court refusing to allow an appeal to be received late is final.

Bills of Advocation and Suspension

8.1.30 The 2010 Act has applied certain time limits within in which a person can appeal by way of Bill of Suspension or Advocation⁷⁰. However, a more fundamental question is whether appeals by these methods should continue in existence at all, especially where leave to appeal, either at the preliminary ruling stage or at the post conviction sift stage, has been refused. The starting point for a consideration of this issue is that the relatively recent provisions of sections 174 and 175 provide a comprehensive code governing appeals from the summary courts. Section 184 of the 1995 Act provides that:

“(2) Subject to section 191 of this Act, on the [stated] case being lodged... the appellant shall be held to have abandoned any other mode of appeal which might otherwise have been open to him”.

Yet section 191 provides:

“(1) Notwithstanding section 184(2) of this Act, a party to a summary prosecution may, where an appeal under section 175 of this Act would be incompetent or would in the circumstances be inappropriate, appeal to the High Court, by bill of suspension against a conviction or, as the

⁶⁸ i.e. in the same way as a timeous application for leave to appeal; 1995 Act s 107(6)

⁶⁹ 1995 Act s 124

⁷⁰ s 6, introducing 1995 Act s 191A

case may be, by advocacy against an acquittal on the ground of a miscarriage of justice in the proceedings”.

8.1.31 The processes of Suspension and Advocacy are archaic in form. They do not require the leave of the court of first instance. They do not require leave to appeal from a judge of the High Court. They thus provide a tempting route, especially in conviction cases, circumventing such hurdles. They are not infrequently used in situations where, were a conviction to follow, an appeal in the normal way would be available. Recently, for example, Bills of Advocacy have been used to challenge the refusal or grant of applications to adjourn trials in summary cases. That type of decision is a discretionary one and appeals should seldom succeed⁷¹. It is not in the wider interests of justice to delay summary proceedings by permitting the lodging of a Bill of Advocacy in such circumstances. Bills of Suspension have been used, again for example, in an attempt to challenge decisions to commit an accused to prison pending his trial in solemn cases. This type of decision is one where, if an appeal is to be competent, it ought only to proceed with leave of the court of first instance.

8.1.32 In summary proceedings, both parties have a right to appeal final judgments, provided, in the case of a convicted person, leave from a judge of the High Court or that Court itself is obtained. There is a power to appeal preliminary rulings, with leave of the court of the first instance. There appears to be little reason why there should not be a general power to appeal all pre trial interlocutory decisions, with such leave. In that event, there would be little

⁷¹ cf *Hunter v PF Livingston* 2011 SCCR 130; *Donald v Kelly* 2004 SCCR 153 following *Tudhope v Lawrie* 1979 JC 44

place for Bills of Suspension and Advocation as a mode of review of summary court decisions in a modern appellate regime. It is recommended that such Bills be abolished as a mode of review of court decisions by accused or convicted persons.

8.1.33 In certain situations, it may be that a convicted person wishes to challenge a summary conviction on the basis of some radical incompetency. There is force in the argument that such cases would be better challenged in an appellate process less complex than that involved in a stated case. However, proceeding by way of a Note of Appeal, rather than stated case, might be a matter which could be authorised by the summary court on an application for that purpose made at the same time as the application for a stated case. This could be achieved by providing, in section 176 of the 1995 Act, that, in cases where the application concerns only the competency of the conviction, the summary court may treat the application as if it were a Note of Appeal and report accordingly. The case could proceed in the same way as a summary appeal against sentence, other than in respect of the *quorum* provisions.

8.1.34 In relation to the use of Advocation by the Crown in solemn cases, its current use is probably restricted to those situations in which the trial judge has made some form of ruling, against which an appeal is not available, where the decision effectively terminates the prosecution. It is recommended that this process be abolished in favour of a right to appeal, without leave, where such termination is the effect of any decision of a court of first instance. This could

be achieved by amendment of section 74 or the new section 107A⁷² provisions of the 1995 Act.

Late Appeals (summary cases)

8.1.35 It is recommended that the same test for leave to appeal late as is suggested for solemn cases be applied to summary cases. It ought also to be made clear that, in accordance with current practice, there is no appeal from the decision of a single High Court judge refusing leave to appeal late in a summary case⁷³.

Nobile Officium

8.1.36 Because: (a) appellate procedure is now regulated in some detail by statute and Act of Adjournal; (b) any decision by the High Court on the merits of a case is final; and (c) in any event, there is the right to apply for a reference to the SCCRC, the utility of the *nobile officium* remaining as a mode of review in the modern era may be regarded as questionable.

8.1.37 In summary cases it is an additional method of attempting to undermine decisions already taken under one of the existing four appellate routes. Thus, for example, where leave to appeal has been refused by the High Court (sitting as a quorum of three) the unsuccessful applicant may, as narrated above, try to have that decision reversed by an identically composed court.

8.1.38 The capability of one mode of appeal interfering with another is inevitably going to cause confusion and with it delay, uncertainty and expense. Having

⁷² inserted by Criminal Justice and Licensing (Scotland) Act 2010 s 74

⁷³ 1995 Act s 181(3)

regard to the need for certainty and finality, this cannot be justified in a modern system of appellate justice. There is no reason why, in all summary cases, a convicted person cannot avail himself/herself of the ordinary mode of statutory appeal by way of an application for a stated case (or appeal, with leave, from a preliminary ruling). If leave is refused, then that ought to be the end of the matter, subject to the jurisdiction of the SCCRC.

8.1.39 What should not occur is that petitions to the *nobile officium* be employed to review decisions refusing leave to appeal or refusing an appeal. There should be clear statutory provision that a decision that concludes a properly conducted appeal procedure should not be capable of circumvention, recognising the authority with which that decision was made. This is the intention, in relation to solemn cases, of section 124 of the 1995 Act. It is therefore recommended that, for the avoidance of doubt, a statutory provision that applies the same finality to summary case appeal decisions that section 124 provides in relation to solemn cases, should be introduced. If the High Court has made some error in deciding a case and this has resulted in a miscarriage of justice, the route to go down ought to be to apply to the SCCRC. It is therefore recommended that it be made clear in statute, again for the avoidance of doubt, that it is not competent to review a decision of the High Court granting or refusing an appeal, or leave to appeal or an application to appeal late, by use of a petition to the *nobile officium*.

8.1.40 Although the Review considered carefully whether petitions to the *nobile officium* should be abolished entirely, it was ultimately persuaded that the

power ought to be retained on the basis that it should continue to be available to deal with circumstances which are truly extraordinary or unforeseen and where there is no other remedy available. But this is on the basis that the High Court is alert to the potential abuses which this equitable procedure can create if it is allowed to be used to challenge quorate final decisions of the High Court exhausting an appeal process or an application for leave to appeal in terms of the 1995 Act.

8.1.41 There is now an opportunity to simplify and modernise the current system of criminal appeals, making it less complex, more accessible and more efficient without compromising an individual's right to appeal decisions that may require to be reversed.

Recommendations

I therefore recommend that:

- **the High Court should be provided with a statutory provision to impose sanctions, including that to dismiss an appeal or to order that particular steps should not be paid for out of public funds, to enforce time limits and its own procedural decisions;**
- **the 1995 Act should be amended to provide that:**
 - (i) where an applicant fails to lodge a Note of Appeal timeously, having lodged a Notice of Intention to Appeal, his/her appeal will be deemed to be abandoned;**
 - (ii) where an applicant seeks to lodge a Notice of Intention to Appeal late or seeks to have his/her abandoned appeal revived by lodging a Note of Appeal, having earlier failed to do so, the court may allow this but only if:**
 - (a) special cause is shown why a late Notice or Note should be allowed; and**
 - (b) the grounds of appeal are such as disclose that, were the appeal to be received late, the appeal would probably succeed on the grounds stated;**

- (iii) discussions on whether to grant leave to appeal late shall all take place in chambers without the requirement of an oral hearing unless the Court otherwise directs; and
 - (iv) the decision of the High Court refusing to allow a Notice of Intention to Appeal or a Note of Appeal to be received late is final;
- where an application for leave to appeal late is granted, the Court must give a reason for that decision in a form capable of being communicated to any victim of the crime or next of kin of any deceased;
 - the processes of Bill of Suspension and Bill of Advocation should be abolished. The provisions of sections 74 and 174 of the 1995 Act should be expanded to permit appeals from any pre trial decision of a court of first instance but only with leave of that court. Where the decision has the effect of terminating a prosecution by acquitting the accused of a charge, or part of a charge, or otherwise the Crown should have the right of appeal without leave;
 - section 176 of the 1995 Act should be amended to permit an applicant for a stated case based solely on the incompetency of a conviction to request the court to authorise that the appeal proceed by Note of Appeal rather than Stated Case. The court should be permitted to grant such authorisation. Other than in relation to the quorum of the Court, the appeal should proceed in the same way as a Note of Appeal against sentence;
 - the same test for leave to appeal late as is suggested for solemn cases should be applied to summary cases. It ought also to be made clear that, in accordance with current practice, there is no appeal from the decision of a single High Court judge refusing leave to appeal late in a summary case;
 - the High Court's *nobile officium* should continue but there should be a statutory provision that applies the same finality to summary case appeal decisions that section 124 of the 1995 Act provides in relation to solemn cases; and
 - further consideration by the court and the legal profession should be given to whether the practice of trial counsel not appearing in the appeal proceedings constitutes a problem and, if so, what steps should be taken to solve that problem.

8.2 FINALITY AND CERTAINTY

Introduction

8.2.1 In introducing the provisions of the 2010 Act that relate to the SCCRC, the Government attempted to address the problem, recognised in *Cadder*, which can happen when “change the law” decisions, capable of having retroactive effect, are made by the courts. The difficulty created follows from the legal fiction that, as distinct from changes made by statute, the courts never change the law but simply declare what the law has always been. This can, and does, occur where a superior court overrules a decision, or series of decisions, taken by a lower court, which may have been applied in practice for years, if not generations. In theory, the new declaration of the law applies to all previous cases. However, of practical necessity, there must be a limit to any retroactivity.

8.2.2 In the Irish Supreme Court case of *A v The Governor of Arbour Hill Prison*, Murray CJ neatly set out the limit in the following terms¹:

“....in a criminal prosecution where the State relies in good faith on a statute in force at the time and the accused does not seek to impugn the bringing or conduct of the prosecution, on any grounds that may in law be open to him or her, including the constitutionality of the statute, before the case reaches finality, on appeal or otherwise, then the final decision in the case must be deemed to be and to remain lawful notwithstanding any subsequent ruling that the statute, or a provision of it, is unconstitutional”.

¹ [2006] 4 IR 88 at 143

Thus, where there is a change of law after the expiry of a time limit for appealing a conviction, or where an appeal or leave to appeal has been refused, the general rule is that the conviction must stand. However, as tends to be common with generalities, there are exceptions. In *Arbour Hill Prison* the exception was expressed as applying if²:

“for wholly exceptional reasons related to some fundamental unfairness amounting to a denial of justice, ... verdicts in particular cases or a particular class of cases be not allowed to stand”.

8.2.3 In *Cadder*, both Lord Hope³ and Lord Rodger⁴ referred to the principle of finality which had been stressed in *Arbour Hill Prison*. Both said that it was for the SCCRC to determine whether it would be in the “public interest” to refer any case raising a *Cadder* point. It should be noted that the relevant part of the reference test in Scotland is the “interests of justice” and not the “public interest”.

