The Carloway Review

Consultation Document

08 April 2011

Foreword

There is no doubt that the UK Supreme Court's judgment in *Cadder v HM Advocate* has had a profound and immediate impact on the Scottish system of criminal justice, as well as raising important constitutional issues. The decision overturned existing Scottish jurisprudence and threw into question existing practice in police detention and questioning. The Scottish Parliament was therefore prompted to pass emergency legislation, and the Cabinet Secretary, Kenny MacAskill MSP, has asked me to undertake a review of the law and practice in this area. The constitutional issues are, of course, for others to tackle.

I am conscious that the debate in the Scottish Parliament on the emergency legislation has already raised a number of challenging issues for this Review to address. It will do so thoroughly and diligently. But I am keen that this Review should be more than an attempt merely to adjust or tweak any perceived flaws in the legislation. It should take the opportunity to re-examine the core principles underlying the procedures of detention, police questioning, charge and arrest, and the implications for concepts such as corroboration and the inference from silence. This will then inform recommendations for changes to the criminal justice system that will enhance its operation as a whole, in a way that properly and fully meets the requirement to protect the rights of victims and suspects.

This Review will therefore explore a range of options and ideas, some of which will be quite radical. The recommendations it produces must be not only sound in legal and human rights terms, but also practicable. I therefore need the help of all those involved in or affected by the criminal justice system in developing robust recommendations that can be put into practice to the benefit of the system as a whole. Please take the opportunity to consider carefully the issues contained in this paper, and to give the Review the benefit of your knowledge, expertise and understanding.

LORD CARLOWAY

CONTENTS

Introduction 7
Glossary 13
Custody: Introduction 15
1.0 – Key elements of Custody
1.1 The suspect 17
1.2 Rights relating to custody and questioning 21
1.3 Putting rights into effect 27
1.4 Police questioning 33
1.5 Child and vulnerable suspects 37
2.0 – Key stages of Custody
2.1 Arrest and detention 47
2.2 Length of custody 53
3.0 – Evidence 59
3.1 Sufficiency of evidence 61
3.2 Admissibility of statements 71
3.3 Inferences from silence 77
4.0 – Appeals 85
4.1 Appeals 87
4.2 SCCRC 95
5.0 - How to respond 99
6.0 - References 101
Annex A - Respondent Information Form 103
Annex B - Response Form 105

INTRODUCTION

Why the Review is taking place

1. Lord Carloway has been commissioned by the Cabinet Secretary for Justice, Kenny MacAskill MSP, to prepare recommendations for legislative change and new guidance following a review of the law and practice of detaining and questioning suspects in a criminal investigation in Scotland. This followed the decision of the UK Supreme Court in the case of *Cadder*, which itself drew heavily on the decision of the Grand Chamber of the European Court of Human Rights in *Salduz.* These decisions held that the right to a fair trial, recognised in Article 6 of the European Convention on Human Rights, would be breached if a prosecutor made use of evidence obtained from a suspect in police custody before the suspect has had the opportunity to receive legal advice, except in particular circumstances.

2. Most importantly, the *Cadder* decision made it clear that the law and practice whereby a suspect could be detained and questioned for a period up to 6 hours without the right to receive legal advice, could not continue. Until this point the view was that the right to a fair trial was safeguarded by other requirements of criminal evidence and procedure, particularly the comparatively short maximum period for detention, the overall fairness test applied before evidence of an admission by a suspect could be relied upon and the requirement for corroboration.

3. The C*adder* decision raised questions not only about how the law should be changed to secure legal advice for suspects at the appropriate time, but also whether the current checks and balances in the criminal justice system needed to be re-examined.

4. In response to the *Cadder* decision, the Scottish Parliament passed emergency legislation, *The Criminal Procedure (Legal Assistance, Detention and Appeals)(Scotland) Act 2010,* 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 a solicitor” prior to and at any time during questioning at a police station. Because of that provision,

certain consequences followed. The 2010 Act also: extended the period of detention 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 the *Cadder* decision about its effects on concluded cases, the 2010 Act altered the procedures for appeal, including the arrangements for references of cases by the SCCRC. But the 2010 Act was not intended to be a permanent solution to the issues raised by *Cadder*.

5. Some of the measures in the 2010 Act attracted considerable debate during its passage, and MSPs were keen to ensure that these measures were revisited as soon as possible. It is clear both that there may be areas of the legislation that need to be re-examined and revised and that the *Cadder* decision raises wider issues regarding criminal law and practice. That is why the Cabinet Secretary has commissioned this Review. 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, which will start very soon." (*Official Report, 27 Oct, col 29554).*

6. The Review, headed by Lord Carloway and supported by a full-time team, was established in December 2010. It is being assisted by a Reference Group consisting of leading practitioners and representatives in relevant fields, who have offered their insights, criticisms and comments in the development of the Review's work. The responsibility for the content of this consultation document, however, lies entirely with Lord Carloway.

What is the Review looking at?

7. The full terms of reference for the Review are set out below.

> **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 UK Supreme Court and the European Court of Human Rights, and with reference to law and practice in other jurisdictions;
>
> (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.

8. The Review has spent some time determining the scope of issues that require to be addressed in order for these terms to be properly met. It has concluded that the issues to be addressed include:

9. **Arrest, detention and questioning of suspects** including arrest and caution, the purpose of arrest and detention, the nature of police questioning of suspects, the grounds for detaining in custody, the length and continuity of custody, disclosure to the suspect and his/her solicitor of information prior to questioning, powers during custody, the right of access to legal advice (including form, nature and waiver), prompt appearance in court, vulnerable and child suspects and the purpose and form of the police charge.

10. **<u>Issues relating to the admissibility of statements</u>** by an accused and co-accused.

11. **<u>Sufficiency of evidence (including corroboration)</u>** covering the thresholds of evidence required for charge, prosecution, determination of "no case to answer" and conviction.

12. **<u>Other "safeguards" for a fair trial,</u>** such as a prohibition on inferences drawn from a suspect's silence at interview.

13. **<u>Appeals in general and references by the SCCRC</u>** including the changes made by the 2010 Act to the requirements on the SCCRC in considering a referral, the grounds upon which the High Court can refuse a referral, the role of Bills of Suspension and Advocation and timings relative to the lodging of a Notice of Intention to Appeal and a Note of Appeal.

How will the Review be carried out?

14. The first phase of work carried out by the Review has defined what Lord Carloway considers to be appropriate and within the scope of the Terms of Reference. This was undertaken in consultation with members of the Reference Group and others.

<u>Public Consultation</u>

15. This first phase was, however, essentially preparation for the principal phase of consultation with all those who have an interest in the operation of the criminal justice system. This is the point at which the Review will be able to get into the detail of the issues to be considered and to develop proposals to form part of the Review's recommendations. It is essential that the recommendations are developed based on the widest possible consultation to ensure that all relevant aspects have been considered and in particular that the proposals are grounded in practical experience and understanding.

16. The chapters in this Consultation Document are arranged into four thematic groups. These are:

1.0 Key elements of Custody;
2.0 Key stages of Custody;
3.0 Evidence; and
4.0 Appeals.

17. Each chapter outlines the law and practice as it currently stands and then raises the main issues that the Review wishes to address. In some cases, the chapter will identify possible options and seek views on them. At this stage it is too early for Lord Carloway to formulate detailed proposals, although in some areas a general direction of travel may be suggested. This means that this consultation is intended to be used as a forum for discussion and evidence gathering and for testing out the variety of options.

Roadshows

18. As part of the consultation process the Review will be meeting a number of organisations through both Roadshow Events and more focused meetings. If you wish to attend one of these or to meet with the Review Team to discuss the issues raised in this consultation, please contact Tim Barraclough, Secretary to the Review, at CarlowayReview@scotland.gsi.gov.uk or on 0131 244 7227.

19. The Review is also undertaking evidence gathering through data collection and analysis, comparison work with other jurisdictions and a number of visits to organisations working in this field. The Review will then draw together the information and evidence gathered, alongside the comments and views received in response to this consultation. Lord Carloway will then prepare recommendations for legislative and other changes designed to reinforce the criminal justice system as robust, fair, effective and efficient.

Outstanding decisions

20. One note of caution must be made. The *Cadder* decision has not made it clear exactly when a suspect's right to legal advice arises; whether immediately, only upon detention/arrest or at some intermediate point. There are several outstanding cases, prompted by the decision, which now await the UK Supreme Court's view on this particular point. Only once that view is known, or perhaps when there is a clear judgment of the Grand Chamber of the European Court, can one be confident that proposed legislative changes relating to the right to legal advice will be regarded as Convention compliant.

GLOSSARY

1995 Act	The Criminal Procedure (Scotland) Act 1995
2010 Act	The Criminal Procedure (Legal Assistance, Detention and Appeals) (Scotland) Act 2010
ACPOS	Association of Chief Police Officers in Scotland
Article 5	Article 5 of the Convention (Liberty)
Article 6	Article 6 of the Convention (Fair Trial)
Cadder	the decision of the United Kingdom Supreme Court in *Cadder* v *Her Majesty's Advocate* [2010] UKSC 43
Convention	European Convention on Human Rights
European Court	European Court of Human Rights (Strasbourg) – not to be confused with the European Court of Justice (Luxembourg)
High Court	High Court of Justiciary which sits as an appeal court in criminal cases
McLean	the decision of the High Court in *Her Majesty's Advocate* v *McLean* [2009] HCJAC 97
PACE	The Police and Criminal Evidence Act 1984
Privy Council	the predecessor of the UK Supreme Court in respect of Scottish criminal cases
SCCRC	Scottish Criminal Cases Review Commission
Salduz	the decision of the European Court of Human Rights in *Salduz* v *Turkey* (2008) 49 EHRR 421
Section 14 detention	detention under section 14 of the Criminal Procedure (Scotland) Act 1995
SLAB	Scottish Legal Aid Board
Solemn case	case where a person is charged on an indictment and tried before a Sheriff or High Court judge with a jury
Summary case	case where a person is charged on a complaint before a Sheriff, Justice of the Peace or Stipendiary Magistrate
Sutherland Committee	Report by The Committee on Criminal Appeals and Miscarriages of Justice Procedure (1996) Cmnd 3245
Thomson Committee	Thomson Committee Report: Criminal Procedure in Scotland (Second Report) Cmnd 6218

1.0 INTRODUCTION TO CUSTODY

1. The principal focus of the Review is the treatment of a suspect when in custody. Much of the public debate since the *Cadder* decision has focused on the section 14 detention. But it is perhaps more appropriate to consider the actual period for which the liberty of a suspect is restricted by the police – in other words, the period which starts with the suspect being taken into custody (detention or arrest) by a police officer until the point at which he/she is either liberated or brought before the court. This is the period referred to in the Convention and accordingly is the concern of this Review.

The right to liberty and security

2. The right to liberty and security of a person is one of the fundamental rights guaranteed by the Convention. Article 5 specifies the limited circumstances in which the detention or arrest of a person may be justified. Those circumstances include:

> " 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 …".

3. In the context of criminal investigation, Article 5 safeguards a person's right to liberty in two ways: first, by restricting the *purposes* for which the power can be exercised; and secondly, by specifying the *grounds* on which the power can be exercised. While arrest and detention have different meanings in Scottish procedure compared to the Convention, both result in the deprivation of the liberty of the person and, accordingly, both require to be exercised in accordance with the purposes and grounds permitted by Article 5.

4. Although the Convention does not expressly permit arrest or detention solely for the purpose of police questioning, the European Court has acknowledged that police questioning may be an integral part of the process of bringing a suspect before a court. The European Court has held[1] that Article 5 does not presuppose that the police should have obtained sufficient evidence to bring charges, either at

the point of arrest or at the point when a suspect is taken into custody. Taking a person into custody for the purpose of questioning with a view to developing a case is legitimate, provided that the police act in good faith. The purpose of custody is to bring the person before a court, should the suspicion be confirmed, whether through answers given at interview or as a result of other evidence being obtained during the period of custody.

5. Given that custody is at the core of this Review's considerations, the following chapters look first at the various elements that constitute it – the various categories of suspect, the right to legal advice or other support which is implied and the role and purpose of police questioning; and secondly, at the appropriate time periods assigned to the various stages of custody.

1.1 THE SUSPECT

1. A starting point for consideration is the powers of the police to detain and question a person. The police have powers according to three broad categories of person: the witness, the suspect and the accused.

The witness

2. Where a person is not under suspicion, the police have no power to take him/her into custody or to compel him/her to submit to police questioning. Such a person is classified, at most, as a witness and the only power is to obtain personal details (name, age and address etc). The witness can be required to "remain with" the police officer for that purpose. Where the police do ask questions of a witness, there is no obligation to advise of any rights, including the implied right to silence or its subsidiary right to seek legal advice.

3. In practice there are two categories of witness: the witness who was clearly not involved in the crime and the witness who might conceivably have been involved but upon whom no suspicion has fallen. The latter witness is not a suspect in the legal sense and the police have no power to detain or question him/her; neither are they obliged to caution him/her. There are an infinite number of degrees of suspicion and they may increase as questions are answered. If suspicion does begin to fall upon a particular witness, the police may caution him/her. If this does not occur, the court may regard the procedure as unfair and exclude any incriminating responses made.