8.2.4 There are, or at least were, two concerns following *Cadder*. First, where a convicted person had not appealed a decision at first instance, he/she might apply to the High Court for leave to appeal late on *Cadder* grounds. In that event, it would be open to the Court to grant that application. An appeal, where the conviction may have occurred years previously, would then be “live” and not subject to the *Arbour Hill Prison* finality dictum. Similar considerations would apply where there was a live appeal but no *Cadder* ground and the appellant sought to introduce such a ground by way of an

² *ibid*

³ at para 62

⁴ at para 103

amendment to his/her Note of Appeal. It is understood that, since *Cadder*, there may have been some inconsistency in the approach of the judges to such applications. However, the correct approach is illustrated by *Ahmad v HM Advocate*⁵, where the appellant was not permitted to introduce a *Cadder* ground in circumstances where his/her appeal ought to have been concluded before *Cadder*. Thus, where no *Cadder* ground has been raised and an appeal has been, or ought to have been, concluded by the time of that decision, no leave to proceed with such a ground ought generally to be given, whether by way of a late Note of Appeal or an amendment to the grounds in an existing Note. In either case, the alternative remains that, secondly, the SCCRC could refer a concluded case to the High Court, thereby reviving it into a state also not struck at by the *Arbour Hill Prison* finality *dictum*. Were an appeal or amendment allowed to be received late or such a reference to be made, the only decision for the Appeal Court, under the existing statutory provisions, would be whether a miscarriage of justice in the trial process had occurred. Whatever the date of any conviction and/or subsequent refusal of any appeal, that decision would have to be made in light of the “new” law as declared by the superior court⁶.

Current Law

8.2.5 Prior to 1997, if a convicted person’s appeal, or application for leave to appeal, was refused, his/her remedy was to apply to the Secretary of State to

⁵ 2011 SCCR 148, Lord Reed at para 11

⁶ see generally the approach to new law and practices in *Coubrough’s Extx v HM Advocate* 2010 SCCR 473 at para [34] – [36] under reference to *R v Hanratty* [2002] 2 Cr App Rep 30 Lord Woolf CJ at paras 98 - 100, *Campbell v HM Advocate* 2004 SCCR 220 LJ-C (Gill) at para 98; *Boncza Tomaszewski v HM Advocate* 2000 SCCR 657 LJG (Rodger) at para 5

have his/her case referred back to the High Court. However, in that year the SCCRC was established⁷ as a body independent of the Government, Crown and Judiciary, to consider applications claiming that a miscarriage of justice had taken place.

8.2.6 The SCCRC may refer a case to the High Court if they⁸:

“believe –

- (a) that a miscarriage of justice may have occurred; and
- (b) that it is in the interests of justice that a reference should be made”.

This is a much less restrictive test than that current in England and Wales, where it is whether there is a real possibility that the conviction would not be upheld, if a reference were made, because of an argument, or evidence, not raised in the trial or prior appellate proceedings and an appeal has been determined or leave to appeal has been refused⁹. There is no enthusiasm for any change in the Scottish test to make it similar to that in England and Wales¹⁰.

8.2.7 It can be seen immediately that on the one hand, in deciding whether to refer a case, the SCCRC have to apply a different, and more stringent, test from that

⁷ 1995 Act s 194A, inserted by the Crime and Punishment (Scotland) Act 1997 following the recommendations of the Sutherland Committee

⁸ 1995 Act s 194C

⁹ see *R v CCRC ex parte Pearson* [2000] 1 Cr App R 141 analysing the Criminal Appeal Act 1995 s 13. The CCRC must have regard to the test which the courts apply in refusing leave to appeal late, especially in change of law situations (*R v Hawkins* [1997] 1 Cr App R 234), when considering whether to refer a case (*R v Cottrell* [2008] 1 Cr App R 7) see Nobles and Schiff: Absurd Asymmetry [2008] 71 MLR 464 and Sinclair: The Relationship between the Commission and the Court

¹⁰ England and Wales and Norway being the only two other jurisdictions with such a Commission

used by the High Court in determining whether to grant leave to appeal (i.e. arguability). On the other hand, the test is less stringent than that applied by the Court in allowing an appeal, i.e. that a miscarriage of justice has, and not just “may have”, occurred in the trial process. But it does contain an important additional element beyond that presently applied by the Court either when granting leave or in allowing an appeal, i.e. that it is “in the interests of justice” that a reference should be made. Prior to the 2010 Act, there was no restriction or guidance on the matters which the SCCRC may take into account under this heading.

2010 Act

8.2.8 Because of the concern that *Cadder* might result in a flood of applications to the SCCRC and consequent references to the court, many of which, on one view, would have resulted in the quashing of the relative convictions, the 2010 Act expanded on the interests of justice element in the test to be applied by the SCCRC by providing that¹¹:

“In determining whether or not it is in the interests of justice that a reference should be made, the Commission must have regard to the need for finality and certainty in the determination of criminal proceedings”.

The intention was to ensure that, when assessing an application, the SCCRC would be bound to take into account the *dictum* in *Arbour Hill Prison* relative to “spent” cases (i.e. those where the time limits for an appeal had expired or the appeal, or application for leave to appeal, had been refused).

¹¹ s 7(3) introducing 1995 Act s 194C(2)

8.2.9 It was perceived that there would remain a problem if, nevertheless, the SCCRC did refer “spent” cases. As already noted, the High Court would not be able to take “the interests of justice” into account. Its role would be restricted to determining whether a miscarriage of justice had occurred in the particular trial process. For this reason, the 2010 Act introduced another provision¹² whereby:

“(1) Where the Commission has referred a case to the High Court under section 194B of this Act, the High Court may, despite section 194B(1), reject the reference if the Court considers that it is not in the interests of justice that any appeal arising from the reference should proceed.

(2) In determining whether or not it is in the interests of justice that any appeal arising from the reference should proceed, the High Court must have regard to the need for finality and certainty in the determination of criminal proceedings”.

The amendments made by the 2010 Act were designed specifically to deal with cases where an applicant to the SCCRC, who had not appealed his/her conviction or had had his/her appeal or application for leave to appeal refused, sought to raise a *Cadder* point, even although the law was as stated in *McLean* at the time of his/her appeal and/or trial.

8.2.10 The amendments made by the 2010 Act apply to all SCCRC references and not just to those raising *Cadder* points. They give to the High Court a gate-keeping role, relative to the interests of justice, which formerly rested only with the SCCRC. Whereas, previously, the sole concern of the High Court was whether a miscarriage of justice had occurred in the trial process, it now

¹² s 7(4) introducing 1995 Act s 194DA

extends to whether the Court considers that a reference ought to have been made “in the interests of justice” having regard, potentially, to a wide range of circumstances, including the reasons why the High Court might previously have refused leave to appeal late or treated an earlier appeal as abandoned.

8.2.11 This gate-keeping role has to be performed by the High Court at a preliminary (procedural) hearing in advance of any full hearing on the merits of the reference. Although the power to reject a reference has not yet been exercised, it might be envisaged that the High Court may refuse to entertain a reference in circumstances where, if an application for a late appeal were to have been made, it would have refused to grant such an application. Equally, it might refuse a reference, if it had already refused to entertain a late appeal and there was no change in circumstances. There may be cases in which the SCCRC and the High Court could reach a different decision on where the interests of justice may lie.

Consideration

8.2.12 There are three main questions to answer: first, is it appropriate that there should be a specific requirement for the SCCRC to consider finality and certainty in deciding whether to refer and, if so, should other aspects of the “interest of justice” test be similarly specified; secondly, should the High Court’s “gatekeeping role”, provided for in the 2010 Act, be continued; and thirdly, are there any other ways in which finality and certainty, or the wider

interests of justice, should be considered in the reference or appellate processes?

SCCRC and the “interests of justice”

8.2.13 The significance of the SCCRC is that it provides, by its very nature, an exception to the principle of finality in criminal proceedings. It has that role because it is recognised that, no matter how proficient the High Court may be in rooting out miscarriages of justice in the trial process, there are some, albeit few, cases, where the High Court has failed to do this or where facts have come to light to demonstrate a miscarriage of justice after the exhaustion of rights of appeal.

8.2.14 As has been highlighted elsewhere in this report, the effect of continued litigation on victims and relatives of deceased persons, as well as those convicted, should not be underestimated. Certainty and finality remain important considerations for any criminal justice system. As a generality, it is in the interests of all of those involved in a case, whether it be victims, witnesses or accused, that it reach a conclusion. It is important, for purposes of public perception, that cases do end and are not subject to repeated appeals or changes of decision.

8.2.15 The need for finality and certainty is reflected in the SCCRC being limited to referring cases where it can be said that it is in the interests of justice for the reference to be made. This element in the reference process must involve taking into account considerations wider than those raised in the particular

application such as whether, despite his/her perception that a miscarriage of justice may have occurred, an applicant decided not to appeal at the time or abandoned an appeal and effectively acquiesced in his/her conviction.

8.2.16 A SCCRC reference is an extraordinary process designed to deal with exceptional cases where something has gone wrong within the criminal justice system. But the form of process acknowledges that it is not enough to demonstrate that a miscarriage of justice may have occurred at the previous trial. A broader test, having regard to the wider interests of justice, must be applied before a case can be referred. It must take into account the *dictum* in *Arbour Hill Prison*, if the evidence adduced at trial was in accordance with the law then or at the appellate stage.

8.2.17 The Review accepts that, even in the absence of the new wording introduced by the 2010 Act, the SCCRC would normally have taken the principles of finality and certainty into account when applying the interests of justice test. The Review is confident that the SCCRC will continue to do so in the immediate future. But there have been instances in the past in which the High Court has not been entirely happy that the SCCRC has fully considered this aspect of a case¹³. Retention of the new wording will ensure that it continues to be regarded as an important factor recognising, if it were not obvious, that the possibility of a miscarriage of justice having occurred in the trial process does not, of itself, mean that it is in the interests of justice that the relative

¹³ see *Hunt v Procurator Fiscal (Inverness)* 2008 SCCR 919 and the sentence cases of *Kelly v HM Advocate* [2010] HCJAC 20, Lord Kingarth at para 6; and *Daffurn v HM Advocate* [2010] HCJAC 53, LJG (Hamilton) at para 11, although focusing on miscarriage of justice

conviction be quashed. This applies in all cases where a miscarriage of justice is alleged and not just in change of law situations.

8.2.18 The Review takes the point that, by specifying this particular aspect of the “interests of justice”, the legislation may be seen as detracting from the importance of other elements. In this connection, the Review notes the terms of the SCCRC information leaflet, which make it a requirement that appeal procedures be exhausted. But the Review is confident that the SCCRC will continue to take into account all the other matters which it has customarily had regard to. It would be reluctant to recommend listing, in statutory form, other aspects of the interests of justice which might be taken into account and which could outweigh the occurrence of a miscarriage of justice at trial.

The High Court’s “Gate-keeping Role”

8.2.19 The Review is acutely aware of the important role that the SCCRC plays in retaining public confidence in the criminal justice system. There is a perception that miscarriages of justice sometimes occur. That perception is well founded, even if it has to be put into a proper perspective relative to the total number of convictions recorded (approximately 140,000) and appeals marked (about 2000) in a given year. The SCCRC receives about 110 applications *per annum* and refers about 8 *per annum* to the appeal court. In conviction cases the SCCRC has referred 57 out of 1,000 cases since 1999. About two thirds of references result in convictions being quashed¹⁴. Of course, there may be miscarriages which are neither complained of nor

¹⁴ see SCCRC Annual Report 2010-11, p16

referred, but the figures do provide some illustration of the extent of any problem¹⁵.

8.2.20 The fact that the High Court must consider a reference from the SCCRC is important in maintaining confidence in the SCCRC and thereby in the criminal justice system as a whole. Miscarriages of justice can arise for reasons not directly connected to the trial process. This is very often the case with “fresh” evidence claims¹⁶. However, some miscarriages of justice arise as a result of the way in which a case has been dealt with by a trial or appellate court¹⁷. It is unusual for the SCCRC to consider a case unless and until the applicant has either unsuccessfully appealed the decision at first instance or has been refused leave to appeal. Thus by the time an application is made to the SCCRC, the applicant, his/her friends, relatives and other supporters, may perceive that the Court is less than sympathetic to his/her position. This concern would be greater if the Court, when originally rejecting the applicant’s appeal or refusing to grant leave to appeal, made negative comments about the merits of the grounds of complaint. If applicants were aware that, even if his/her case were to meet the criteria for a reference by the SCCRC, the Court could refuse to consider the reference *in limine* for reasons other than whether there was a miscarriage of justice, this may well deter them from applying to the SCCRC in the first place. If applicants are deterred from applying to the SCCRC because of that perception, this has a strong potential

¹⁵ some, however, would say that a low percentage reflects on the SCCRC’s willingness to refer cases; see in England Nobles and Schiff: The Criminal Cases Review Commission: Establishing a Workable Relationship with the Court of Appeals [2005] Crim L R 173

¹⁶ e.g. *Campbell v HM Advocate* 2004 SCCR 220, *Johnston v HM Advocate* 2006 SCCR 236 and *Gilmour v HM Advocate* 2006 SCCR 626

¹⁷ *Campbell (supra)* and *Campbell v HM Advocate* 2008 SCCR 847

for undermining the important role of the SCCRC within the criminal justice system.

8.2.21 On the other hand, SCCRC references are not, or at least ought not to be, the same as appeals made in the ordinary manner. However egregious a potential miscarriage of justice may be, the SCCRC cannot refer the case to the High Court unless they also believe it would be in the interests of justice to do so. If the Court were to be allowed to consider the interests of justice test, all that it would be doing would be applying part of the same statutory test as that laid down by Parliament for making a reference in the first place. Of course, if the SCCRC apply the test appropriately, the Court should rarely have any basis upon which to reject a case on this ground. But if it is for the SCCRC to consider whether it is in the interests of justice to refer a case, then logically it may also be appropriate for the Court to consider such a test at least when determining the appeal. It is countered that, if the SCCRC does not appropriately consider the interests of justice, the Crown could elect to “judicially review” the reference¹⁸. But introducing a civil process into this arena, and one involving an Outer House judge at least initially, may be seen as unnecessarily elaborate.

8.2.22 The case for maintaining a gatekeeping role for the High Court would have greater force if there were a perception that the SCCRC had a significant track record of frivolous or inappropriate references and it were thought that some further measure was required to bring greater discipline to their activities. The

¹⁸ for a challenge by applicants see *M Petmr* 2006 SLT 907, and in England see *R (on the application of Director of Revenue and Customs Prosecutions) v Criminal Cases Review Commission* [2007] 1 Cr App R 30

Review is content to note that there has been no suggestion from any source, nor is there any other reason to suppose, that this is the case. Indeed, it seems to be widely accepted that, despite the occasional lapse, the SCCRC has been a conspicuous success in discharging its duties conscientiously and responsibly.

8.2.23 The “flood” of referred cases that was feared following *Cadder* has not materialised. The Review understands that, in the period from the *Cadder* decision in October 2010 up until July 2011, there were thirty-eight applications to the SCCRC citing *Cadder* grounds. Added to fourteen similar applications made before *Cadder* was finally determined, this makes a total of fifty-two applications. Of these fifty-two applications, at least twenty-four have been fully processed by the SCCRC and none have been referred to the Court. It may be that a proportion of the remaining twenty-eight cases may result in references, but this cannot be said to be a deluge. The Review notes that more references may arise following *Ambrose*. However, the outcome of that case would suggest that they will be very few in number.

8.2.24 In all these circumstances, it is inappropriate for the Appeal Court to have a gate-keeping role in relation to references from the SCCRC because of the effect which such a role could have relative to the function committed by Parliament to the SCCRC. That new provision of the 1995 Act ought to be repealed.

References to the High Court

8.2.25 In references, there are wider considerations than exist in an ordinary appeal process, when the Court is generally only reviewing the proceedings in the trial court, although fresh evidence may also have an impact. By the time a reference is made, there may also have been a previous conscious decision by an applicant not to appeal, or not to do so on particular grounds. He/she may have abandoned an appeal or expressly departed from one or more grounds. There may have been a decision to refuse an applicant leave to appeal late either because of the absence of any arguable grounds or on the merits of the application as framed. In a reference, it may transpire that there is “fresh” evidence on both sides. Rather than continuing the process by, for example, ordering a re-trial¹⁹, it may be more appropriate for the Court to be able to bring matters to a conclusion in a reference by considering, in whatever order it deems appropriate in the particular case, but after a final hearing, whether: (a) there has been a miscarriage of justice in the trial process; and (b) it is also in the interests of justice that the appeal be allowed. The law might thereby be advanced in so far as the Court can determine in appropriate cases what wider considerations of justice might result in a conviction being sustained, notwithstanding the finding of a material miscarriage in the original trial or appeal proceedings. Such a determination may assist the SCCRC when considering the interests of justice in subsequent applications.

¹⁹ e.g. *Fraser v HM Advocate* 2011 SLT 515

Recommendations

I therefore recommend that:

- section 194 C(2) of the 1995 Act (as inserted by Section 7(3) of the 2010 Act) which introduces a requirement on the SCCRC to consider “finality and certainty” in considering a reference, should be retained. There should, however, be no further statutory listing of the criteria included in the “interests of justice” test for SCCRC references;**
- section 194 DA of the 1995 Act (as inserted by Section 7(4) of the 2010 Act) which provides a “gate-keeping role” for the Appeal Court in relation to references from the SCCRC should be repealed; and**
- when considering appeals following upon references from the SCCRC, the test for allowing an appeal should be that:
 - (a) there has been a miscarriage of justice; and**
 - (b) it is in the interests of justice that the appeal be allowed.****



Research Report:

The Impact of Corroboration on Prosecution

**Data commissioned from and provided by
Crown Office and Procurator Fiscal Service**

June / July 2011

Aim of the research

The Review wished to gain some understanding of the possible effect of the current requirement of Scots criminal law for essential facts to be proved by corroborated evidence. To aid the Review in this, the Crown Office and Procurator Fiscal Service (COPFS) was asked to consider whether they held data that could be analysed to indicate what effect the abolition of the corroboration requirement might have.

Methodology

COPFS held data on cases where an accused person had been placed on petition and the case had been marked ‘no further proceeding due to insufficient evidence’. There were a number of caveats (mentioned below) in using this data. However, it was considered that, in the absence of any other relevant data, this provided the best and most robust route to take in assessing any effect.

COPFS were able to identify 458 such cases, covering the calendar year 2010. COPFS also identified a further 141 sexual offence cases, covering a period of six months from 1 July 2010 to 31 December 2010, which were reported to its National Sexual Crimes Unit, but where the accused was not placed on petition due to lack of evidence.

As this data was both confidential, subject to data protection requirements, and required someone with experience of the prosecution side of the criminal justice system, COPFS identified two procurators fiscal (an experienced prosecutor currently working with solemn cases in COPFS and a recently retired senior District Procurator

Fiscal) to assess these cases. This work started on 20 June 2011 and finished 8 July 2011, with the two fiscals taking ten working days over the three week period to complete it. The costs for this work were met by the Review.

The fiscals applied a two-stage test. First, they considered for each case whether there would be sufficient evidence to prosecute if the corroboration requirement were removed. Secondly, they applied a qualitative test to the available evidence. Using the methods applied in England and Wales, they looked at the credibility and reliability of the available evidence and considered whether there was a reasonable prospect of securing a conviction. In reading the tables it is important to remember that the removal of the requirement for corroboration would not guarantee a conviction in these cases.

This research looked at the relatively small number of cases reported but marked for no proceedings. It cannot be determined how many cases the police did not report to COPFS because there was obviously only one source of evidence and therefore insufficient for criminal proceedings.

Table 1 lists the cases, broken down by crime type, where an accused person had been placed on petition but his/her case was subsequently marked ‘no further proceeding due to insufficient evidence’. These have then been remarked by the fiscals engaged in the research to determine whether the cases would have proceeded to trial on the basis that there would be a ‘reasonable prospect of conviction’, were the requirement for corroboration not a factor. These cases cover the whole of Scotland for the 2010 calendar year.

Table 1

	Total		Sufficient without corroboration		Reasonable prospect of conviction	
	No.	%	No.	%	No.	%
Total	458	100	374	81.7	268	58.5
Dishonesty	48	10.4	36	75	33	69
Drugs	41	8.9	20	49	15	37
Other	41	8.9	29	71	20	49
RTA	1	0.2	1	100	1	100
Sex – Non rape*	13	2.8	10	77	7	54
Sex – Rape*	6	1.3	6	100	2	33
Violence	308	67.2	272	88	190	62

** Table 1 includes sexual cases where an accused person was placed on petition but then marked for no further proceedings due to insufficient evidence. Table 2 covers cases that have been reported to National Sexual Crimes Unit but where the accused was not placed on petition due to lack of evidence. There are, therefore, sexual offence cases that appear in both Tables 1 and 2 although the numbers are low.*

Table 2 provides information, covering the whole of Scotland for a six month period from 1 July 2010 to 31 December 2010, on cases reported to the COPFS National Sexual Crimes Unit but where an accused was not placed on petition. These have then been ‘marked’ by the researching fiscals to determine whether the cases would have proceeded to trial on the basis that there would have been a reasonable prospect of

conviction, were the rule of corroboration not a factor. Of the 46 cases where there would be no reasonable prospect of conviction, this is further broken down by the reasoning, other than insufficient evidence.

Table 2

Total cases		Sufficient without corroboration (% of total)		Reasonable prospect of conviction (% of total)			No reasonable prospect of conviction cases		Victim did not want to proceed (% of no prospect of Conviction)		Victim would/could not attend court (% of no prospect of Conviction)	
No.	%	No.	%	No.	%		No.	%	No.	%	No.	%
141	100	140	99	95	67		46	100	17	40	4	8

The Sexual Offences Analysis covers all cases where no proceedings or no further proceedings were instructed by the National Sexual Crimes Unit during the last six months of 2010. The National Sexual Crimes Unit considers all serious sexual crimes cases submitted to the Crown Office and Procurator Fiscal Service by the police.

Caveats

- Apart from sexual offences reported to COPFS National Sexual Crimes Unit, the review was only able to consider cases on petition and then marked “no further proceedings”. The numbers of cases marked for no proceedings at all due to insufficient evidence are significantly higher.