The suspect

4. The law does not specifically define what a "suspect" is or confer a distinct legal status. However, in the terms of the Convention any imposition on the liberty of the individual is only justified where there exist reasonable grounds for suspecting that the individual has committed a crime. Where such grounds exist, the individual may be described as a "suspect" who attains certain rights and becomes subject to certain police powers.

5. Where there are reasonable grounds for suspicion, the police have limited statutory powers to detain the suspect and to question him/her. However, a person cannot be arrested, distinct from being detained under section 14, on such general grounds. On the other hand, the police may decide that, while they wish to question such a suspect, there is no need to detain him/her for that purpose. There will also be situations where the police strongly suspect a person, but have no *reasonable* grounds for doing so and hence for detaining him/her.

6. There is no statutory provision covering the suspect who remains at liberty. He/she need not be told that he/she is under suspicion, unless the police intend to ask him/her questions. A suspect may agree to questioning at the scene of the crime, in his/her own home or at a police station under the voluntary attendance procedure. Unless a suspect is formally detained at a police station, he/she remains at liberty and can terminate the questioning at any point. If the police do want to question a suspect, that person must be cautioned that he/she is not obliged to answer any questions and that any answers may be used in evidence. Any admissions from a suspect who has not been so warned will generally not be admissible.

7. There is no statutory obligation on the police to advise a suspect who is at liberty that he/she is entitled to seek legal advice, although a person truly at liberty is free to consult a solicitor if he/she wishes to do so. If a suspect is detained under section 14, he/she must then be afforded the rights now provided by section 15 and 15A of the 1995 Act. These include the right to access legal advice. But it is his/her status as a person in custody, rather than that of a suspect, which secures that right.

The accused

8. Once suspicion increases and crystallises upon a person as the perpetrator of the crime, he/she is, at least in theory, entitled to greater protection. Any admission elicited from the person after that point is vulnerable to successful objection in the trial process.

9. The reality, since at least the introduction of section 14 detention in 1980, is that the police have been in the habit of questioning individuals whom they suspect to be the perpetrator of a crime and whom they intend to charge no matter what his/her answers might be. Few objections have been taken to this and it is discussed in more detail elsewhere in the consultation document.

10. When the suspicion is sufficiently supported by evidence, a suspect will normally be charged by the police. The law is that such a person is to be regarded in the same way as an accused and is entitled to be protected from further questioning by the police.

<u>Questions</u>

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

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

1.2 RIGHTS RELATING TO CUSTODY AND QUESTIONING

1. This chapter deals with the right to legal assistance and how this applies to an individual who has been identified by the police as a suspect.

Right to legal advice

2. Article 6 of the Convention encompasses the right to a fair trial. Article 6(3) sets out minimum rights to be given to a person charged with an offence. These include the right to defend himself or herself in person or through legal assistance. That legal assistance is in some circumstances to be provided free of charge.

3. The extent to which a suspect detained under section 14 has a right to legal assistance was the specific issue considered by the UK Supreme Court in the *Cadder* case. The UK Supreme Court's decision is derived from the decision of the European Court in *Salduz* in which the following passage appears:

> "….. 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, unless it is demonstrated in the light of the particular circumstances of each case that there are compelling reasons to restrict this right. Even where compelling reasons may exceptionally justify denial of access to a lawyer such restriction – whatever its justification- must not unduly prejudice the rights of the accused under article 6. 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."[2](emphasis added).

4. The European Court considered that the right to legal assistance was necessary to protect a detained suspect's right to silence and his/her privilege against self-incrimination. The provision of legal assistance is regarded as essential to enable the detained suspect to make an informed decision about whether to speak to the police or to remain silent.

5. In *Cadder*, the UK Supreme Court made it clear that a detained suspect has a right to legal assistance before being questioned by the police. If this right is not provided, incriminatory statements obtained during questioning will not be

admissible. However, the Court did not specify whether this right arises only once a suspect is actually in custody or whether it arises as soon as a person is a suspect and is asked questions, wherever that may be.

6. If the right arises when a suspect is first *interrogated,* the *Cadder* decision does not explain when police questioning can be said to amount to "interrogation". The changes made by the 2010 Act operate on the basis that the right to access legal advice arises prior to questioning in detention – in other words, once the suspect is brought to the police station. On this view interrogation would be any questioning where the individual has had his/her liberty curtailed.

7. An alternative view is that any police questioning of a suspect could count as "interrogation". That would mean that any statement made in response to police questioning is not admissible unless it has been preceded by the opportunity for the suspect to have legal advice. This latter interpretation would have far-reaching consequences and would amount to a substantial extension of the current legislative requirements.

8. It would mean that a police officer who arrives at a potential crime scene may find it hard to ascertain whether a crime has been committed, or who might have been involved, without invoking *Cadder* rights. Consider examples where the police officer:

- is first to attend a road traffic incident;
- enters a house occupied by a number of residents in which drugs may be found; or
- encounters a person in the street at night carrying a baseball bat or golf club.

9. Does the police officer need to bring the road traffic victims, all the occupants of the house, or the baseball bat owner to the police station and then wait for a solicitor to provide advice, or alternatively expect a solicitor to attend the scene before asking any questions at all? The judges in *Cadder* did make some comments

about the significant practical problems that could arise if a person were entitled to legal assistance prior to being detained. If one solution is to detain potential suspects to facilitate solicitor access, this would seem to risk a great deal of unnecessary detention.

10. As a result of the *Cadder* decision, the defence in several cases have objected to evidence of admissions made in a variety of different contexts prior to the accused's detention or arrest. The Lord Advocate has referred a number of these cases directly to the UK Supreme Court. This is because of concern at the disruption currently being caused within the criminal justice system which can only be resolved once that Court's views are made clear. These cases include responses to police questions posed:

- at the house of a suspect prior to any restriction on the person's liberty;
- to a passenger apparently drunk in the seat of a car; and
- to a detained co-accused who had not had access to legal advice (in this instance, it is clear that an admission could not be used against the suspect who made it, but is it admissible against his co-accused?).

11. There are many other cases which are either at appeal before the High Court or which have been adjourned at Sheriff Court level pending a resolution of the central issue. It seems essential that the issue of when the right to legal advice arises be resolved promptly, given the very significant practical implications it raises.

Right to legal assistance – further timing issues

12. Since the 2010 Act, the following suspects have a right to a private consultation with a solicitor:

- detainees under section 14;
- voluntary attendees at a police station;
- persons arrested (but not charged).

13. The right to a private consultation arises both before the suspect in custody is questioned and at any time during questioning. Whatever the suspect's initial decision on whether to decline or obtain legal advice before questioning, the suspect still has a right to advice during the interview. It is suspected that changes of mind are rare, although the Review has no statistics on this.

14. In exceptional circumstances, the right to legal advice can be delayed. This caveat was expressed in *Salduz* but the European Court did not identify what would be regarded as "exceptional circumstances". It is thought that the circumstances would have to be extreme – for example, where immediate questioning may help reveal the location of an abductee in danger – although this will be a matter for the courts to determine.

Waiver of rights

15. A suspect may waive certain rights if the waiver is:

- voluntary;
- unequivocal; and
- not contrary to an important public interest.

16. The right to legal assistance can, in normal circumstances, be waived. The changes made by the 2010 Act do not make any provision on how the right may be waived or the circumstances in which it cannot be waived. The ACPOS Manual Guidance on Solicitor Access provides that any waiver, even partial, must be recorded in writing and the suspect must sign the waiver. The fact that the suspect has waived the right will be referred to at the start of any interview. Given the importance of the right as explained in *Cadder*, it might seem prudent to make express statutory provision describing the manner in which the right can be waived and how such waiver should be recorded. Express provision could be made stipulating the information to be given before a suspect would be capable of waiving the right.

17. Indicative estimates suggest that about three quarters of detainees elect not to consult a solicitor, although many do elect to have intimation of their detention sent to a solicitor. It is unclear why so many suspects do waive their right. Some will have been detained in the past and will be well aware of the likely advice from their solicitor. Many may have made up their minds not to say anything in any event. Others may genuinely have nothing to be concerned about and are quite happy to explain their position. However, one effect of *Cadder* is that suspects taken into custody, especially experienced ones, will be concerned that arranging for a private consultation with a solicitor, and especially seeking a face-to-face meeting, will significantly prolong the length of time for which they are detained. The exercise of the right may well result in a longer detention period and, depending upon the result of the interview, a much longer period before appearance in court.

18. Particular concern has been expressed on the ability of child and vulnerable suspects to waive their right to legal assistance. This issue is considered in a separate chapter.

<u>Questions</u>

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

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

1.3 PUTTING RIGHTS INTO EFFECT

1. In order to be Convention compliant, the State must ensure that the right to legal assistance is “practical and effective”. But the Review is not concerned only to secure the minimum Convention rights.

What form should legal advice take?

2. The Convention requires that consultation with a legal advisor should be in private, except in limited circumstances. The 2010 Act provides such a right. There may be circumstances when it is not appropriate for a suspect to be left unsupervised. That may not be sufficient reason to delay a consultation. But, if a suspect can be overheard, this may limit the ability of a solicitor to advise him/her properly. This has the potential to undermine the effectiveness of the right to legal assistance.

3. The legal advice may be provided by whatever means are appropriate. Very few solicitor’s offices or police stations have video-link facilities that would permit that type of remote face-to-face consultation. But the changes made by the 2010 Act specifically provide that advice may be provided by telephone and do not prescribe any situation when attendance by a solicitor is required or desirable. Arguably it is for the suspect, in consultation with his solicitor, to determine whether the solicitor needs to attend. Currently, the vast majority (in excess of three quarters) of consultations with solicitors are by way of short telephone conversations. This may be because the advice in most cases is likely to be invariable; that being not to say anything.

4. Concern has been expressed that, at least in some circumstances, a consultation by telephone may not be Convention compliant. This remains to be tested in court. The police do not have power to insist that a solicitor attend the police station or indeed communicate at all with a suspect. SLAB might encourage such attendance or contact by way of payment. Persons suspected of murder or culpable homicide already have a right under the legal aid system to a face-to-face meeting free of charge. In such serious cases, it is more likely that a solicitor will

attend to give advice at the police station, although he/she may not remain for the interview itself. This suggests that the appropriateness of telephone or other types of consultation will depend on factors such as the seriousness and complexity of the crime, the vulnerability of the suspect and the advice to be given.

5. Following the 2010 Act the suspect's right is to a consultation with a solicitor and not with a paralegal. This contrasts with England where legal assistance does not have to be provided by an enrolled solicitor. Provided this continues to be considered Convention compliant, one option is to allow legal advice to be provided by paralegals, although there would need to be a way of ensuring that they were capable of giving advice to an appropriate standard. The Review is not aware that there is any shortage of suitably qualified solicitors to give legal assistance. However, presumably the busier a solicitor is, the more likely he/she would be to delegate this task to a junior colleague if the case were relatively routine and the advice to be given straightforward.

6. The arrangements for legal aid are an important factor in ensuring that the right to legal advice is practical and effective. The Scottish Government and SLAB are currently in the process of amending the scheme for providing initial advice to suspects in custody. They are all entitled to funded advice under the Advice and Assistance Scheme. At present, a suspect may, in some circumstances, have to contribute towards the cost of the consultation.

7. Neither the legislation nor the Convention provides a suspect with a right to a consultation with a solicitor of his/her own choice. If the suspect is paying for the solicitor's advice, he/she may choose which solicitor to consult, subject to that solicitor being available. If a suspect has asked for a particular solicitor, whether paying for the advice or not, the police will have to attempt to contact that solicitor in the first instance. But they may have problems in doing so. That may delay police questioning and result in an extension of the section 14 detention period. Since the period for questioning is finite, the period in which to find a solicitor available to give advice must be limited too. The chosen solicitor may be available to give advice under the Advice and Assistance scheme, but equally he/she may either not undertake such work as a generality or not be free at the particular time. In either

event, there requires to be a scheme providing access to a duty solicitor as an alternative. If the suspect wants to be advised by a solicitor under the Advice and Assistance Scheme or is obliged to do so because his own solicitor is not available, the choice of solicitor will be limited to those on duty. Consideration needs to be given to the circumstances in which a suspect should not be entitled to await his/her solicitor of choice.

Disclosure of evidence prior to questioning

8. When a suspect exercises a right to a consultation, the police are not required to tell the solicitor about the information and evidence upon which the suspect has been detained. There may, however, be cases where the police choose to provide such information.

9. The issue of what information should be provided prior to questioning has been considered in other jurisdictions. In both England and Northern Ireland the courts have stressed the importance of the police acting fairly and in good faith when questioning suspects. However, the courts have not considered that "fairness" necessarily requires information about the evidence be provided prior to questioning.

10. In *R v Farrell*[3] it was said that:

> "First of all, it is a matter of judgment as to what should be disclosed 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. ……..
>
> "…the [trial] judge made a distinction between active lying intending to induce a confession on the one hand,… 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.".

11. Given that it is a matter of judgment for the police, the ACPOS Manual Guidance on Solicitor Access provides:

> “6.4 Officers and staff must carefully consider any requests for further information that solicitors may make. Although there is no legal obligation to provide further information, officers and staff may do so where they consider that it is appropriate for additional information to be passed to the solicitor at this stage. It is considered that it will usually be appropriate to provide the date, time and location of the alleged offence (if known). ….
>
> 6.5 It will also be appropriate to provide information concerning medical or vulnerability issues relating to the suspect which may have a bearing on the solicitors contact with the suspect or have a bearing on the safety of the solicitor”.

12. As a general rule, it would seem advisable for the police to inform the solicitor of the general grounds for the detention. Whilst the suspect will have been told these grounds, he/she may not have adequately passed on this information. The nature of the offence will obviously be an important factor in a solicitor deciding not only what his advice might be but also whether it can be given adequately by telephone.

13. When the consultation takes place, neither the suspect nor the solicitor is likely to be fully aware of the extent of the evidence known to the police. The Review understands that in most cases the legal advice given to a suspect is not to answer questions. This may be partly because of this lack of awareness and partly because, by responding, a suspect may provide the corroboration currently required to allow a prosecution to follow.

14. The Review also understands that suspects in England are advised to speak more often than in Scotland. It appears that in England there is a greater emphasis on resolving issues that would normally be addressed by the courts in Scotland in the police station. If that is the aim then from the outset it would seem that, more often than not, summarising the available key evidence helps. Otherwise, solicitors denied information will routinely suggest to their clients not to make comment, and there is a reduced chance of early resolution to the case.

15. The provision of information allows the suspect to make a more informed decision about whether to comment at interview. The suspect may be more willing to do so if he/she knows that there is an overwhelming case against him/her and feels that it would be better for any eventual plea in mitigation to admit his/her involvement

at the earliest stage. If innocent, the suspect may be able to provide the police with lines of enquiry which may result in his/her early exculpation and consequent release. But the imposition of a duty on the police may prejudice the investigation. It may also imperil prosecutions where it is demonstrated that those duties had not been discharged.

Questions

5. What forms of legal advice are sufficient?

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

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

1.4 POLICE QUESTIONING

1. This chapter seeks views on the extent of, and limitations on, the police power to question a suspect in connection with a crime. At the outset, it is important to be aware of the significant alteration in the approach of the courts to evidence of confessions. Traditionally, and perhaps up until the decision in *Cadder*, this was primarily from a perspective of the necessity of providing for the control of police powers in the general interest of fairness to all. It was not based solely on constitutional notions, such as the right to silence or the privilege against self incrimination. The change in angle is that the courts, especially following the decision in *Cadder*, must now look at the issue principally, if not exclusively, from the standpoint of protecting a person's Convention rights.

The purpose and nature of questioning

2. The purpose of police questioning is not set out in statute or in the Convention. Where a suspect is detained under section 14, the purpose of questioning can be inferred from that of detention which is: "to facilitate investigations into the offence and whether criminal proceedings should be instigated against the detainee".

3. Section 14 provides the police with power to ask questions relevant to the investigation. The suspect has an absolute right not to answer any or all of the questions. He/she has no right, however, not to be asked questions and the interviewing officer is entitled to put each and every question he chooses. The admissibility of any answers remains subject to the common law notions of fairness. But gauging that fairness does not just involve the rights of the suspect but also the public interest in the effective investigation of crime.

4. In practice, police questioning serves a number of purposes. It allows the police to seek to establish whether the suspect is the perpetrator of the crime and whether there is sufficient evidence to charge him/her. In pursuit of that aim, the police may legitimately seek to test the suspect's account, thereby perhaps incidentally eliciting an incriminating statement. Questioning also provides the

suspect with an opportunity to give any account that he wishes to provide or to advance any defence which he may have.

5. The nature of the questions asked may vary. Some may be open questions seeking comment. Others may be akin to the type of questions asked during cross-examination at trial. The police may adopt a robust approach to questioning, but an overly robust approach risks rendering inadmissible any answers given. If the questioning amounts to *interrogation* then any answers given are inadmissible[4].

When should questioning cease?

6. The common law rule is that questioning should not be permitted after charge. The traditional approach has been that a suspect in custody should be charged when the evidence becomes sufficient to do so. This rule ought also to mean that no questions should be asked after the point at which the police are in a position to charge such a suspect. If this is correct, and there is authority to the contrary[5], questioning may be carried out for the purpose of establishing whether a case exists against the suspect, to ascertain whether he/she has any exculpatory account but not for the purpose of bolstering, through his/her own statements, an existing case against him/her.

7. On the other hand, the European Court has held that:

> "The object of questioning during detention . . . 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.". [6]

8. On this interpretation of the Convention, it is legitimate to question a suspect in custody for the purpose of obtaining any incriminatory or exculpatory evidence from him/her. Questioning is permitted if its purpose is to confirm or dispel reasonably held suspicion. The corollary may be that questioning which goes further than that may not be regarded as legitimate. But the Convention does not prohibit questions after there is sufficient evidence to charge the suspect, after he/she has

been charged by the police or even after his appearance in court; provided, of course, that he/she has access to legal advice. The admission of evidence elicited by questions asked at any of these points would not necessarily infringe the Convention right to a fair hearing.

9. In a system based upon the protection of rights rather than general fairness and control of the police, it may be that the police should be entitled to ask questions after a sufficient case has been made out. In many cases, a bare sufficiency will not provide a secure basis for a prosecution. An exclusionary rule which stops questioning prematurely may impede an investigation unnecessarily. Safeguards such as the recording of police interviews, the right to legal advice and the need for prompt appearance in court may be sufficient to protect the interests of the suspect at all times. There may be no reason in principle for prohibiting police questioning even between charge and trial. Allowing questioning at a later stage would permit the police to put questions as the evidence develops and provide an opportunity for an accused to provide any explanation, which may then require investigation, which he/she wishes to proffer.

Questions

8. Are the parameters of legitimate police questioning clear?

9. When must questioning stop?

1.5 CHILD AND VULNERABLE SUSPECTS

1. The Review is seeking views on how the rights of children and vulnerable adults who are suspected of committing an offence should be safeguarded.

Children: definition of a child

2. The Review is seeking views on how a child suspect should be defined. The United Nations Convention on the Rights of the Child 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. In Scotland the age of majority is 18.

3. For the purposes of the 1995 Act generally, a "child" is defined as:

- a person under 16; or
- a person aged 16 or 17 who is subject to a supervision requirement.

4. The provisions relating to section 14 detention define a child as "a person under 16 years of age". There is some recognition of the vulnerability of 16 and 17 year olds who are subject to local authority supervision. The power of the Sheriff to remit 16 and 17 year olds to the Children's Reporter on conviction of a summary offence recognises the need, in some cases at least, for 16 and 17 year olds to be treated as children. It may be difficult to resist the conclusion that in relation to child suspects "child" ought to be defined as any person under eighteen years of age.

5. It may be thought, however, that there should be differences between the safeguards for younger and for older children. Children under 12, for example, may be criminally responsible but are not liable to criminal prosecution, as distinct from referral to the Children's Hearing. But criminal acts may result in a referral to the Children's Hearing on offence grounds which, if established, may have long term consequences for the child. It may be that particular safeguards are required to protect such children. Equally it may be thought that different considerations apply to older children, and in particular to 16 and 17 year olds, who may face prosecution.

If this is the case, the Review seeks views on how best to cater for an approach which distinguishes between children of different ages.

Children: rights

6. The United Nations Convention on the Rights of the Child affords children a number of rights which apply in this context. Of particular importance are Article 37:

> "No child shall be deprived of his or her liberty unlawfully or arbitrarily. The arrest, detention or imprisonment of a child shall be in conformity with the law and shall be used only as a measure of last resort and for the shortest appropriate period of time;
>
> Every child deprived of liberty shall be treated with humanity and respect for the inherent dignity of the human person, and in a manner which takes into account the needs of persons of his or her age. In particular, every child deprived of liberty shall be separated from adults unless it is considered in the child's best interest not to do so and shall have the right to maintain contact with his or her family through correspondence and visits, save in exceptional circumstances.
>
> Every child deprived of his or her liberty shall have the 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 …"

and Article 40:

> "A child accused or found guilty of breaking the law must be treated:
>
> 1 …in a manner consistent with the promotion of the child's sense of dignity and worth… and which takes into account the child's age …
>
> 2. (b) Every child alleged as or accused of having infringed the penal law has at least the following guarantees: … (ii) 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; (iii) To have the matter determined without delay by a competent, independent and impartial authority or judicial body in a fair hearing according to law, in the presence of legal or other appropriate assistance and, unless it is considered not to be in the best interest of the child, in particular, taking into account his or her age or situation, his or her parents or legal guardians; (iv) Not to be compelled to give testimony or to confess guilt;…(vii) To have his or her privacy fully respected at all stages of the proceedings.".

Current safeguards

7. At present, the fact that a suspect is a child is a factor to be taken into account in determining the fairness of any police interview, but there are few additional protections which exclude or restrict questioning of child suspects. In the event of detention or arrest, the police must intimate that fact to the child's parent or guardian who then has a right of access to the child, subject to any restrictions required for the purposes of investigation.

8. The 1995 Act also contains provisions which state that, where a child is arrested and cannot be brought "forthwith" before a sheriff, a police officer of the rank of inspector or above or the officer in charge of the police station must "inquire into the case" and may liberate the child on certain undertakings. The child ought, if practicable, not to be kept in the police station pending any court appearance.

9. When a child is interviewed, a parent or other suitable person (such as a social worker) will normally be present during that interview.

10. The recently published ACPOS Manual of Guidance on Solicitor Access provides that:

> "The test of [the] 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'.
>
> For children and those aged 16 and 17 there is a presumption that they should have access to advice from a solicitor and every effort should be made to obtain those services. It may be more difficult to establish informed waiver for these individuals.
>
> Where the suspect is a child, a parent or other responsible adult must be contacted and asked to be present and assist when the rights of solicitor access are explained to the child.
>
> In dealings with both children and vulnerable adults it is expected that in the majority of cases the services of a solicitor will be sought. If this is not the case then this fact and the reasons should be fully recorded.".

11. The current approach is therefore focused on the need to secure legal advice and the support of a parent or other responsible person.

Further measures

12. The Review is seeking views on what, if any, additional measures may be required to safeguard the rights of children, who are in custody or who are to be questioned.

13. In practice, a parent may express views or offer advice which conflicts with the views of the child and, potentially, any legal advice which is given. Dilemmas are likely to arise where, for example, the child or his/her parents consider that the right to legal advice should be waived in circumstances in which an objective observer may consider that such advice is vital. Careful judgments, therefore, require to be made about how the child's views are obtained and how his/her interests are best safeguarded.

14. In some jurisdictions the attendance of a lawyer is mandatory – there is no waiver available to the child. This may be an option, but it would not provide the flexibility to adopt a proportionate approach. It can be argued that the more adults that are required to attend a child's interview, the longer the child may have to be kept in detention – and the more intimidating the environment might be. All of this requires to be considered in the context of the particular child's age and maturity. Views are sought on how such matters should be addressed in practice.

Vulnerable adults

15. Part 5 of the 1995 Act makes comprehensive provision for the treatment, during criminal proceedings, of accused persons who are vulnerable by reason of a mental health condition. In addition, any vulnerability on the part of the suspect (whether attributable to a mental health condition or otherwise) will be a factor to be taken into account, at common law, in determining the overall fairness of the proceedings. Where an interview is unfair, it will be inadmissible. However, as with

children, there are few specific rules which make provision for the treatment of the vulnerable suspect at the stage of the police investigation.

16. The ACPOS Manual provides that:

> “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.”.

17. The current approach to vulnerable adult suspects is thus focused on the need to secure legal advice and, in appropriate cases, the presence of an Appropriate Adult at interview.

Identifying vulnerable adults

18. Identifying an adult suspect as vulnerable undoubtedly requires sound judgment by the investigating and custody officers. While there will be suspects whose vulnerability is patent and attributable to a particular condition, there may be some whose vulnerability is latent. There is no statutory or other definition of who should be regarded as a vulnerable suspect or how the rights of such suspects should be regarded.

19. There is, however, a statutory definition of a vulnerable witness. Section 271 of the 1995 Act classifies a person as vulnerable if:

> “(1)(b) . . . there is a significant risk that the quality of the evidence to be given by the person will be diminished by reason of—
>
> - mental disorder…, or
> - fear or distress in connection with giving evidence at the trial”.

What interest requires to be safeguarded?

20. According to the vulnerable witness test, a special approach is justified where the quality of the evidence to be given by the vulnerable person will be diminished by

reason of his vulnerability. It is the ability of the vulnerable person to give complete and undiminished evidence which must be safeguarded. The same safeguards apply where the accused is a vulnerable person and he/she elects to give evidence at his/her own trial. But what are the interests of the vulnerable suspect which require to be safeguarded during the police investigation? The aim must be to safeguard the vulnerable person's Convention rights. It may be said that that is done, in part, by safeguarding the ability of the vulnerable suspect to understand the proceedings and to engage in them in a meaningful way. It is necessary that he/she 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 he/she is asked and what he/she says. As is noted above, the ACPOS guidance requires that the individual's rights are fully explained and understood and that any waiver of rights is "informed waiver". In England and Wales the PACE Code of Practice (Code C) defines a person as mentally vulnerable where, by reason of his/her mental state or capacity, he/she: "may not understand the significance of what is said, of questions or of their replies".