- The numbers of cases which are never reported to the Procurator Fiscal by the police due to lack of evidence is unknown. As data is not gathered on this, by either the Police or COPFS, the proportion of cases not reported because of no evidence at all compared to cases with insufficient evidence is not clear.
- Although it is fairly straightforward to establish whether there would be a technical sufficiency in the absence of a requirement for corroboration, applying a qualitative test is a much more difficult exercise. This requires greater use of discretionary and qualitative judgment both by COPFS staff involved in case marking and by police officers investigating cases.
- The test applied in this research was whether there was a ‘reasonable prospect of a conviction’.
- All serious sexual offences are reported to the COPFS National Sexual Crimes Unit where they are considered prior to being placed on petition.



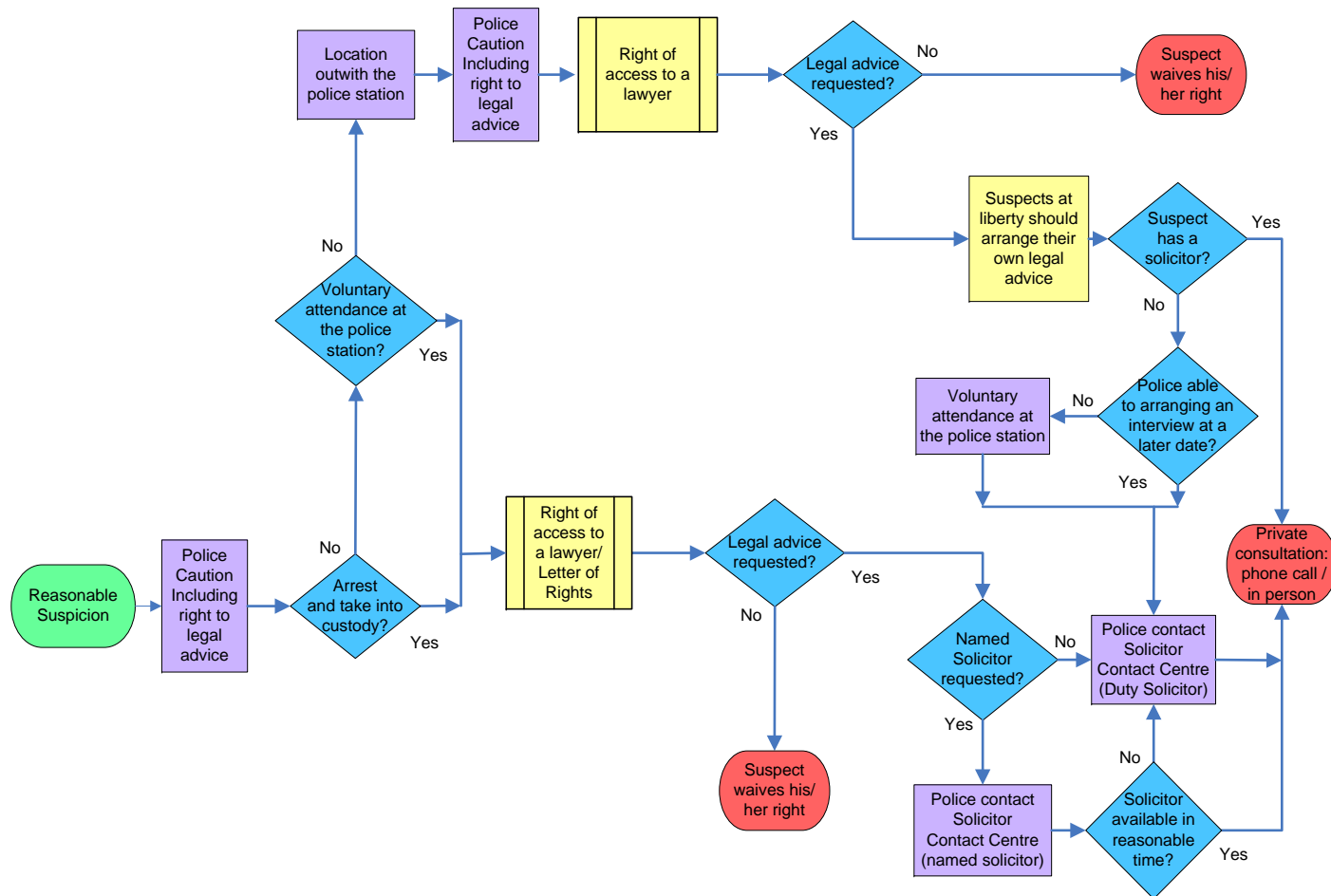
Carloway Review Process Maps

This Annex contains five process maps which present how some of the key procedures of arrest, detention, investigation and appearance before the court would work if the Report's recommendations were implemented. The aim of these maps is to aid an understanding of the practical effects of the new approach being proposed.

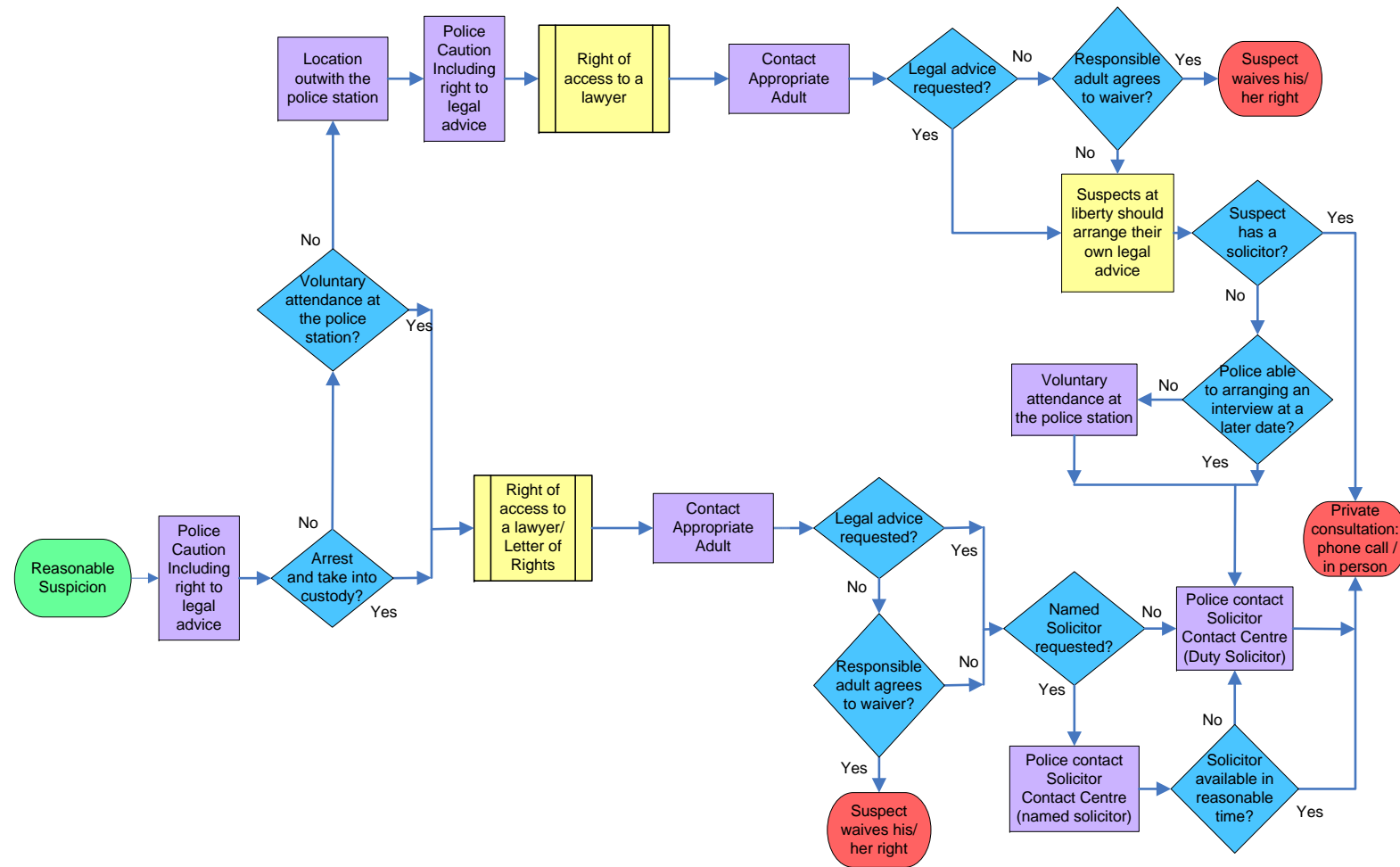
The first four maps take as their starting point the identification of reasonable grounds to suspect a person of having committed an offence. Maps 1-3 then present how the right of access to a lawyer would be implemented for a non-vulnerable adult, a vulnerable adult and a child. Map 4 concentrates on liberation/custody processes, emphasising the alternatives to custody and also the potential to liberate a suspect from custody at various stages after arrest and charge. Map 5 sets out the proposed processes which would enable questioning of a suspect after he/she has been charged or a reported to the procurator fiscal.

It should be emphasised that these process maps are illustrative only and can not be taken to include every detail that is covered in the text of the report.

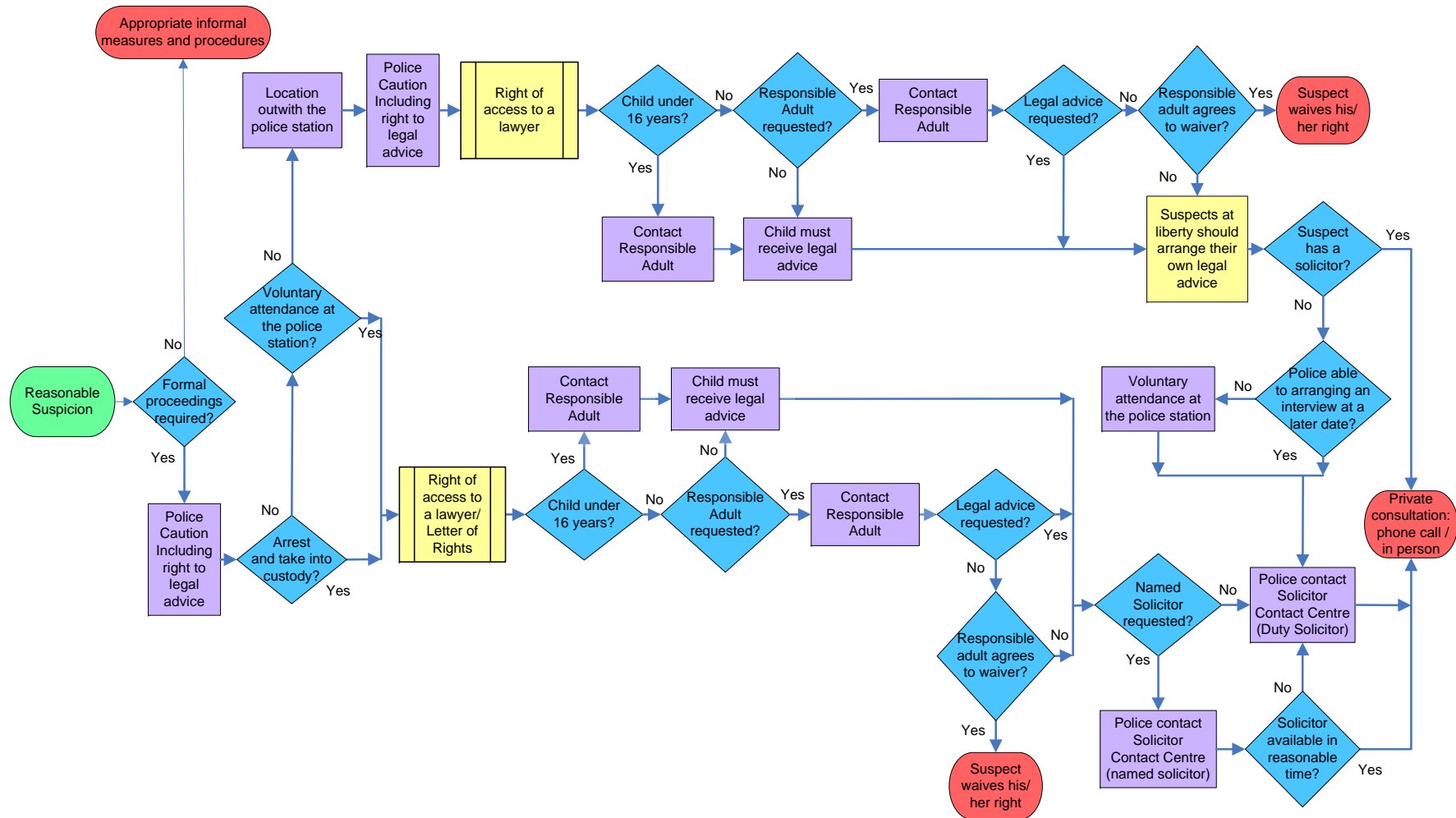
Right of access to a lawyer – The non vulnerable adult suspect

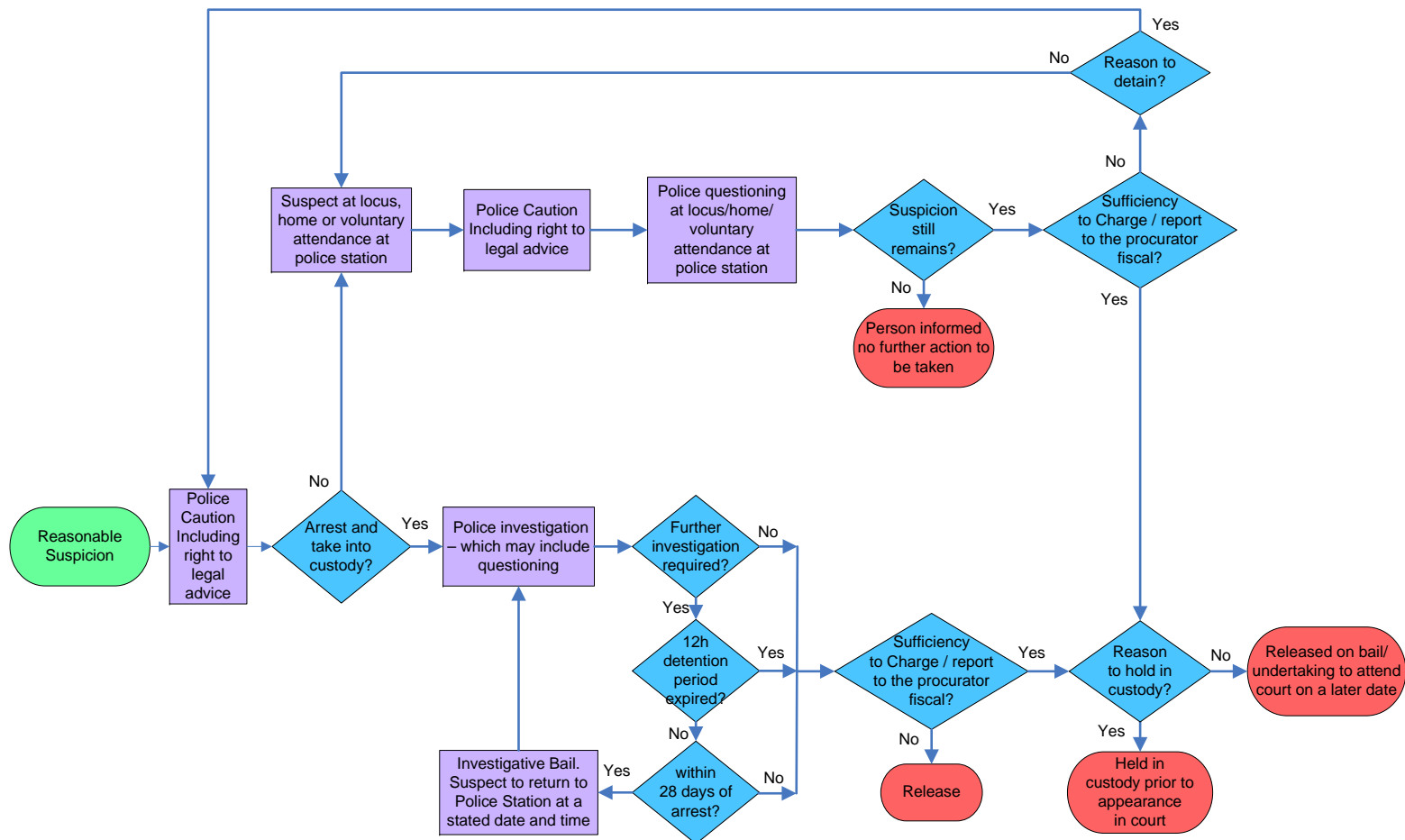


Right of access to a lawyer – The vulnerable adult suspect

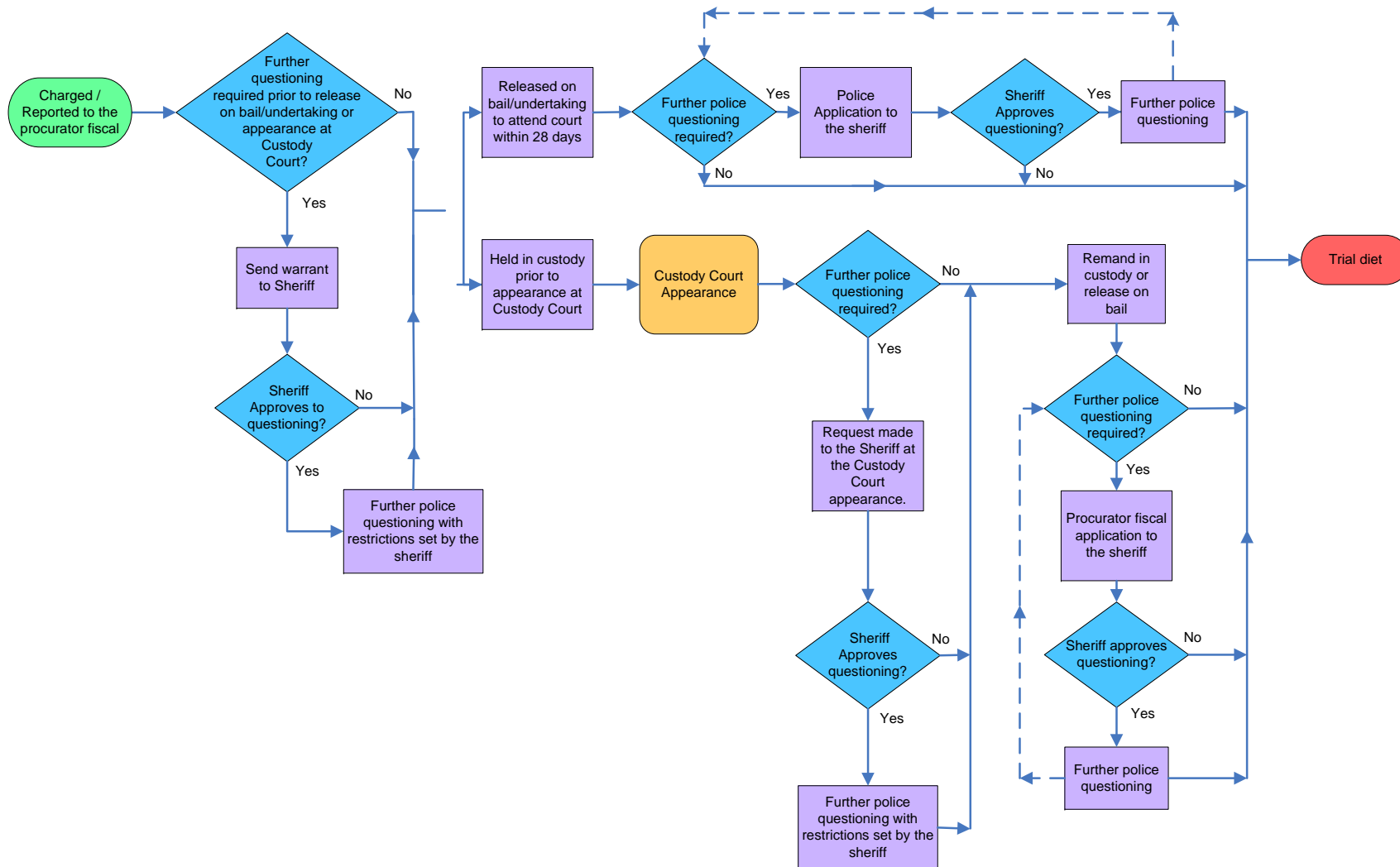


Right of access to a lawyer – The child suspect



Liberty / custody procedure

Police questioning after charge / report to the procurator fiscal



Pre Trial Detention in the European Union: An analysis of Minimum Standards**van Kalmthout et al**

Country	Appearance before a court/judge (hours)	Decision by the court/judge to remand in custody/pretrial detention (starting from the moment of the appearance) (hours)
Austria	48	48
Belgium	24	
Bulgaria	24	---
Cyprus	24	72
Czech Republic	24	24
Denmark	24	Without delay, maximum three days
Estonia	As soon as possible, maximum day after arrest	48
Finland	No later than noon on the third day from arrest	Maximum four days from arrest
France	24	---
Germany	As soon as possible, maximum day after arrest	48
Greece	24	72
Hungary	72	
Ireland	24 (7 days)	
Italy	96	
Latvia	48	
Lithuania	48	---
Luxembourg	24	---
Malta	48	
Netherlands	Three days and 15	
Poland	48	24
Portugal	24 – 48	
Romania	24	24
Slovakia	48	48 – 72
Slovenia	48	
Spain	72	72
Sweden	By noon on third day after arrest	Four days after arrest
United Kingdom	24	---

As will be readily seen, the table, found on page 61 at paragraph 3.4, is only indicative, since twenty-four hours is not, at least in real time, the maximum period in any part of the United Kingdom for appearance in court.