How should vulnerability be assessed?

21. The vulnerable witness legislation identifies two types of vulnerability: mental disorder and fear or distress in connection with giving evidence at the trial. Central to the regime is a recognition that vulnerability may arise, not merely because of some pre-existing mental condition, but also from the circumstances in which the (otherwise non-vulnerable) person finds him/herself.

22. In determining whether a witness should be regarded as vulnerable (whether on grounds of a mental health condition or fear and distress in connection with giving evidence) the court is required to take account of a number of factors, including:

- the nature and circumstances of the alleged offence to which the proceedings relate,
- the nature of the evidence which the person is likely to give,
- the relationship (if any) between the person and the accused,
- the person’s age and maturity,
- any behaviour towards the person on the part of -
  - the accused,
  - members of the family or associates of the accused,
- any other person who is likely to be an accused or a witness in the proceedings, and
- such other matters, including -
  - the social and cultural background and ethnic origins of the person,
  - the person’s sexual orientation,
  - the domestic and employment circumstances of the person,
  - any religious beliefs or political opinions of the person, and
  - any physical disability or other physical impairment which the person has, as appear to the court to be relevant.

23. When there is a mental health condition, which may affect the ability of the vulnerable adult to engage in the investigation in a meaningful way, particular measures such as the presence of an Appropriate Adult may be justified. Equally, there may be physical disabilities or language barriers which will require a particular approach to the investigation; in particular, during the interview of the suspect. There may, however, be other circumstances in which an adult suspect should be regarded as vulnerable in the absence of any mental health or physical condition or difference. The Review is seeking views on whether such circumstances exist and, if so, what factors should be taken into consideration.

The likelihood of the suspect’s interest being compromised

24. For the vulnerable adult witness a special approach will only be justified where the risk of the witness’s evidence being diminished is significant. For the

vulnerable adult suspect, however, the threshold for taking particular measures should, perhaps, adopt a more cautious approach, having regard to the irretrievable prejudice which can be caused, both to the suspect and the investigation, where a latent vulnerability has not been identified. ACPOS guidance provides that an Appropriate Adult must be sought to assist in explaining the suspect's rights where officers have *reasonable grounds* to believe that the suspect may be unable to make a decision about accessing legal advice due to a mental disorder or lack of capacity. In England and Wales, the suspect should be treated as mentally vulnerable and an Appropriate Adult called where the custody officer has *any doubt* about the mental state or capacity of a detainee.

The measures

25. The measures required to safeguard the interests of a vulnerable adult may vary significantly from case to case. Where there is a significant condition and, perhaps, doubt over the suspect's capacity or fitness to be questioned, a medical opinion may be required. In other instances, however, it may be that the suspect can be interviewed with additional support and assistance from a professional experienced in mental health. An Appropriate Adult is often present during the interview of a vulnerable adult. The role of the Appropriate Adult is[7]:

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

26. The presence of an Appropriate Adult is an important additional means of safeguarding the interests of a vulnerable suspect during the police investigation, but the Review is seeking views on whether there are other measures which may be required to safeguard the interests of vulnerable suspects and the circumstances in which any such measures should be taken.

<u>Questions</u>

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

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

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

13. How should the vulnerable adult suspect be defined?

14. What rights of the vulnerable adult suspect, beyond those in the Convention, require to be safeguarded and how should those rights be defined?

2.0 KEY STAGES OF CUSTODY

2.1 ARREST AND DETENTION

1. The police powers in Scotland to take a suspect into custody as part of a criminal investigation are unique. The Review is looking closely at these powers and the standards and processes involved in their use. It is also giving consideration to whether it is still necessary to continue with the distinction between section 14 detention and subsequent arrest or whether these should be replaced with a single power of arrest.

Reasonable suspicion

2. *Reasonable suspicion* is a sufficient ground on which to detain a suspect. The words "*reasonable* suspicion" have been said to mean the existence of facts or information which would satisfy an objective observer that the person concerned may have committed the offence. They do not require there to be evidence against a person, far less a corroborated case. They permit the detention and questioning of a person before there is sufficient evidence to proffer a charge or to commence a prosecution. Elsewhere, suspicion has been described in the following way:

> "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." .[8]

3. Where reasonable suspicion is established, the person becomes a suspect and, as such, may be detained under section 14.

Detention

4. The current power of detention is contained in section 14 of the 1995 Act. This provides that:

> "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 . . . ".

5. The UK Parliament introduced this time-limited power as an intermediate stage before formal arrest and charge. It was seen as a method by which a person, against whom there was insufficient evidence to merit a charge, could be questioned under controlled conditions, i.e. a police station.

6. Section 14 detention, rather than arrest, is the normal means of taking a person, upon whom reasonable suspicion has fallen, into custody. It is also often used in circumstances where there is already enough evidence upon which to arrest and charge that person. In that situation, arrest becomes simply a formal stage at the conclusion of questioning. The suspect is "arrested" when he/she is already in police custody (being detained).

Arrest

7. Subject to certain exceptions, a person can only be arrested under the authority of a judicial warrant. A warrant for the arrest of a suspect is sought only once it has been decided to commence criminal proceedings against a person and the arrest is necessary to secure attendance at court, usually on a serious charge. An arrest warrant is granted by the Sheriff on the application of the Procurator Fiscal. A summary complaint, raised on the basis of corroborated evidence, or a solemn petition, raised on the basis of at least a single source of evidence, will outline the charge against the suspect and seek a warrant for arrest.

8. There must be evidence that the person named in the warrant is the perpetrator of the crime; reasonable suspicion on the part of a police officer is not a sufficient ground for arrest. Arrest does not include the power to take a suspect into custody purely for the purpose of further investigation or questioning by the police. Indeed, questioning after arrest is generally discouraged and any evidence or

information gathered through police questioning after arrest is only admissible in exceptional circumstances.

9. At common law, the police have the power to arrest without warrant where that is necessary for certain, urgent purposes. Those purposes are: the prevention of further crime; the absconsion of the suspect; or the destruction of evidence. The power is exercisable where there is *reasonable suspicion* of the person having committed an offence.

10. A police officer may arrest without warrant if he/she witnesses a crime being committed or attempted by a person, sees violence being threatened by someone, or if the officer observes the offender in flight from the scene of a crime. A police officer may also arrest on credible information that a serious crime has recently been committed or attempted, if there is a probability that the offender will abscond. Arrest for these purposes of urgency does not require to be grounded on evidence sufficient to commence criminal proceedings. If arrested in such circumstances, the suspect is not subject to section 14 detention procedures.

Is detention a necessary power?

11. The Convention makes no distinction between the grounds for detention and arrest, applying its requirements to "arrest or detention" equally.

12. It may be said that the Convention and section 14 detention achieve the same ends by different means. Both allow a person to be taken into custody on reasonable suspicion of having committed a crime and then to be questioned before court appearance. However, until *Cadder*, there remained an important distinction between arrest and detention in the Scottish context. Whereas on arrest a person was entitled to have a private interview with a solicitor before his/her appearance in court, a person detained had no right of access to legal advice before arrest. That was seen as a balanced approach given the limited maximum permitted time of detention in Scotland, compared to most other European jurisdictions. Since *Cadder*, and the consequent enactment of the 2010 Act, that distinction no longer

exists. A person now has a right to legal advice from the time of being taken into custody in a police station, whether that is following detention or arrest.

13. The Review is therefore considering whether there is a continued need for section 14 detention to exist as a distinct means of taking a person into custody. Arrest on reasonable suspicion, followed by police questioning, is a common approach in other jurisdictions. For example, in England, PACE defines that arrest without warrant can only be made for certain purposes, including arrest to allow the prompt and effective investigation of the offence or the conduct of the suspect.

14. There may, however, continue to be some value in retaining detention as a separate power. Reform may require significant procedural and cultural changes to little practical effect. But it may also be that reform would: provide an opportunity to clarify and simplify the scope of police powers; allow the powers to be aligned more closely with the express terms of the Convention; and better reflect modern practice by removing the need for the suspect to be "formally arrested" at the conclusion of the period of detention. Views may, of course, be influenced by the wider issues being consulted upon, including the nature and extent of the rights of the suspect and the corresponding powers of the police.

Police charge

15. In the current system of detention and arrest, the formal charging of a suspect by the police, following arrest, plays an important part in criminal practice and procedure. Once charged, the suspect can no longer be questioned by the police and any answers are admissible at trial only in exceptional circumstances. The rationale is that once charged, a person ceases to be a suspect but becomes an accused. The courts consider that it is unfair to question further a person who is thereby under the protection of the court. But, in selecting the time of charge as significant, the point at which the protection operates is, to some extent, at the discretion of the police.

16. The Convention does not prohibit questioning after charge and Article 5 does not require a charge to be made at any point prior to court appearance. All that is

required is that the suspect be told of the reason for his/her arrest or detention and the substance of "any" charge in existence.

17. Article 6 expressly refers to the rights of persons facing a "criminal charge". The jurisprudence of the European Court is that a person is deemed to have been charged when that person becomes a "suspect" and is "substantially affected" by an investigation. Therefore, in Convention terms, a person will be the subject of a "charge" before any police charge has actually been laid.

18. The question is whether the police charge serves any useful practical function. Article 6 states that the suspect has the right to be informed of the "nature and cause of the accusation…". Under the current system, a formal police charge may be different to the charge contained in a complaint or petition issued by the Procurator Fiscal. This may be confusing to the accused. Another consideration is that, as a result of *Cadder*, a suspect now has substantially the same rights whether arrested or detained in custody.

19. The investigating officers could simply notify the suspect that their dealings with him/her are at an end and that the case is to be referred to the Procurator Fiscal to consider whether charges should be brought and, if so, what form those charges should take. Meantime, the suspect would be advised that he/she is to be held in custody for "prompt" appearance in court or released.

20. It would be possible to provide that police questioning should cease when the police notify the suspect that the case is to be referred to the Procurator Fiscal. Alternatively, statute could provide that questioning can continue after such notification, or after charge, in appropriate circumstances.

Questions

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

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

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

2.2 Length of Custody

1. Custody is the period during which a suspect has his/her liberty removed until he/she first appears in court.

2. Under Article 5(3) of the Convention:

> "Everyone arrested or detained in accordance with the provisions of paragraph 1(c) of this Article shall be brought promptly before a judge… and shall be entitled to trial within a reasonable time or to release pending trial…".

3. The European Court appears, for the moment, to consider that a period of up to four days detention is Convention compliant. Any period beyond that may be regarded as a violation of the right to liberty.

Length of detention

4. The 2010 Act extended the period that a person could be detained from 6 hours to 12 hours with the possibility, in certain circumstances, of extending this to a maximum period of 24 hours.

5. Prior to the end of the initial 12 hour period, a Custody Review Officer (a police officer of at least the rank of inspector who has not been involved in the investigation) may authorise an extension of the detention period. The detained person and his/her solicitor, if available, have the right to make representations about the possible extension of the detention period. The Custody Review Officer may only authorise an extension if he/she is satisfied that:

- extending the detention period is necessary to secure, obtain or preserve evidence;
- the crime is indictable; and
- the investigation is being conducted diligently and expeditiously.

6. The police are, of course, required to terminate the detention if they cease to have *reasonable suspicion* that the suspect has committed the crime.

7. There are a number of factors relevant to a consideration of what the maximum period of detention prior to charge should be, including:

- the time needed for a solicitor requested by the suspect to provide advice;
- the desirability of the police conducting an effective and expeditious investigation;
- the impact on the suspect, e.g. potential impact on family, work, other commitments;
- the accumulation of evidence over the period of detention;
- the age and vulnerability of the suspect;
- the seriousness of the offence;
- the complexity of the investigation;
- the need for the suspect to have meal breaks and rest periods;
- the time taken to provide additional services, e.g. medical attention, contacting a parent/appropriate adult/interpreter; and
- the potential effect of the detention on the suspect's mental and physical health.

8. If the maximum detention period is to be capable of extension, consideration needs to be given to how this should be done and the length of the extended detention period. This includes determining:

- Who should authorise the extension? Should it be a police officer not connected with the investigation or should it be a sheriff?
- How long should the maximum extension period be?
- In what circumstances should the detention period be able to be extended?

Release from custody

9. A suspect's detention will end with either release or arrest and charge. If a suspect is released from detention before the expiry of the maximum detention period, it is possible for him/her to be detained again in relation to the same matter. In practice this does not happen. The police do not have the power to apply conditions to any release, such as to return to the police station on a set date or to keep away from witnesses or from a particular place. It has been suggested that the police, in the context of a twelve hour detention period, should have the ability to release a suspect on conditions, subject to the overall detention period remaining the same. For example, if the maximum detention period were 12 hours, the police could release a suspect after 7 hours and later detain him/her for a maximum of 5 hours (unless an extension was authorised). Breach of a condition would need to be subject to the imposition of a sanction by the court.

10. A provision for conditional release could provide the police with greater flexibility in investigating a crime; e.g. further time to collect evidence or to obtain the results of forensic testing. It could also result in a suspect spending a shorter period in custody. It would be important to ensure that the conditions applied could not amount to a deprivation of liberty that might breach Article 5.