CARLOWAY REVIEW REFERENCE GROUP AND REVIEW TEAM

The Carloway Review Reference Group consisted of the following members:

Ian Bryce	Board member, Law Society of Scotland
Bridget Campbell	Director, Justice, Scottish Government
Professor Peter Duff	Professor of Criminal Justice, University of Aberdeen
John Dunn	Deputy Crown Agent, Crown Office & Procurator Fiscal Service
Shelagh McCall	Commissioner, Scottish Human Rights Commission
Lindsay Montgomery (alternatively, Tom Murray)	Chief Executive, Scottish Legal Aid Board (Director of Legal Aid & Applications)
Gerry Moynihan, QC	Faculty of Advocates
Sheriff Elizabeth Munro	Dundee Sheriff Court
John Scott, QC	Solicitor Advocate
Gerard Sinclair	Chief Executive, Scottish Criminal Cases Review Commission
Chief Constable David Strang	Chair of ACPOS Criminal Justice Business Area

The members of the Review team were:

Lord Carloway	
Tim Barraclough	Secretary to the Review
Ian McFarlane	Project Officer
Andrew McIntyre	Lawyer
Lynne Mochrie	Project Manager
Rachel Rayner	Lawyer
Paul Main (Consultant)	Association of Chief Police Officers in Scotland

VISITS AND MEETINGS

Visits

The Review undertook a number of visits to research other jurisdictions and the issues within those criminal justice systems.

Manchester – 15th-16th March 2011

Defence Lawyers	<ul style="list-style-type: none"> ▪ Effects of an adverse inference from silence on legal advice ▪ Admissibility of evidence of bad character ▪ Process of prosecutions based on a single source of evidence ▪ Test for and use of “no case to answer” submission ▪ Exculpatory and mixed statements ▪ Disclosure of evidence prior to questioning ▪ Availability of solicitors and systems to ensure advice ▪ “Significant statements” prior to legal advice
Crown Prosecution Service	<ul style="list-style-type: none"> ▪ Admissibility of evidence of bad character ▪ Process of prosecutions based on a single source of evidence and directions given to juries ▪ Exculpatory and mixed statements ▪ Availability of solicitors and systems to ensure advice ▪ “Significant statements” prior to legal advice
Judiciary	<ul style="list-style-type: none"> ▪ Admissibility of evidence of bad character ▪ Test for and use of “no case to answer” submission ▪ Exculpatory and mixed statements ▪ “Significant statements” prior to legal advice
Greater Manchester Police	<ul style="list-style-type: none"> ▪ Effects of an adverse inference from silence on legal advice ▪ PACE in practice ▪ Caution and other warnings in relation to adverse inference from silence ▪ Disclosure of evidence prior to questioning ▪ Role of the appropriate adult ▪ Availability of solicitors and systems to ensure advice ▪ “Significant statements” prior to legal advice

London – 18th-19th May 2011

New Zealand Police	<ul style="list-style-type: none"> ▪ New Zealand criminal procedure ▪ Police powers to arrest and detain ▪ Police powers to interview ▪ Right of access to a lawyer
Criminal Bar Association	<ul style="list-style-type: none"> ▪ Use of adverse inference ▪ Test for and use of “no case to answer” submission ▪ Test for appeals ▪ Appeals procedure
Criminal Courts Solicitors Association	<ul style="list-style-type: none"> ▪ Legal advice at the police station ▪ Police custody ▪ Use of video links for court appearance

London – 18th-19th May 2011 - continued

Ministry of Justice	<ul style="list-style-type: none"> ▪ Policy view of PACE ▪ Implications of upcoming European decisions
Lord Justice Hooper	<ul style="list-style-type: none"> ▪ Appeals process ▪ Late appeals ▪ Sufficiency of evidence ▪ Miscarriages of justice and the role of the CCRC
Professor Thomas Weigend	<ul style="list-style-type: none"> ▪ Practice in European jurisdictions
Baroness Kennedy QC & JUSTICE	<ul style="list-style-type: none"> ▪ Issues arising out of <i>Cadder</i> ▪ Sufficiency of evidence ▪ Right of access to a lawyer ▪ Information given to suspects

Birmingham & Oxford – 23rd May 2011

CCRC	<ul style="list-style-type: none"> ▪ Corroboration as a safeguard ▪ Relationship with the Court of Appeal
Professor Andrew Ashworth	<ul style="list-style-type: none"> ▪ Right to silence & adverse inferences ▪ Right to access a lawyer ▪ Corroboration ▪ Waiver of rights ▪ Police questioning

Dublin – 2nd-3rd June 2011 – Hosted by Mr Justice Charleton

Judiciary	<ul style="list-style-type: none"> ▪ Overview of the criminal justice system ▪ Role of the Constitution ▪ Implications of <i>Cadder</i>
Legal Researchers	<ul style="list-style-type: none"> ▪ The process of the Appeal Court and Supreme Court of Ireland
An Garda Siochana	<ul style="list-style-type: none"> ▪ Police questioning procedures
Director of Public Prosecutions	<ul style="list-style-type: none"> ▪ Prosecution process based on a single source of evidence ▪ Rules of evidence
Law Society of Ireland Criminal Law Committee	<ul style="list-style-type: none"> ▪ Police questioning ▪ Adverse inference from silence ▪ Access to a solicitor – practicalities
Advisory Committee on Garda Interviewing of suspects	<ul style="list-style-type: none"> ▪ Role of the Constitution ▪ Remit of the committee ▪ Securing legal advice ▪ Role of the solicitor ▪ Adverse inference from silence ▪ Child and vulnerable suspects

Observing

The Review observed current systems in practice relating to the review.

Date	Location	System / Process	Discussion held with:
15 th February 2011	London Road Police Station, Glasgow	The detention and arrest process	<ul style="list-style-type: none"> ▪ Custody Sergeant ▪ Lead Investigating Officer
20 th June 2011	Glasgow Sheriff Court	Custody and Domestic Abuse Court Process	<ul style="list-style-type: none"> ▪ Sheriff Principal Craig Scott ▪ Procurators fiscal ▪ Sheriff Court police officers ▪ Reliance staff
23 rd August 2011	Scottish Legal Aid Board	Solicitor contact Centre	<ul style="list-style-type: none"> ▪ Lindsay Montgomery (CE) ▪ Solicitor Contact Centre Project team ▪ Solicitor Contact Centre Manager ▪ Duty solicitors

Consultative Meetings

Date	Organisation	Agenda
12 th January 2011	Ministry of Justice	<ul style="list-style-type: none"> ▪ Policy view of PACE ▪ Implications of upcoming European decisions
26 th January 2011	Lord Advocate & Solicitor General	<ul style="list-style-type: none"> ▪ Implications of <i>Cadder</i> on the current criminal justice system
7 th February 2011	Scottish Law Commission	<ul style="list-style-type: none"> ▪ Review and remit ▪ Impact of <i>Cadder</i> issues
9 th February 2011	Victim Support Scotland, Rape Crisis, Women's Aid	<ul style="list-style-type: none"> ▪ The effect of <i>Cadder</i> on sexual offence cases ▪ Corroboration ▪ Police Bail
14 th February 2011	Children's Commissioner	<ul style="list-style-type: none"> ▪ Definition of "child" ▪ What persons should be present if a child is detained, and their role ▪ Waiver ▪ The age of criminal responsibility ▪ Legal advice and other protections for the child who is too young to be prosecuted ▪ Guidance for and training of professionals
23 February 2011	Scottish Court Service	<ul style="list-style-type: none"> ▪ Issues in which the Review might impact on the Court Service

Consultative Meetings - continued

1 st March 2011	Scottish Labour Party	<ul style="list-style-type: none"> ▪ Review timetable ▪ “Sons of <i>Cadder</i>” cases ▪ The right of access to a lawyer ▪ Detention and the authorisation required for their extension ▪ Detention and arrest ▪ Corroboration ▪ Period of custody ▪ Rights of victims and witnesses
1 st March 2011	Justice Cromwell	<ul style="list-style-type: none"> ▪ Overview of the Canadian justice system ▪ Right of access to a lawyer ▪ Sufficiency of evidence ▪ Right to liberty
9 th March 2011	Scottish Liberal Democrats	<ul style="list-style-type: none"> ▪ Review timetable ▪ Training for the police and legal profession ▪ “Sons of <i>Cadder</i>” cases ▪ Confessions ▪ Corroboration ▪ The relationship between the detention period and custody period ▪ SCCRC ▪ Adverse inferences from silence
10 th March 2011	Scottish Conservatives	<ul style="list-style-type: none"> ▪ Review timetable ▪ “Sons of <i>Cadder</i>” cases ▪ The right of access to a lawyer ▪ Corroboration ▪ The role of the European Court of Human Rights ▪ Detention and arrest ▪ Saturday courts ▪ Checks during long periods in custody
23 rd March 2011	Scottish Children’s Reporter Administration	<ul style="list-style-type: none"> ▪ Issues relating to child suspects in police custody
16 th June 2011	Swedish police	<ul style="list-style-type: none"> ▪ Swedish criminal procedure ▪ Police powers to arrest and detain ▪ Police powers to interview ▪ Right of access to a lawyer
5 th July	Lord Advocate and Solicitor General	<ul style="list-style-type: none"> ▪ Review timetable and process ▪ Developing jurisprudence on questioning ▪ Corroboration ▪ Practical implications of “prompt” appearance requirement

Consultative Meetings - continued

26 th July 2011	Scottish Labour Party	<ul style="list-style-type: none"> ▪ Review timetable ▪ “Sons of <i>Cadder</i>” cases ▪ The period of detention and custody ▪ The right of access to a lawyer ▪ The age of a child and waiver ▪ The numbers for waiver ▪ Corroboration ▪ Public confidence
16 th August 2011	Scottish Children’s Reporter Administration	<ul style="list-style-type: none"> ▪ Issues relating to child suspects in police custody
1 st September 2011	Petal Support, Rape Crisis Scotland, Scottish Women’s Aid, Victim Support	<ul style="list-style-type: none"> ▪ Evidential requirements ▪ Custody periods ▪ Appeals
21 st September 2011	COPFS	<ul style="list-style-type: none"> ▪ Questioning after charge ▪ Liberation at different stages of the police investigation and post charge
29 September 2011	Scottish Human Rights Commission	<ul style="list-style-type: none"> ▪ Length of detention ▪ Practicalities of access to a lawyer ▪ Waiver ▪ Vulnerable adults ▪ Liberation

Reference Group MeetingsPlenary

Date	Agenda
20 th December 2010	<ul style="list-style-type: none"> ▪ Terms of Reference and the Role of the Group ▪ Scope of the Review ▪ Consultation ▪ Timing of Meetings and Reports
3 rd February 2011	<ul style="list-style-type: none"> ▪ Review Update ▪ Arrest, Detention and Questioning of Suspects and Witnesses
14 th March 2011	<ul style="list-style-type: none"> ▪ The Carloway Review Consultation Document and Process ▪ Vulnerable Suspects, Evidence, Statements, Confessions and Appeals
7 th June 2011	<ul style="list-style-type: none"> ▪ Update on Consultation Process ▪ Corroboration ▪ Next Steps