11. The process of conditional release is used in other jurisdictions. In England the police have the power to release a suspect on conditions, however, the purpose of the conditions must be to ensure that the person released:

- surrenders to custody at a police station,
- does not commit an offence,
- does not interfere with witnesses,
- does not obstruct the course of justice, or
- makes him/herself available to assist the police with certain enquiries.

12. In the English system there is no time limit on the length of the conditional release but at some point the suspect must either be further detained, within the time limit, or released unconditionally.

13. In considering how such a power could operate in Scotland the following issues need to be considered:

- the advantages and disadvantages of such a power to a suspect in custody;
- the advantages and disadvantages of such a power to the police;
- the circumstances in which the power could be used;
- the test for using such a power;
- the purpose of attaching conditions to a person's release;
- the period during which a released suspect can remain subject to conditions; and
- the sanction which should be imposed for breach of conditions.

Appearance in court

14. Under section 14 a suspect may only be "detained" for up to 12 hours or, on an extension, up to 24 hours. There has been much focus on that time period. But it may, however, only be a portion of the time that a suspect remains in police custody. Once arrested after questioning the accused may be held in custody until his/her court appearance. Once at court, the accused will be served with the charges against him/her. It is then for the court to decide whether to release or to remand the accused. In either event, after the appearance in court, the accused ceases to be in police custody.

15. The police have a statutory duty to bring offenders to justice with "all due speed" and to ensure that a person charged with an offence is not unreasonably and unnecessarily detained in custody. There is a provision requiring that a suspect be brought before the court on the first court day after arrest. The first court day is defined as being "not a Saturday, Sunday or court holiday". Current practice in some areas is that, if there is a public holiday on both the Friday and the Monday, the court will sit on the Saturday or the Monday.

16. Although the requirement of court appearance operated satisfactorily within the context of a six hour detention period, its application is more complicated with a

12 hour, extendable, period. If a person is detained on a Thursday afternoon and then arrested on the Friday afternoon, prior to a holiday weekend, the accused may not be brought to court until the following Tuesday. The extent to which this happens is not known to the Review.

17. Few jurisdictions have separate maximum permitted periods for custody after "detention" and after "arrest". They do not have these two different modes of restricting a person's liberty. One suggestion is that the period of detention and the requirement relating to appearance in court should be considered together. If there are no breaks in the detention period, i.e. release on conditions, then a requirement for a court appearance on the next court day after the start of the custody would make it clear precisely when a suspect should appear in court. If release on conditions were carried forward as a recommendation, further consideration of "prompt appearance in court" will be required to ensure Convention compliance.

18. If custody is considered as a single time period, the question is how should the current requirement for appearance in court on the day following arrest operate? Should the requirement to appear in court be determined by the start of the custody period, from the point of charge or by some other measure?

Saturday courts

19. Further to the issues around holiday weekends mentioned above, at present, in the main urban areas, the number of custodies on a Monday can be considerable and have a tendency to overload not only the courts but also the police, the Procurator Fiscal's office and defence agents.

20. One solution would be to re-open courts on Saturdays. Opening all Sheriff and District Courts on Saturdays would have significant resource implications. There may be options which will address this, including, for example, a single custody court serving an entire region on those days.

<u>Questions</u>

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

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

20. Should a Saturday Custody Court be reintroduced?

3.0 Evidence

1. Although the *Cadder* case primarily concerned the admissibility of evidence arising from statements made in detention without prior legal advice, there are broader consequences for other rules of evidence. *Cadder* overruled the decision of the High Court in *McLean,* which had been based on the premise that, in judging whether or not a trial was fair, it was appropriate to look at the balanced package of safeguards as a whole. The High Court concluded that the application of other safeguards compensated for any potential unfairness in there being no right to legal advice during detention.

2. Following the 2010 Act, which introduced the requirement for legal advice prior to police questioning, there has been some public comment that this has tilted the balance of the system too far in favour of an accused; in rights terms, the argument is that not enough weight is given to the right to an effective and fair criminal justice system that protects the security of individuals.

3. The Review has therefore been asked to look at whether there is a continuing need for some of the safeguards cited in *McLean,* particularly the requirement for corroboration and the lack of adverse inference. Views on these issues are sought in the chapters that follow. It should be said, however, that the Review has not looked at these issues solely or even primarily in terms of "re-balancing" the system between the interests of the suspect, the investigating authorities and the victims of crime. Rather, it wishes to examine the practical value of these evidential rules in and of themselves. *Cadder* has made it clear that the purpose and functions of these safeguards cannot include overcoming any disadvantage from the lack of availability of other rights. It is therefore the Review's intention to explore the practical contribution these safeguards make to the administration of justice.

4. There is a danger in this area that, because all the rules and provisions regarding investigations, prosecutions and the conduct of trials are so interlinked, this Review is drawn into re-opening the entire regime of criminal evidence and procedure. The Review takes the approach, however, that sufficiency of evidence

and adverse inference can be considered largely discretely, but that these connections to wider questions should be borne in mind.

3.1 Sufficiency of Evidence

1. This chapter considers the evidence required for a person to be convicted of an offence and specifically whether the requirement for corroboration should be retained. It is recognised that corroboration is regarded by many as a cornerstone of the criminal justice system. It is perceived to be an important check which helps to ensure, so far as practicable, that miscarriages of justice are kept to a minimum.

2. Sufficiency of evidence is the amount of evidence required for a conviction. This is a matter of law. It is not concerned with whether the evidence is truthful or reliable. There may be sufficient evidence for a conviction, yet the judge or jury may choose to acquit an accused because of the quality of that evidence.

3. For a person to be convicted of a crime there must be:

- at least one source of evidence, e.g. the testimony of a witness, that describes the commission of the crime and points to the accused as the perpetrator; and
- an additional source of evidence, e.g. the testimony of at least one other witness, which confirms or supports the first source in respect of each of these two essential or crucial facts, i.e. that the crime was committed and that the accused was the perpetrator.

4. The sources may consist of direct (eye witness) evidence or indirect (circumstantial) evidence.

5. There are some limited statutory exceptions to the requirement for corroboration. These exceptions, which tend to relate to crimes such as road traffic contraventions, have not attracted any significant adverse criticism.

6. Article 6 of the Convention does not require that evidence be corroborated in order for a person to be convicted. It does, of course, provide a right to a fair trial and there have been cases in which the European Court has been willing to consider

the nature or quality of the evidence when considering whether a trial as a whole has been fair[9]. Since the requirement for corroboration does not exist in any other European jurisdiction, it is reasonable to assume that, were it to be removed, there would be no basis for concluding that this, at least of itself, would result in a breach of Article 6. But that is not a good or sufficient reason to remove the requirement if it serves a useful purpose in the domestic system. In that regard, every system has its own checks and balances and corroboration has been regarded for centuries as one of these checks and balances.

The requirement for corroboration

7. Corroboration is biblical in origin, its roots being found in references in both Old and New Testaments[10] to a fact needing to be established by two or more witnesses. The purpose of the requirement is to protect an accused from being convicted on the basis of a single witness, who may be either fallible or dishonest. Hume states:

> "no matter how trivial the offence and how high so ever the credit and character of the witness, since the law is averse to rely on his single word in an inquiry which may affect the person, liberty or fame of his neighbour; and rather than run the risk of such an error, a risk which does not hold when there is concurrence of testimonies, it is willing that the guilty should escape.".[11]

8. The classic statement on the principle of corroboration comes from a civil case[12]:

> "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".

9. The requirement for corroboration was re-stated more recently in *Fox* v *HM Advocate*[13] in the following, rather different, terms:

> "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.".

10. Evidence can be corroborative even if, taken on its own, it does not point conclusively towards a suspect's guilt. So, in a case where identification is in issue, a positive identification by one witness may be corroborated by a resemblance identification by another. Corroboration is about the number of witnesses available to prove facts. It is not about number of facts available to prove guilt. Thus, a single circumstance, such as the finding of a fingerprint in a particular place, may be sufficient to prove identity (a crucial fact) provided that the finding of the print and it being from the accused's finger are each spoken to by more than one witness. Alternatively, two separate circumstances, each spoken to by separate witnesses, may be sufficient if both point towards guilt.

11. Despite the fact that the requirement for corroboration has been part of the fabric of the justice system for so long, there has been some criticism. One commentator has said that the need for corroboration:

> "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".[14]

12. The proposition is simply that Scots law is out of date and out of kilter with all other European and common law systems.

13. In other European and common law systems, the decision to prosecute a crime tends to be based on the strength of the evidence and public interest concerns

rather than an objective minimum numerical requirement. The test for conviction is also one based on the quality and not the quantity of the evidence. There is no need for two separate sources.

14. Previously, many common law systems required juries to be warned of the danger of convicting an accused on the basis of one witness's evidence alone. In England, for example, this applied to the evidence of children, complainers in sexual offence cases, accomplices and perjury cases. These rules have largely been abolished because they were deemed to be inflexible, complex and anomalous. Some systems allow warnings to be given if they appear justified in the circumstances. But the effectiveness of these warnings cannot be considered in isolation but as one part of the checks and balances in the particular system.

No case to answer

15. Sufficiency of evidence for a conviction is usually reflected in the test for "no case to answer". An accused can make a submission of "no case to answer" at the conclusion of the Crown case; that is before he/she decides whether to give evidence or call any witnesses. The judge may, after hearing both parties, acquit the accused if satisfied that the evidence led by the prosecution is insufficient in law. An accused can, in addition and after all the evidence has been heard, ask a judge to direct the jury to acquit him/her on the basis of insufficient evidence. It is important to note that the judge, in considering whether there is a case to answer, is not concerned with the quality of the evidence, e.g. the credibility and reliability of witnesses, but with whether there is corroborated evidence available, whatever its quality, to prove the case. This is in contrast to the powers of the High Court to quash a conviction on the basis of "unreasonable verdict".

16. In England, where there is no requirement for corroboration, a trial judge can acquit the defendant if he/she is satisfied that no jury, if properly directed, could convict the defendant. In Australia a trial judge can direct the jury to return a not guilty verdict if the evidence is such that, "when taken at its highest", it could not sustain a guilty verdict. The position in European jurisdictions, where cases are decided either without a jury or by a jury with the judge, are not directly comparable.

Grounds for appeal

17. There is a substantial link between what is required at first instance as sufficient evidence for a conviction and the test for allowing an appeal against that conviction on the basis of lack of adequate evidence. A different test is applied by a trial judge, in determining whether a case should be left to a jury, from that of a three or more judge appeal court, when reviewing the adequacy of the evidence upon which a conviction was based. The High Court has, for almost a century, been able to grant an appeal where it has considered that no reasonable jury could have reached a guilty verdict.

18. The Sutherland Committee confirmed that the High Court should be able to overturn a jury's verdict where that verdict was unreasonable and had resulted in a miscarriage of justice. This is because, even allowing for the jury's advantage over an appeal court in having seen and heard the witnesses, there could be exceptional cases where it would be difficult to understand how "any reasonable jury could not have entertained at least a reasonable doubt"[15]. The High Court has been cautious in granting appeals on this basis and has stressed that it is not sufficient that the Court itself may entertain a reasonable doubt.

19. In England, a conviction can be successfully appealed on the ground that the conviction is "unsafe"[16] . The Court of Appeal in England has in the past referred to the existence of a "lurking doubt" being sufficient for a conviction to be deemed unsafe:

> "This means that in cases of this kind the Court must in the end ask itself a subjective question, whether we are content to let the matter stands as it is, or 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"[17].

20. The Review understands that a more robust approach has been adopted in practice in recent years.

Should the requirement for corroboration be abolished?

21. The principal benefit of corroboration is that it is thought to reduce 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. First, the witness can be unreliable, even if acting in good faith. In particular eye-witness identification evidence is often regarded as being potentially unreliable. Secondly, the judge or jury can be wrong in their assessment of that witness. Given the consequences of a criminal conviction for an accused, corroboration has been regarded as an important protection. Furthermore, witnesses may be concerned about giving evidence if their testimony is the only evidence on which a person's conviction is based.

22. The need for corroboration provides a clear and objective test for prosecutors to apply when deciding whether to prosecute. If the requirement were removed, prosecutors would need to decide whether cases should be prosecuted on the evidence of one witness alone. But prosecutors in other jurisdictions make such decisions as a matter of routine, based on broad concepts such as the likelihood of conviction and the interests of justice. Accordingly, this would not appear to present a significant bar to the removal of the corroboration requirement.

23. Corroboration also provides an equally clear and objective minimum "baseline" for judges before considering whether to convict. However, judges can have very different views on what might constitute corroboration in a particular case. They may also have different, perhaps even more divergent, views on what constitutes adequate evidence for a conviction, if the requirement for corroboration were to be abolished.

24. Corroboration is more likely to exist in relation to some offences than others. This is exactly the same consideration as prompted the removal of the requirement for corroboration in the civil law. For example, where crimes are usually committed in private, including rape and other sexual offences, the only direct evidence available will be from the accused and the complainer. There may be nothing, or very little, else. The effect of the requirement for corroboration is that the jury cannot

convict the accused, even if the complainer is entirely credible and reliable. This means that prosecutions cannot be brought in such cases. On the other hand, where there is only the evidence of the accused and the complainer, the accused may be more vulnerable to miscarriage of justice and so may need greater protection.