Subgroup & individual meetings

Date	Attendees	Issues discussed
13 th December 2010	John Dunn	<ul style="list-style-type: none"> ▪ Police questioning ▪ Detention and arrest and charge ▪ Law, practice and culture in England ▪ Timing of charge
15 th December 2010	David Strang	<ul style="list-style-type: none"> ▪ Arrest, detention and charge ▪ Reform of the detention model ▪ Police questioning ▪ Police powers ▪ Time period of detention ▪ PACE ▪ Evidence
16 th December 2010	Peter Duff	<ul style="list-style-type: none"> ▪ The approach in France and the role of the examining magistrate ▪ When the right to legal advice arises ▪ Police charge ▪ The requirement of fairness
16 th December 2010	Ian Bryce Gerry Moynihan John Scott	<ul style="list-style-type: none"> ▪ Arrest, caution and charge ▪ Period of detention and custody ▪ Police questioning ▪ Rights pre- and post-charge ▪ Police charge ▪ The right to silence ▪ Victims and the general public ▪ Disclosure of evidence ▪ Admissibility of evidence
17 th December 2010	Shelagh McCall	<ul style="list-style-type: none"> ▪ The emergency legislation ▪ Limits placed on liberty ▪ The rights of victims and of suspects ▪ Convention compliance ▪ Section 14 detention ▪ Police questioning ▪ Police charge ▪ Right against self-incrimination ▪ Vulnerable people
25 th January 2011	John Dunn	<ul style="list-style-type: none"> ▪ Police charge ▪ Prompt appearance at court ▪ Judicial control over detention and questioning ▪ Police bail ▪ The nature of police questioning ▪ Questioning after appearance in court ▪ Provision of information prior to interview
26 th January 2011	Ian Bryce Gerry Moynihan John Scott	<ul style="list-style-type: none"> ▪ Provision of legal assistance in practice ▪ Legal aid ▪ The right of access to a lawyer ▪ Prompt appearance at court

Subgroup & individual meetings – continued

31 st January 2011	Liz Munro	<ul style="list-style-type: none"> ▪ Detention and Arrest ▪ Fairness ▪ Police Charge ▪ Prompt Appearance at Court ▪ Police Bail ▪ Corroboration
31 st January 2011	Shelagh McCall	<ul style="list-style-type: none"> ▪ Right of access to a lawyer ▪ Nature of police questioning ▪ Prompt appearance at court ▪ Other Convention Articles
1 st February 2011	David Strang	<ul style="list-style-type: none"> ▪ Investigation of crime ▪ Interdependencies of the criminal justice system ▪ Adverse inference from silence ▪ Demand for legal advice ▪ The purpose of arrest ▪ Liberation by the police ▪ Questioning a child or vulnerable adult ▪ Role of the responsible or appropriate adult ▪ Disclosure of evidence ▪ Police questioning
3 rd February 2011	Lindsay Montgomery	<ul style="list-style-type: none"> ▪ The provision of legal advice ▪ Jurisprudence from the UK Supreme Court and ECtHR ▪ The duty solicitor scheme – call centre ▪ Vulnerable adults and children ▪ The need for guidance to solicitors ▪ Waiver ▪ Other agencies with interrogative powers
3 rd February 2011	Peter Duff	<ul style="list-style-type: none"> ▪ The right of access to a lawyer ▪ Other European jurisdictions ▪ Admissibility of evidence ▪ Questioning of child or vulnerable suspects ▪ Sufficiency of evidence ▪ Admissibility of statements
23 February 2011	Lindsay Montgomery	<ul style="list-style-type: none"> ▪ The provision of legal advice ▪ Jurisprudence from the UK Supreme Court and ECtHR ▪ The duty solicitor scheme – call centre ▪ Vulnerable adults and children ▪ The need for guidance to solicitors ▪ Waiver ▪ Other agencies with interrogative powers
3 rd March 2011	Shelagh McCall	<ul style="list-style-type: none"> ▪ Corroboration ▪ Sufficiency of evidence ▪ Admissions by children and vulnerable suspects ▪ The role of the SCCRC and Appeal Court ▪ Appeals procedure ▪ Carloway Review roadshows

Subgroup & individual meetings – continued

4 th March 2011	Peter Duff	<ul style="list-style-type: none"> ▪ SCCRC ▪ Late appeals ▪ Change in the law ▪ 2010 Act ▪ Adverse Inference from Silence in European jurisdictions ▪ Corroboration
7 th March 2011	David Strang	<ul style="list-style-type: none"> ▪ Corroboration ▪ Sufficiency and quality of evidence ▪ Potential safeguards ▪ Vulnerable and child suspects ▪ Implications of <i>Cadder</i> and other cases referred to Supreme Court relating to interviewing suspects ▪ Adverse inference from silence
8 th March 2011	John Dunn	<ul style="list-style-type: none"> ▪ Corroboration ▪ Sufficiency and quality of evidence ▪ Adverse inference from silence
9 th March 2011	Liz Munro	<ul style="list-style-type: none"> ▪ Corroboration ▪ Sufficiency and quality of evidence ▪ Adverse inference from silence ▪ Child and vulnerable suspects
10 th March 2011	Gerard Sinclair	<ul style="list-style-type: none"> ▪ Bills of Suspension and Advocation ▪ Nobile officium ▪ Timing appeals ▪ Power of court to reject a reference from the SCCRC
10 th March 2011	Ian Bryce Gerry Moynihan John Scott	<ul style="list-style-type: none"> ▪ Corroboration ▪ Sufficiency and quality of evidence ▪ Appeals and SCCRC
6 th July 2011	David Strang	<ul style="list-style-type: none"> ▪ Powers of arrest ▪ Period of custody
11 th July 2011	Ian Bryce Gerry Moynihan	<ul style="list-style-type: none"> ▪ Purpose and powers of arrest ▪ Period of custody in relation to Article 5 ▪ Impact on the legal profession
25 th July 2011	Lindsay Montgomery	<ul style="list-style-type: none"> ▪ Duty Solicitor Scheme – practicalities ▪ Period of custody
28 September 2011	John Scott	<ul style="list-style-type: none"> ▪ Developing jurisprudence on police questioning

Roadshows

The Review held five roadshows across Scotland as part of the consultation process.

3rd May 2011 - Aberdeen
 5th May 2011 - Edinburgh
 10th May 2011 - Glasgow
 12th May 2011 - Inverness

Workshop 1	<u>Adverse Inference from silence</u> <ul style="list-style-type: none"> Should the court be allowed to draw adverse inference from no/inadequate response to police questions in some circumstances? What difference would this [the introduction of adverse inference] make?
Workshop 2	<u>Corroboration</u> <ul style="list-style-type: none"> Should the requirement for corroboration be abolished? What should the test for sufficiency of evidence be?
Workshop 3	<u>Form of legal advice</u> <ul style="list-style-type: none"> What forms of legal advice are sufficient? What obligations, if any, should there be on the police in relation to the disclosure of information prior to questioning?
Workshop 4	<u>Police custody</u> <ul style="list-style-type: none"> Should the concepts of detention / arrest continue as separate entities? When should police questioning stop?

16th June 2011 - Edinburgh

Workshop 1	<u>Appeals</u> <ul style="list-style-type: none"> 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? 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? 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? Is there any purpose in retaining Petitions to the <i>nobile officium</i> and Bills of Advocation and Suspension as a mode of appeal or review be abolished?
Workshop 2	<u>SCCRC</u> <ul style="list-style-type: none"> Should the factors which bear upon the test of “the interests of justice” to be applied by the SCCRC be set out in legislation? 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?

Conferences/Seminars

Lord Carloway and the Review team also attended a number of conferences and seminars over the course of the review.

Date	Conference/Seminar
18 th January 2011	ACPOS/NPIA seminar - Solicitor Access - Current and Future position and practical considerations
18 th March 2011	SPLG Seminar - The Relationship between Strasbourg and UK Human Rights Law
22 nd March 2011	Central Law Training (Scotland) - Cadder v HMA - the Impact on Criminal Practice Conference
27 th May 2011	Association of Scottish Police Superintendents' Annual Conference 2011
6 th September 2011	Law Society Annual Conference

CONSULTEES

In order to ensure the greatest involvement and balance of responses the Review carried out an 8 week consultation. The consultation was launched through the media and the Review's website.

Although the consultation was open to the public to respond, the Review invited comments from a large number of groups and organisations including, among others, solicitors and advocates, police, victims groups, law schools, and specialist reporting agencies.

The Review received 50 responses to the consultation. The names of those individuals, where they have agreed, and organisations that responded are listed at Table 1 and Table 2, respectively, below. All responses, where permission was given, have been published on the Review website at www.CarlowayReview.org.

Table 1 – Individuals who responded to the consultation

Individual	
Anonymous Response	JB Duncan Henderson
Confidential Response	David Hingston
James Chalmers	Dr Fiona Leverick & Professor Lindsay Farmer - joint response
Colin Christie	Andrew Muir
Sheriff Frank Crowe	Professor Fiona Raitt
Peter Fergie	Dr George Ross
Professor Pamela Ferguson	Findlay Stark

Table 2 – Organisations that responded to the consultation

Organisation	
ACPOS	RSPB Scotland
Association of Scottish Police Superintendents (ASPS)	SAY Women
Barnardo's Scotland	SCCRC
Barnsley and Barnsley Consultants	Scottish Children's Reporter Administration
CHILDREN 1ST	Scottish Court Service
Crown Office and Procurator Fiscal Service	Scottish Human Rights Commission
Dumbarton Faculty of Solicitors	Scottish Justices Association – Confidential Response
Equality and Human Rights Commission	Scottish Law Commission
Faculty of Advocates	Scottish Legal Aid Board
Glasgow Bar Association	Scottish Liberal Democrats
HM Revenue & Customs	Scottish Police Federation
JUSTICE	Scottish Water
Law Society of Scotland	Scottish Women's Aid
NHS National Service Scotland	Senators of the College of Justice
North Lanarkshire Council Revenue and Benefit	Sheriffs Association
North Lanarkshire Council Trading Standards Services	The Royal Society of Edinburgh
Petal Support Limited	The Society of Solicitor Advocates
Rape Crisis Scotland	Victim Support Scotland

MATERIALS REFERRED TO IN THE REPORT

Legislation

Australia

[Criminal Procedure Act 1986](#)

[Law Enforcement \(Powers and Responsibilities\) Act 2002 \(New South Wales\)](#)

[Law Enforcement \(Powers and Responsibilities\) Regulations 2005 \(New South Wales\)](#)

Canada

[Criminal Code RSC 1985](#)

[Canadian Charter of Rights and Freedoms](#)

Ireland

[Children Act 2001](#)

[Criminal Evidence Act 1992](#)

[Criminal Justice Act 1984](#)

[Criminal Justice \(Drug Trafficking\) Act 1996](#)

[Criminal Justice Act 2007](#)

[Criminal Law \(Rape\) \(Amendment\) Act 1990](#)

[Offences against the State Act 1939](#)

[Road Traffic Act 1961](#)

[Criminal Justice Act \(Treatment of Persons in Custody in Garda Siochana Stations\)](#)

[Regulations 1987](#)

[Treason Act 1939](#)

New Zealand

[Crimes Act 1961 No 43](#)

[Evidence Act 2006](#)

Scottish Parliament

[Act Anent Wrongous Imprisonment 1701](#)

[Adult Support and Protection \(Scotland\) Act 2007](#)

[Children's Hearings \(Scotland\) Act 2011](#)

[Criminal Justice and Licensing \(Scotland\) Act 2010](#)

[Criminal Legal Assistance \(Duty Solicitors\) \(Scotland\) Regulations 2011](#)

[Criminal Procedure \(Legal Assistance, Detention and Appeals\) \(Scotland\) Bill Policy Memorandum](#)

[Criminal Procedure \(Legal Assistance, Detention and Appeals\) \(Scotland\) Act 2010](#)

[Mental Health \(Care and Treatment\)\(Scotland\) Act 2003](#)

[Vulnerable Witnesses \(Scotland\) Act 2004](#)

United Kingdom Parliament – UK-wide application

[Contempt of Court Act 1981](#)

[Equality Act 2010](#)

[Human Rights Act 1998](#)

[Misuse of Drugs Act 1971](#)

[Road Traffic Act 1988](#)

[Road Traffic Regulation Act 1984](#)

United Kingdom Parliament – Applying wholly or mainly to Scotland

[Act of Adjournal \(Criminal Procedure Rules\) 1996](#)

[Age of Majority \(Scotland\) Act 1969](#)

[Children \(Scotland\) Act 1995](#)

[Civic Government \(Scotland\) Act 1982](#)

[Civil Evidence \(Scotland\) Act 1988](#)

[Crime and Punishment \(Scotland\) Act 1997](#)

[Criminal Justice \(Scotland\) Act 1980](#)

[Criminal Law \(Consolidation\) \(Scotland\) Act 1995](#)

[Criminal Procedure \(Scotland\) Act 1887](#)

[Criminal Procedure \(Scotland\) Act 1995](#)

[Law Reform \(Miscellaneous Provisions\) \(Scotland\) Act 1968](#)

[Legal Aid \(Scotland\) Act 1986](#)

[Matrimonial Homes \(Family Protection\) \(Scotland\) Act 1981](#)

[Requirements of Writing \(Scotland\) Act 1995](#)

[Scotland Act 1998](#)

[Sheriff Courts \(Scotland\) Act 1971](#)

United Kingdom Parliament – Applying wholly or mainly to England and Wales

[Costs in Criminal Cases \(General\) Regulations 1986](#)

[Criminal Appeal Act 1968](#)

[Criminal Appeal Act 1995](#)

[Criminal Justice and Public Order Act 1994](#)

[Criminal Law Amendment Act 1885](#)

[Mental Health Act 1983](#)

[Perjury Act 1911](#)

[Police and Criminal Evidence Act 1984 \(PACE\)](#)

[Prosecution of Offences Act 1985](#)

Directives, Reports and Guidance

- [ACPOS Manual of Guidance on Solicitor Access](#)
- [ACPOS Solicitor Access Data Report, 23 June 2011](#)
- [Canadian Charter of Rights and Freedoms](#)
- [Council of Europe: “Child Friendly Justice” \(November 2010\)](#)
- [Criminal Procedure in Scotland \(Second report\) Thomson Committee](#)
- [Effective Criminal Defence in Europe \(2010\)](#)
- [European Union draft Directive on the Right of Access to a Lawyer in Criminal Proceedings \(2011\) Com 326/3](#)
- [European Union draft Directive on the Rights to information in criminal proceedings \(2010\) Com 329/3](#)
- European Union draft Directive on establishing minimum standards on the rights etc of victims of Crime
- [Guidance On Interviewing Child Witnesses In Scotland, Scottish Executive 2003](#)
- [HM Inspectorate of Constabulary: Report on the Care of Arrested and Detained Children \(June 2008\)](#)
- Identification Procedure under Scottish Criminal Law (the Bryden Report) Cmnd 7096 (1978)
- JUSTICE: Giving Legal Advice at Police Stations: Practical Pointers (November 2010)
- Law Commission Report: Corroboration of Evidence in Criminal Trials (Cmnd 1620) (1991)
- [Law Society of England and Wales response to the Ministry of Justice of England and Wales Discussion paper on the European Commission proposal for a Directive on the right of access to a lawyer in criminal proceedings and on the right to communicate upon arrest](#)
- Lord Advocate’s Guidelines: “Reporting of Offences Committed by Children” (April 2006)
- [McInnes Report \(The Summary Justice Review Committee\)](#)
- [New South Wales Law Reform Commission Report No 95, 2000](#)
- Parliamentary Joint Committee on Human Rights (HC paper 40-1)
- Report by the Committee on Criminal Appeal and Miscarriages of Justice Procedures Cmnd 3245 (ISBN 0-10-132452-9) “the Sutherland Committee”
- [Report of the Committee on Sexual Offences Against Children and Youths published in Canada \(1984\)](#)
- Royal Commission on Criminal Justice Study: Custodial Advice and the Right to Silence (1993)
- [Scottish Government Guidance on Appropriate Adults Services in Scotland](#)
- Scottish Law Commission: “Proposals for Reform of the Law of Evidence Relating to Corroboration”
- [Scottish Law Commission 100th Report](#)
- [Scottish Law Commission Report No 149 \(1995\)](#)
- [The Scottish Law Commission “Similar Fact Evidence and the Moorov Doctrine”](#)
- [The Scottish Law Commission Report on Rape and other Sexual Offences](#)
- [United Nations Convention on the Rights of Persons With Disabilities](#)
- [United Nations Convention on the Rights of the Child](#)
- [United Nations Rules for the Protection of Juveniles Deprived of their Liberty](#) (the “Havana Rules” 1990)
- United Nations Standard Minimum Rules of the Administration of Juvenile Justice (the “Beijing Rules 1985)

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 Adetoro v United Kingdom, 20 April 2010 (no 46834/06)
 Aydin v Turkey (1997) 25 EHRR 251
 Beckles v United Kingdom (2003) 36 EHRR 162
 Boner v United Kingdom 1995 SCCR 1
 Brennan v United Kingdom (2002) 34 EHRR 18
 Brogan v United Kingdom (1989) 11 EHRR 117
 Buckley v United Kingdom (1996) 23 EHRR 101
 Condrón v United Kingdom (2001) 31 EHRR 1
 Corigliano v Italy (1983) 5 EHRR 334
 Croissant v Germany (1992) 16 EHRR 135
 Dayanan v Turkey, 13 October 2009 (no 7377/03)
 Deweer v Belgium (1980) 2 EHRR 439
 Eckle v Germany (1982) 5 EHRR 1
 Egue v France (1988) DR 57, 47
 Edwards and Lewis v United Kingdom (2005) 40 EHRR 24
 Fox v United Kingdom (1991) 13 EHRR 157
 Funke v France (1993) 16 EHRR 297
 Gafgen v Germany (2011) 52 EHRR 1
 Handyside v United Kingdom (1976) 1 EHRR 737
 Hatton v United Kingdom, 8 July 2003 (no 36022/97)
 Heaney and McGuinness v Ireland (2001) 33 EHRR 12
 Jalloh v Germany (2007) 44 EHRR 32
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 Kangasluoma v Finland, 20 January 2004 (no 48339/99)
 Mattocia v Italy 25 July 2000 (no 23969194)
 Murray v United Kingdom (1994) 19 EHRR 193
 Murray v United Kingdom (1996) 26 EHRR 29
 O'Halloran and Francis v United Kingdom (2008) 46 EHRR 21
 Panovits v Cyprus, 11 December 2008 (no 4268/04)
 Pishchalnikov v Russia, 24 September 2009 (no 7025/04)
 Quinn v Ireland, 21 December 2000 (unreported)
 Salduz v Turkey (2008) 49 EHRR 19
 Saunders v United Kingdom (1996) 23 EHRR 313
 Schiesser v Switzerland (1979) 2 EHRR 417
 Scoppola v Italy (No.2) (2010) 51 EHRR 12
 Shabelnick v Ukraine, 19 February 2009 (no 16404/03)
 Shannon v United Kingdom (2006) 42 EHRR 31
 SF v Switzerland (1994) DR 76
 Talat Tunk v Turkey, 27 March 2007 (no 2343/96)
 Tas v Turkey (2001) 33 EHRR 325
 Taxquet v Belgium, 16 November (no 926/5)
 Zaichenko v Russia, 18 February 2010 (no 39660/02)

Scottish

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 Advocate, HM v Sinclair, unreported, High Court, 10 September 2007
 AJE v HM Advocate 2002 JC 215
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 Al Megrahi v HM Advocate 2002 JC 99
 Ambrose v Harris [2011] UKSC 43
 Anderson v HM Advocate 1974 SLT 239
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 Brown v Macpherson 1918 JC 3
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 Daffurn v HM Advocate [2010] HCJAC 53
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 Dickson v HM Advocate 2001 JC 203
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 Hunter v PF Livingston 2011 SCCR 130
 Hussain v HM Advocate 2010 SCCR 124
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 Jones v Milne 1975 SLT 2
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 Lees v Macdonald (1893), 3 White 468
 Little v HM Advocate 1983 JC 16
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 McIntosh v HM Advocate 2003 SCCR 137
 McLaren v Caldwell's Paper Mill Co 1973 SLT 158
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 Marcic v Thames Water Utilities [2004] 2 AC 42
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 Miranda v Arizona (1966) 384 US 436
 M v The Queen (1994) 181 CLR 487
 Mule v The Queen (2005) 221 ALR 85
 Nickolson [1999] Crim LR 61
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 People (DPP) v Clarke [1995] ILRM 355
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 Pryer [2004] EWCA Crim 1163
 The Queen v Bilick and Starke (1984) 36 SASR 321
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 R v Argent [1997] 2 Cr App R 27
 R v Aziz [1996] 1 AC 41
 R v Beckles [2005] 1 WLR 2829
 R v Biniaris [2000] 1 SCR 381
 R v Chamber (1990) 780 CR (3d) 235
 R v DPP, ex parte Kebilene [2000] 2 AC 326
 R v Duncan (1981) 73 Cr App Rep 359
 R v Cooper [1969] 1QB 267
 R v Cowan (1996) 1 Cr App Rep 1
 R v Farrell [2004] EWCA Crim 597
 R v Galbraith [1981] 1 WLR 1039
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 R v Hester [1973] AC 296
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 Weissenteiner (1993) 178 CLR 217
 Wendo v The Queen (1964) 109 CLR 559
 Western v DPP [1997] 1 Cr App Rep 474
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Principles & Practice of the Criminal Law of Scotland	Allison	1833
Criminal Pleading	Archbold	2011
Trial by Fire and Water	Bartlett	1986
Rolment of Courts	Bisset	1622
Criminal Procedure: A Worldwide Study	Bradley	2007
Medieval Canon Law	Brundage	1995
Criminal Law	Burnett	1811
Argyll Justiciary Records Vol 1, The Justiciary Records of Argyll and the Isles, 1664-1742	Cameron	1949
The Law and Practice of Diligence and Citation	Campbell	1862
Effective Criminal Defence in Europe	Cape et al	2010
Human Rights (2nd ed)	Clayton and Tomlinson	2009
Evidence	Davidson	2007
Evidence (3rd ed)	Dickson	1887
The Psychology of Interrogations and Confessions : A handbook	Gudjonsson	2003
Blackstone's Criminal Practice	Hooper LJ et al	2011
Commentaries on the Law of Scotland respecting Crimes (Bell ed)	Hume	1844
Essays in Jewish and Comparative Legal History	Jackson	1975

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Torture and the Law of Proof	Langbein	1977
A practical Treatise on the Criminal Law of Scotland (5th edn)	MacDonald	1948
Laws and Customs of Scotland in Matters Criminal (2nd ed)	Mackenzie	1699
Revised version of Research Paper on The Law of Evidence of Scotland	MacPhail	1979
Standing Accused: The Organization and Practices of Criminal Defence Lawyers in Britain	McConville et al	1994
Evidence	McGrath	2005
The Scottish Police : Powers and Duties (1944)	Mill	1944
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