25. The rules of corroboration have become somewhat convoluted in certain areas, partly as a counter to the problem of securing convictions in sexual offence cases. Elaborate rules concerning corroboration have been devised over many years. These have included the division of facts into different categories; crucial or essential, evidential and procedural. In rape cases, evidence of a complainer's distress after the incident can be treated as a circumstance capable of corroborating her lack of consent at the material time. The *Moorov* doctrine[18] provides that one complainer's testimony about a particular attack can corroborate another complainer's evidence of a different attack; provided both incidents are sufficiently closely connected in time, character and circumstance. In that situation, what are separate acts are treated as a single course of conduct and it is that course of conduct, perpetrated by the same person, that requires to be proved by corroborated evidence and not each separate incident. In all of these cases, the trial judge often has to provide the jury with intricate directions on where the corroboration can be found. These directions can be misunderstood.

26. One view is that it should simply be for the jury to decide whether the prosecution has proved the accused's guilt beyond reasonable doubt. A jury 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 be corroboration, should not necessarily prevent a judge or jury from deciding that the evidence of a complainer is believable and sufficient to establish guilt. However, it may remain the position that, in cases where there is no corroboration, judges and juries will find it difficult to find guilt established.

27. In this context, therefore, what degree of practical protection does the corroboration requirement actually provide to an accused? As has been stressed already, corroboration concerns the quantity and not the quality of evidence. There

are many circumstances where the testimony of a single witness is more persuasive than a "cloud of witnesses". There are cases where the corroborating identification evidence is testimony that a person of a general description, consistent with the accused's appearance but not definitively so, was involved in the crime[19]. In some cases, such as *Fox* v *HM Advocate*[20], the corroboration consists of a complainer's distress which is capable of supporting both the complainer's testimony and the accused's version of events.

28. It is not clear how many additional prosecutions and convictions there would be if the requirement for corroboration were removed. In cases where the only substantial evidence is that of the accused and the complainer, a jury may still find it difficult to be satisfied beyond reasonable doubt that the accused committed the offence, even if the complainer were to be regarded as generally credible. England, Wales and Ireland do not have a requirement for corroboration, but the conviction rates for reported rapes is comparable and still very low.

29. The requirement for corroboration may result in a suspect being reluctant to respond to police questioning, on the advice of his/her solicitor, where otherwise he/she might choose to respond. The concern of the solicitor will be that, on the one hand, the suspect's answers may inadvertently corroborate other evidence and create a sufficiency. This can place a suspect in a difficult position if, on the other hand, it is felt that the jury would be more likely to accept his/her account as credible if he/she raises it at the earliest opportunity. An obvious example is in a rape case, where a jury may find an accused's evidence that sexual intercourse was consensual more believable if the accused had said this at police interview. However, such an admission may provide corroboration that sexual intercourse has taken place and make it more likely that the evidential threshold has been met and so increase the likelihood of a prosecution and subsequent conviction. Similar considerations apply in assault cases where the accused maintains that he/she was acting in self defence.

30. If removing the requirement for corroboration were to lead to an increase in convictions, which were subsequently overturned on appeal as being "unreasonable", this might create a perception that all convictions based solely on

the word of a complainer are unsustainable. This in turn could discourage victims from reporting allegations if they thought that there may not be any other evidence.

31. The Scottish Law Commission has previously considered whether the requirement for corroboration should be removed in relation to sexual offences[21]. However, the majority of consultees did not support this and the Commission concluded that would be difficult to justify such a removal and to identify the specific offences in respect of which corroboration should not apply.

Other changes that may arise from the abolition of the requirement

32. The grounds for acquitting on the basis of a "no case to answer" or common law submission could be extended to situations where the judge considers that the evidence is insufficient for a reasonable jury to convict. This might provide an accused with some added protection against the possibility of an unreasonable verdict. But, because of the different views of judges on sufficiency and adequacy of evidence, that may have a tendency to promote idiosyncratic acquittals. Without a requirement for corroboration, a single piece of testimony may be sufficient for a jury to convict if satisfied that the evidence was credible. Widening the grounds for a "no case to answer" submission may not provide the same protection against fallible testimony as exists with the requirement for corroboration.

33. The accused might be given added protection from miscarriages of justice by extending the ground of appeal to include where the appeal court has a "lurking doubt" of the appellant's guilt. But the scope of such an enquiry, undertaken by the Sutherland Committee, or one which examines the appropriate majority for guilt in jury cases, is considered beyond the scope of Review.

Questions

21. Should the requirement for corroboration be abolished?

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

3.2 Admissibility of Statements

1. This chapter seeks views on the admissibility of statements by suspects.

Confessions at common law

2. The general principle is that confessions made by suspects will be admitted in evidence if they were voluntarily made and fairly obtained. Thus, a statement made spontaneously will be admitted, whereas a statement brought about by inducements or pressure will not. Often, however, the circumstances in which a statement is made are not so clear cut.

3. The law departed from the former notion that the questioning of suspects is necessarily unfair, recognising the need to achieve the correct balance between the interests of the public and those of the suspect. In *Miln v Cullen* Lord Wheatley reaffirmed fairness as the only test and stressed that:

> "…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". [22]

4. In determining whether statements should be admitted, it is the judge, and not the jury, who decides, on a balance of probability, whether a statement has been fairly obtained. The standard is thus lower than that required to find guilt. In England, the standard of proof of fairness is "beyond reasonable doubt".

The impact of the Convention

5. There is no specific reference in Article 6 to any right of silence or a privilege against self-incrimination either at a trial or when a suspect is questioned by the police. But these are regarded by the European Court as "generally recognised international standards which lie at the heart of the notion of a fair procedure under

article 6". The privilege against self-incrimination is seen as closely linked to the presumption of innocence. In looking at whether the use of statements obtained from a suspect violated the general right to a fair trial, the Court has held that each case has to be looked at on its own facts:

> "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 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".[23]

6. The European Court has not normally recognised any circumstances in which the general right to a fair trial can be overridden by, for example, arguing that forcing persons to answer questions is a proportionate response when dealing with terrorist suspects. But in road traffic cases, where section 172 of the Road Traffic Act 1988 requires a person to give information as to the driver of a car, both the Privy Council and the European Court have held that a person can be so forced. The Privy Council was keen to stress that, whereas the general right to a fair trial was an absolute one, the implied rights (such as the privilege against self incrimination) in Article 6 were not.

7. Against this background it might be concluded that the right to silence and the privilege against self-incrimination did not preclude the fair questioning of a suspect.

8. It is now clear from the decision in *Cadder* that a test of general fairness alone is not a sufficient safeguard to ensure that a person's Convention rights are protected. Once a suspect is in some form of custody at a police station, he/she has the right "to obtain legal advice" before being questioned. The decision creates an almost absolute prohibition on the admissibility of statements obtained from a person in custody who has not been advised of his right to legal advice, however fair the rest of the process may have been. It is therefore an exclusionary rule, albeit that it may be subject to exceptions in extreme circumstances. There is now, in relation to the suspect, a combination of exclusionary rules which provide circumstances in which admissions can never be fair and a general fairness rule which ensures that in all other circumstances, admissions will only be admitted if obtained fairly.

Exculpatory and mixed statements

9. Generally, evidence of what a person has said about the crime outwith the witness box in court is excluded as "hearsay". The rule is a useful one in restricting evidence to what witnesses themselves saw or heard, rather than what they think they heard other people later saying. However, confessions by suspects are allowed as an exception to the rule against hearsay because they are "statements against interest" and are therefore regarded as more likely to be true than not. Of course, many statements by suspects will not fall to be regarded as entirely incriminatory. Many will contain some facts which might point to guilt (e.g. an admission of presence at the scene) and some might point to innocence (e.g. an account of self defence) - so called "mixed statements". Other statements are wholly exculpatory. Matters can become even more complicated where, as often happens, a suspect gives a series of different statements over time; some wholly exculpatory, some mixed and some entirely incriminatory.

10. The traditional approach is that an accused cannot lead evidence of exculpatory statements, or even partly exculpatory or mixed statements, as a substitute for giving evidence. In the celebrated case of *Meehan v HM Advocate*[24], when the accused wished to undergo an examination 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 has told them that he had not committed the crime. This may be regarded as an important rule which prevents an accused from providing an account to a generally credible person shortly before his/her trial and thus potentially avoiding cross-examination and the risk of a charge of perjury.

11. Mixed statements are treated as "qualified admissions". In *McCutcheon*[25] the court stated the following elaborate principles regarding their competency as evidence:

> "(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 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".

12. The position remains, therefore that, as far as proof of fact is concerned, a mixed statement is admissible at the instance of the Crown but not the defence. There may be some force in the idea that the question of whether a statement ought to be regarded as "against interest" and hence admissible hearsay should be a decision to be made by the opposite party. On the other hand, it may be suggested that evidence is either relevant, and thus admissible, as demonstrating the likelihood or otherwise of the accused committing the crime, or it is not.

13. On this view such statements should be capable of being proved by the defence, even where the accused elects not to give evidence. One view is that this would allow the accused to prove the statement which is, on one interpretation, exculpatory in nature while bearing none of the risk of giving evidence. Alternatively, it could be argued that a jury is capable of assessing such evidence for what it is worth especially where the accused has not given evidence; a fact which may thereby become the subject of comment.

14. The law is unclear on whether wholly exculpatory statements are ever admissible, but they may be at least to show consistency when an accused gives evidence and his/her credibility and reliability is challenged.

15. It must be difficult for a jury to understand and to apply the distinction between using a statement to test credibility and reliability and as proof of the facts libelled. This is especially so where intricate directions relating to different parts of a mixed statement and different statements are given.

Questions

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

24. Should the Common Law fairness test for the admissibility of statements be clarified in statute?

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

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

3.3 INFERENCES FROM SILENCE

1. There are two aspects to the "right of silence". First, there is the generally recognised right of a suspect to remain silent when asked questions by the police. Secondly, there is the subsequent privilege of an accused against self-incrimination at trial. Closely linked to both is the question of what, if any, significance can be attached by a judge or jury to the failure by a suspect to answer a question asked of him/her or to comment on any piece of evidence presented to him/her, prior to trial.

2. On the one hand, it may be said that to draw any significance from a suspect's silence encroaches on that right. After all, if an adverse inference can be drawn from silence, a suspect may feel compelled to speak and the right to be silent can thereby be seen to be compromised, indirectly at least. Against that is the argument that, while no person should be compelled to answer a question prior to trial or to incriminate him/herself at trial, the court should be entitled to interpret silence in either situation as common sense permits. That argument 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.

Inferences

<u>Silence before trial</u>

3. No adverse inference can be drawn at trial from a suspect's silence when questioned or charged by the police. Inferences from silence during police interview are prohibited, especially where a suspect has been cautioned. The terms of the caution deprive a failure to respond of any evidential value.

4. The position can be different, however, where the person is not being interviewed or charged by the police and he/she fails to respond to an allegation made, perhaps by a co-accused in the presence of others, shortly after the occurrence of the crime. It may be inferred from the person's silence that he/she admits the allegation. This principle has been expressed thus:

> "A statement by another person, whether or not that person is a co-accused, made in presence of an accused, is not in itself evidence against that accused. The accused's reaction to that statement, or indeed his failure to react to it where it is an accusation of his guilt, is, however, evidence against him in the same way as a statement made by him, silence in the face of accusation being capable of being construed as an admission of guilt. The evidence of the other person's statement is therefore admissible for the limited purpose of explaining the accused's reaction." .[26]

5. The principle extends to circumstances in which the suspect fails explicitly to refute an allegation, but instead provides an explanation which is, on the face of it, exculpatory or mitigatory. In one case[27], the accused was asked whether he had set his dog on children. His reply that the children had "no right to be in the garden" was regarded as an admission that he had done so. His silence (or rather his failure to answer the question directly) was taken as proof of the accusation embedded in the question. This type of situation is not so much one involving an inference from silence as one containing a constructive admission of fact.

Silence at Judicial Examination

6. Judicial Examination takes place in solemn procedure, although now generally only in murder and rape cases, soon after the accused's first appearance in court and long before an indictment is served. Its purpose is: "to give an accused an opportunity to state his position at an early stage. It also gives an accused the opportunity of admitting, denying or explaining any admissions which the police allege that he has made"[28].

7. Section 36(4) of the 1995 Act provides that, at Judicial Examination:

> "An accused may decline to answer a question [asked at Judicial Examination]; and, where he is subsequently tried on the charge . . . or on any other charge arising out of the circumstances which gave rise to the charge . . ., 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.".

8. Where the accused does not give evidence at trial, no adverse inference can be drawn from his earlier silence at Judicial Examination. However, if the accused

does give evidence and mentions facts, which he/she had not stated during his Judicial Examination, this can be adversely commented upon. In practice, however, such comment is rarely made because both the Crown and the court may regard it as unfair, especially where the accused states that he/she was acting upon legal advice. Making such a comment may jeopardise any conviction upon appeal.

Silence at trial

9. Silence at trial is a factor which, in certain circumstances, can be commented upon by the judge and taken into account by judge or jury when reaching a verdict. The court has recognised that the absence of any comment from an accused at trial, where the evidence "cries out" for an explanation, is a relevant factor to be taken into account when reaching a verdict[29]. It has long been established that a judge may direct the jury's attention to the failure of the accused to give evidence in certain circumstances, notably where the facts established by the evidence, if accepted, raise an inference of guilt. The High Court has expressed the view that:

> "No doubt the prosecutor is precluded from offering any comment upon the fact that an accused does not go into the witness-box; but the judge may, and in my opinion should, in exceptional cases, comment upon the fact and bring it distinctly under the notice of the jury, who are, of course, always entitled to consider the fact that an accused—who, it may be, is the only man in possession of the full knowledge of the facts—refrains from going into the witness-box for the purpose of clearing his feet and establishing his own innocence."[30].

10. Since the 1995 Act there has been no express prohibition on the prosecutor from commenting adversely on an accused's failure to give evidence, although the limits of such comment are untested. In practice, again, such comment is rarely made.

11. Silence at trial cannot add to the available proof, i.e. it is not a source of evidence which can prove fact or provide corroboration. But it is clear that, if comment can be made about silence, then a jury must be entitled to draw some adverse inference from it. However, such comments should be made with the utmost care.

The Convention

12. While the Convention does not explicitly provide for the right to silence, such a right is recognised as central to the conduct of a fair trial. As to the extent of the right, the European Court has said that:

> "It cannot be said therefore that an accused's decision to remain silent throughout criminal proceedings should necessarily have no implications when the trial court seeks to evaluate the evidence against him . . .
>
> 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 particular 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". [31]

13. The Court has held that the drawing of an adverse inference is fair where:

- the accused was entitled to remain silent and had done so;
- he/she was not compelled to give evidence and did not do so;
- maintaining silence did not amount to an offence;
- the trier of fact was an experienced judge and not a jury;
- any inference could only operate once the prosecutor had established a sufficient case and one not be based solely on adverse inference;
- the accused required to be warned about the implications of remaining silent; and
- the trial judge had discretion over whether any adverse inference should be drawn.

14. The European Court has considered whether an inference can be drawn from the silence of a suspect who was advised by his lawyer to remain silent. The Court held that:

> "the very fact that an accused is advised by his lawyer to maintain his silence must also be given appropriate weight by the domestic court. There may be good reason why such advice may be given . . . ". [32]

15. The Court endorsed the English Court of Appeal's test that:

> "the jury should [be] directed that it could only draw an adverse inference if satisfied that the applicants' silence at the police interview could only sensibly be attributed to their having no answer or none that would stand up to cross-examination."[33].

Inferences in England

16. In England there are provisions in the Criminal Justice and Public Order Act 1994 permitting an inference to be drawn at trial from a suspect's silence, whether at interview, at the point of charge or during trial.

Silence before trial

17. Where an accused fails to mention a fact, when interviewed by the police, which he/she later relies on at his/her trial and which he/she could reasonably have been expected to mention, the court, in determining whether there is a case to answer, and the court or jury, in determining whether the accused is guilty of the offence charged, can draw such inferences from the failure as appear proper. Silence during police interview does not of itself permit an adverse inference to be drawn at trial. It is necessary that the accused seeks at trial to rely on a fact which he/she did not mention when questioned by the police.

18. However, the Court in England[34] has identified six separate conditions that must be satisfied before an adverse inference from silence at interview can be drawn by the jury when reaching a verdict. In addition, the English jurisprudence has developed further so that no inference can be drawn from silence if:

- at the time the police had already made up their mind to charge the suspect;
- the allegations are complex or old and no sensible immediate response was appropriate;
- the facts in question were not known to the defendant at the time when he failed to disclose them; or

— the charge at trial is for a different offence from that with which the defendant was charged, cautioned or arrested.

19. In England access to legal advice and the nature of any advice given are important factors in determining whether any adverse inference may be drawn. An inference cannot be drawn if the suspect was not afforded legal advice prior to the interview. Where the suspect has had access to legal advice, the court is required to look at the context in which the accused refused to answer and a two stage test is applied: (1) the subjective test: did the accused genuinely rely on the advice; i.e. did the defendant accept the advice and believe that he was entitled to follow it? And (2) the objective test: was it reasonable for the defendant to rely on the advice? Where the jury considers that the accused was silent because he was genuinely and reasonably following legal advice, no adverse inference can be drawn from any failure to comment.

20. A further constraint applies where the suspect's silence was maintained because he/she, or his/her solicitor, knew little or nothing about the case against the suspect. Where only minimal information is provided, the proper advice may be to remain silent, in which case no inference can be drawn.

21. An inference drawn from silence at interview, or at trial, cannot be the *sole* evidence on which a conviction is based. There must be other evidence which proves the accused's guilt.

Silence at trial

22. An adverse inference may be drawn from an accused's silence at trial. The inference is not restricted to cases in which the evidence "cries out" for an explanation and the law appears to permit the inference to be drawn in all cases in which there is a case to answer.

Questions

27. Should the court be allowed to draw an adverse inference from a suspect's silence when questioned by the police?

28. What practical difference would such a provision make, especially where silence is maintained upon the advice of a solicitor?

4.0 Appeals

1. The Review's Terms of Reference require that it considers "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". Sections 5-7 of the Act include provisions relating to appeals and the referral of cases by the SCCRC.

2. There was particular debate during the passage of the Act on the provisions relating to the SCCRC. Members of the Scottish Parliament were interested both in the addition of a statutory requirement that the SCCRC consider finality and certainty in deciding whether to make a referral, and in the perceived shift in the relationship between the SCCRC and the High Court arising from the new power in the Court to reject a SCCRC reference.

3. The following chapters therefore investigate the issues of late appeals, the arrangements by which judicial decisions can be made subject to review by the High Court and the particular circumstances of referral by the SCCRC.

4.1 Appeals

1. This chapter deals with the changes to the 1995 Act made by sections 5 to 7 of the 2010 Act. In particular, it considers late appeals and, generally, Bills of Advocation and Suspension together with petitions to the *nobile officium*.

Late appeals

2. In solemn conviction cases, the starting point of the appeal process is the lodging of a Notice of Intention to Appeal; a formal document just stating that intention. This must be done within 2 weeks from the date of final determination of the case, i.e. the sentence. After lodging the Notice, there is a further eight week period during which the potential appellant must lodge his/her Note of Appeal. The Note of Appeal is supposed to contain a "*full* statement of *all* the grounds of appeal". An applicant can apply to the court, at any time, for an extension to either of the two periods. There is no long stop provision setting a time beyond which no such application can be made. Accordingly, an applicant can apply for an extension of time years, and in some case many years, after conviction. This may be because new evidence has emerged, but that is not always the case.

3. There is no test laid down in the statute for allowing a late Notice or Note. Following the 2010 Act, in the case of an application to allow a late Notice, the applicant must specify why he/she failed to comply with the time limit and state what his/her grounds of appeal are. But there is no guidance as to the basis upon which the court should allow 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 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.

4. In England, where the time limit for lodging an appeal is 28 days from the conviction, there is also no statutory guidance on the reasons required for a late appeal. However, the courts have taken the view that:

- "substantial" reasons must be advanced as to why the application is late; and
- the applicant requires to show that there are "such merits that the appeal would probably succeed"[35].

5. The reasons that tend to be given to the High Court for the applicant's failure to appeal in time include:

- administrative errors by his agents in marking an appeal;
- failure on the part of his former (trial) agents to comply with instructions to mark an appeal;
- the applicant's error in realising the time limits or the existence of a ground of appeal; and
- the applicant's confused mental state following conviction.

6. The court seldom has the time or resources to examine the accuracy of these statements, even if it is almost always prepared to accept agents' accounts of administrative error.

7. Late appeals can be difficult to deal with as the trial judge will have to report on matters which occurred months, and perhaps years, ago. Late appeals also undermine the principles of finality and certainty which the statutory timetable is designed to promote.

8. 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. But, especially in cases where the appellant has been allowed interim liberation, there may be little incentive to an appellant to have his/her appeal dealt with quickly, where a refusal of the appeal will result in the appellant being

returned to custody. However, there is no specific statutory sanction, as there is in civil procedure, which can be applied in the event of a party failing to comply with any time limits set by the court. This appears to lead to a degree of laxity in such compliance.

9. In summary proceedings, there are four potential types of appeal: stated case, preliminary rulings, Bill of Suspension and Bill of Advocation.

10. The applicant for leave to appeal against conviction must request a stated case within one week of the final determination of the case. There are a variety of time limits designed to expedite the summary appeal process. The High Court may extend the time periods "as it may think proper". Similar considerations apply in relation to late appeals as they do in solemn cases. In relation to preliminary rulings in the summary courts, there is a statutory right of appeal, but only with leave, within two days of the decision taken. There is no power to extend this time limit.

Delay in dealing with appeals

11. A related problem is the length of time which it takes to process some criminal appeals. Such a process may often involve a consideration of an application to amend the existing grounds of appeal. Such applications are akin to late appeals themselves, raising, as they do, grounds not contained in the original Note of Appeal. One major contributory factor to delay may be the view of some that the appeal process ought to involve a complete re-examination of the proceedings at first instance by lawyers who were not involved in the trial.

Proposals

12. One option would be to require, as appears to be the case in England, that a late application for leave to appeal should only be granted if the appeal is likely to succeed. No matter how late an appeal may be, there is a strong argument that the appeal should be allowed to be argued in circumstances where it clearly has merit and a reference from the SCCRC would be inevitable. But where the appellant has failed to appeal within the statutory limits, the threshold for allowing him/her to appeal

late, or to amend existing grounds, ought to be a different, and potentially higher, test than that applicable to passing the sift (an "arguable" ground).

13. Another option would be to provide, at least in cases not involving fresh evidence, a longstop date, say of a year, after which no appeal could be brought. The potential appellant would have to apply to the SCCRC. The SCCRC would determine whether, having regard to the applicant's failure, the need for finality and certainty and all the other circumstances, a referral to the court would be in the interests of justice. The SCCRC would have the same problems as the court in determining whether the reasons for lateness can be substantiated, but it may be better placed than the court to investigate these matters even if its workload might thereby be increased. Such a provision would obviate the necessity of an applicant seeking leave to lodge his/her appeal late before going to the SCCRC, as is normally required at present.

14. A further option would be the provision of statutory powers to the court, including that of dismissal of an appeal or an order that particular steps should not be paid for out of public funds, in order to enforce its own procedural decisions and to ensure the smooth running of appeals.

Petitions to the *Nobile Officium*

15. There is a continuing concern about the use of the *nobile officium* of the High Court to challenge decisions of the court before, during and after the completion of the appeal process. In particular, there is a concern about attempts to use the power to review decisions taken by other benches of identical size. 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 remedy is provided for by law"[36]. It is very much a remnant from a bygone age before criminal procedures were regulated by the detailed statutory provisions which are in existence today and before the introduction of the SCCRC in 1997.

16. Section 124 of the 1995 Act provides, 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…”.

17. This seems to state clearly that a decision of the High Court (that is one with a quorum of three) cannot be overturned by another decision of the same court. It is final. But in *Hoekstra*[37] the court appeared to overturn one of its own decisions. Although the facts there were very special, this case has been interpreted by some practitioners as a basis for challenging any decision of the High Court in solemn appeals. The courts have attempted to discourage such an approach but this has not stopped applications being made.

18. The Review is considering whether there is any purpose in the High Court retaining the *nobile officium* as a mode of review of its own or inferior decisions in ordinary summary and solemn criminal processes. It has been suggested that it is useful for the court to have a procedure that can be used in exceptional circumstances, when there is no alternative mechanism. But it might at least be made clear that the *nobile officium* is not available to review the decisions of the High Court sitting in its appellate or first instance capacity.

19. Petitions to the *nobile officium* are also used in relation to summary cases. There is no equivalent of the finality provision for summary procedure because it was previously accepted that a decision on an appeal to the High Court from the inferior courts was final. However, this has not stopped applications to the *nobile officium* being used to permit the High Court to review its own decisions in summary appeals. Such applications undermine decisions already taken under the first four appellate routes. Once more, it would seem appropriate to make clear the limits of this jurisdiction as a mode of reviewing a decision on the merits of a summary appeal.

Bills of Suspension and Advocation

20. In the context of summary prosecutions, a Bill of Suspension can normally only be employed to challenge final judgments at the conclusion of the trial. It has traditionally been used in cases where there the facts are not in dispute and there is

a crisp issue of competency. Advocation, although usually resorted to by the prosecutor, is available generally to review decisions other than final judgments, again usually on the basis of some point of competency although challenging decisions on adjournments is not unknown. It is of some value to the Crown where the Sheriff or Justice of the Peace has made a decision which effectively ends the prosecution. However, otherwise, in summary proceedings, both parties have a right to appeal final judgments. There is an opportunity to appeal against preliminary rulings, with leave of the court. Given the archaic nature of both forms of Bill, one option would be to provide for a general right to appeal all interlocutory decisions, with leave of the court and perhaps also with special leave of a judge of the High Court, rather than relying on these old forms of procedure.

21. The availability of one mode of appeal being capable of interfering with another is inevitably going to cause confusion and with it delay, uncertainty and expense. That there are potentially multiple appeal routes does not fit with the need for certainty and finality in the justice system.

22. Where permission to appeal has been refused by the High Court (sitting as a quorum of three), the unsuccessful appellant may try to have that decision reversed by an identically composed court. This has actually been achieved in one case[38] albeit in circumstances regarded by some as incompetent. It is not unknown for a party, who has been refused leave to appeal in a stated case, to attempt to circumvent that decision by lodging a Bill of Suspension and/or a Petition to the *nobile officium*.

23. In summary cases, a convicted person and the Crown can make use 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 to appeal is refused either at sift or on an application for leave, that ought to be the end of the matter subject to the jurisdiction of the SCCRC.

<u>Questions</u>

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

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

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

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

4.2 Scottish Criminal Cases Review Commission

1. The SCCRC was set up in 1997 to consider miscarriages of justice deserving of reconsideration by the court. It is an independent body, which took over a function which had previously rested with the Secretary of State. The SCCRC may refer a case to the High Court if they:

> "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"[39].

2. In dealing with an ordinary appeal, the High Court is required to apply the test of whether a miscarriage of justice has occurred. It cannot consider whether it is in the interests of justice to allow the appeal. Prior to the 2010 Act, the High Court could not refuse to consider a case referred to it by the SCCRC. It could not therefore consider matters such as the lateness of the appeal or, perhaps even, the content of inadmissible evidence.

3. The Criminal Cases Review Commission in England and Wales is required to apply a more stringent test than the SCCRC in referring cases to the Court of Appeal in England. That Court has stipulated that, when deciding whether to refer a case, the Criminal Cases Review Commission must have regard to the test which that Court applies in refusing leave to appeal late, especially in change of law situations.

4. The UK Supreme Court in *Cadder* considered the effect of its decision on concluded cases where statements had been made in the absence of legal assistance. These cases would remain concluded, at least if an appeal had not been marked within the permitted time limit. The only option for a convicted person would be an application to the SCCRC. In *Cadder* the court commented:

> "The Scottish Criminal Cases Review Commission must make up its own mind, if it is asked to do so, as to whether it would be in the public interest for those cases to be referred to the High Court. It will be for the appeal court to decide what course it ought to take if a reference were to be made to it on those grounds by the Commission.".

5. This raised a concern that the SCCRC would refer concluded cases back to the High Court if part of the evidence had been a statement made contrary to the law as laid down in *Cadder*.

6. As a result of this, the 2010 Act made two changes to the referral process. First, it provided that the SCCRC, in determining whether a referral would be in the interests of justice, must have regard to the need for finality and certainty in the determination of criminal proceedings. Secondly, it gave the court a power to reject a reference if it considered that it was not in the interests of justice that it should proceed. In determining this second matter, the court is required to have regard to the "need for finality and certainty in the determination of criminal proceedings".

7. The Scottish Government's rationale for these changes was:

> "The SCCRC has a vital role in considering possible miscarriages of justice, but the Government does not think that an application to the SCCRC should be used as a means to undermine the need for finality and certainty that the Supreme Court has expressed"[40].

8. The provisions have attracted a significant amount of comment, especially as they apply to all cases referred by the SCCRC and not just those affected by the *Cadder* decision.

9. In considering the interests of justice, the SCCRC already have regard to the need for finality. In these circumstances, a statutory requirement may be superfluous. In considering the interests of justice, a number of factors may have to be taken into account, not just finality. Highlighting one element may give it undue prominence.

10. Giving the High Court power to refuse to consider referrals from the SCCRC is a significant change to the relationship between the High Court and the SCCRC. Because of the structure of the legislation, this new gate-keeping role has to be performed at a preliminary hearing in advance of any consideration of the merits of the case. The High Court must first decide whether it is in the interest of justice to consider the appeal at all. If it is not, the High Court will refuse consideration,

regardless of whether there may have been a miscarriage of justice. Although the power has not yet been exercised, it might be envisaged that the court could refuse to entertain a reference if, were an application for a late appeal to be made, it would have refused to allow such an application. Equally, it might refuse a reference if it has already refused to entertain a late appeal and there were no change in circumstances.

11. One of the strengths of the SCCRC may be its power to require the High Court to consider all cases that it refers. Giving the High Court power to refuse to consider a reference arguably weakens the role of the SCCRC. This could reduce public confidence in the SCCRC. A potential appellant, who was refused leave to appeal or whose appeal was refused, may be deterred from taking a case to the SCCRC, if he/she perceives that, even if the SCCRC refers the case, the same High Court that refused the appeal also has the power to refuse to entertain any reference. It is possible that the SCCRC and the High Court could reach different conclusions on where the interests of justice may lie. Both views could be valid. In these circumstances, the question becomes one of whether the High Court's view should prevail over that of the SCCRC.

12. If an applicant or the Crown consider that the SCCRC has not properly applied the interests of justice test in deciding whether to refer a case, either could seek to have the decision judicially reviewed. But it may be simpler and more cost effective for the criminal court to use its gatekeeping power to determine this rather than to have the matter judicially reviewed by the Court of Session.

<u>Questions</u>

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

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

5.0 How to respond

This consultation paper can be viewed online on the Review website at http://www.scotland.gov.uk/About/CarlowayReview/reviewprocess/ConsultationProcess. You can telephone Freephone 0800 77 1234 to find out where your nearest public internet access point is. As the Carloway Review is independent of the Scottish Government this consultation will not appear in the 'Consultation' section of the Scottish Government website.

The consultation commenced on 8 April 2011 and will run for 8 weeks. We would ask that responses are received by 3rd June 2011.

A response form can be downloaded from Link to response form.

Please send your response with the completed **Respondent Information Form** to:

carlowayreview@scotland.gsi.gov.uk or

The Carloway Review

GF-62
Victoria Quay
Edinburgh
EH6 6QQ

or

If you have any queries contact Tim Barraclough on 0131 244 7227.

We would be grateful if you could clearly indicate in your response which questions or parts of the consultation paper you are responding to as this will aid our analysis of the responses received.

Handling your response

We need to know how you wish your response to be handled and, in particular, whether you are happy for your response to be made public. All consultation responses must be returned with a completed **Respondent Information Form** as

this will ensure that we treat your response appropriately. If you ask for your response not to be published we will regard it as confidential, and we will treat it accordingly.

Publishing responses

Where respondents have given permission for their response to be made public and after we have checked that they contain no potentially defamatory material, we aim to publish responses on the Carloway Review website within 6 weeks of the close of the consultation.

What happens next?

Following the closing date, all responses will be analysed and considered along with any other available evidence to help Lord Carloway produce the final recommendations that will be presented to the Cabinet Secretary for Justice towards the end of the year.

Comments and complaints

If you have any comments about how this consultation exercise has been conducted, please send them to Tim Barraclough - contact details as above. It would also be appreciated if you could inform us of any changes to contact details to ensure that future communications are correctly directed.

6.0 REFERENCES

Glossary of references

AC	Appeal Cases (England)
Cr App R	Criminal Appeal Reports (England)
EHRR	European Human Rights Reports
EWCA	England & Wales Court of Appeal
JC	Justiciary Cases (Official 20th and 21st century criminal law reports, contained in Session Cases (SC)
LJ	Lord Justice (England)
LJC	Lord Justice Clerk
LJG	Lord Justice General
LP	Lord President
QB	Queens Bench
SCCR	Scottish Criminal Cases Reports (Law Society of Scotland)
SLT	Scots Law Times (W Green & Son)

[1] *Brogan v UK* (1989) 11 EHRR 117 and *Murray v UK* (1994) 19 EHRR 193
[2] *Salduz v Turkey* (2008) 49 EHRR 421, paragraph 55
[3] [2004] EWCA Crim 597, Buxton LJ
[4] *Jones v Milne* 1975 SLT 2 per Lord Justice General Emslie
[5] eg *Johnstone v HM Advocate* 1993 SCCR 693
[6] *Murray v UK* (1994) 19 EHRR 193
[7] http://www.scotland.gov.uk/Topics/Justice/law/victims-witnesses/Appropriate-Adult

[8] (*Hussien v Chong Fook Law* [1970] AC 942 Lord Devlin at 948) Privy Council on appeal from Malaysia
[9]For example, *Edwards and Lewis* v *United Kingdom* (2005) 40 EHRR 24 on entrapment and disclosure
[10] Eg Deuteronomy 19 v15, Matthew 18 v16
[11]Hume Commentaries **II**, 383
[12]*O'Hara v Central SMT Co* 1941 SC 363, LP (Normand) at 379
[13] 1998 JC 94, LJG (Rodger) at 100-101
[14] Wilkinson : Evidence 204
[15]Report by the Committee on Criminal Appeals and Miscarriages of Justice Procedures Cmnd 3245, paragraph 2.67
[16] Criminal Appeal Act 1968 s 2
[17] *R* v *Cooper* [1969] 1QB 267
[18]*Moorov v HM Advocate* 1930 JC 68
[19] For example *Ralston* v *HM Advocate* 1987 SCCR 467
[20]1998 JC 94
[21] The Scottish Law Commission Report on Rape and other Sexual Offences, December 2007
[22] 1967 JC 21
[23] *ibid* at para 68
[24] *Meehan v HM Advocate* 1970 JC 11. This relates to statements remote from the time of the crime and the position may be different where the accused makes such a statement shortly after the crime (*de recenti* statements)

[25] *McCutcheon v HM Advocate* 2002 SLT 27
[26] *Buchan v HM Advocate* 1993 SCCR 1076
[27] *Kay v Allan* 1978 SCCR Supp 188
[28] *McEwan v HM Advocate,* 1990 SCCR 401
[29] *Donaghy v Normand* 1991 SCCR 877
[30] *ibid* LJG (Strathclyde) at 8
[31] *Saunders v United Kingdom* (1996) 23 EHRR 313 and *Murray v United Kingdom* (1996) 26 EHRR 29
[32] (2001) 31 EHRR 1
[33] Approved in *R. v Karen Condron and William Condron* (1997) 1 Cr App R 185
[34] [1997] 2 Cr App R 27
[35] *R v Rigby* (1923) 17 Cr App R 111, *R v Marsh* (1935) 25 Cr App R 49
[36] *Anderson v HM Advocate* 1974 SLT 239, LJG (Emslie) at 240
[37] *Hoekstra v HM Advocate* (No 2) 2000 JC 387
[38] *Akram v HM Advocate* (*sic*) 2010 SCCR 30
[39]1995 Act s194C
[40] The Criminal Procedure (Legal Assistance, Detention and Appeals)(Scotland) Bill Policy Memorandum, paragraph 40

Annex A

RESPONDENT INFORMATION FORM

Please Note this form **must** be returned with your response to ensure that we handle your response appropriately.

1. Name/Organisation

Organisation Name

☐

Title Mr ☐ **Ms** ☐ **Mrs** ☐ **Miss** ☐ **Dr** ☐ ***Please tick as appropriate***

Surname

☐

Forename

☐

2. Postal Address

Postcode	**Phone**	**Email**

3. Permissions - I am responding as…

Individual ☐ / **Group/Organisation** ☐

Please tick as appropriate

(a) Do you agree to your response being made available to the public through the Carloway Review web site?

Please tick as appropriate ☐ **Yes** ☐ **No***

(b) Where confidentiality is not requested, we will make your responses available to the public on the following basis

Please tick ONE of the following boxes

Yes, make my response, name and address all available ☐

or

Yes, make my response available, but not my name and address ☐

or

Yes, make my response and name available, but not my address ☐

(c) The name and address of your organisation ***will be*** made available to the public through the Carloway Review web site).

Are you content for your ***response*** to be made available?

Please tick as appropriate ☐ **Yes** ☐ **No**

(d) The independent Carloway Review is preparing a report for the consideration of the Cabinet Secretary for Justice, which may lead to proposals from the Scottish Government for legislation. If you have agreed that your response may be made public, the Scottish Government may wish to contact you in the future, but they require your permission to do so. Are you content for the Scottish Government to contact you in relation to this consultation exercise?

Please tick as appropriate ☐ **Yes** ☐ **No**

Annex B

RESPONSE FORM – ALL QUESTIONS AND TEXT BOXES FOR RESPONSES

1.0 – Key elements of Custody

1.1 The suspect

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

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

1.2 Rights relating to custody and questioning

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

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

1.3 Putting rights into effect

5. What forms of legal advice are sufficient?

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

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

1.4 Police questioning

8. Are the parameters of legitimate police questioning clear?

9. When must questioning stop?

1.5 Child and vulnerable suspects

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

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

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

13. How should the vulnerable adult suspect be defined?

14. What rights of the vulnerable adult suspect, beyond those in the European Convention, require to be safeguarded and how should those rights be defined?

2.0 – Key stages of Custody

2.1 Arrest and detention

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

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

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

2.2 Length of custody

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

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

20. Should a Saturday Custody Court be reintroduced?

<u>3.1 Sufficiency of evidence</u>

21. Should the requirement for corroboration be abolished?

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

<u>3.2 Admissibility of statements</u>

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

24. Should the Common Law fairness test for the admissibility of statements be clarified in statute?

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

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

<u>3.3 Inferences from silence</u>

27. Should the court be allowed to draw an adverse inference from a suspect's silence when questioned by the police?

28. What practical difference would such a provision make, especially where silence is maintained upon the advice of a solicitor?

4.0 – Appeals

4.1 Appeals

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

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

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

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

4.2 SCCRC

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

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