**Post-corroboration Safeguards Review**

**Consultation Response Form**

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Name of organisation: Scottish Human Rights Commission

Preferred contact details (eg email address): bruce.adamson@scottishhumanrights.com

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Website: [www.scotland.gov.uk/About/Review/post-corroboration-safeguards](http://www.scotland.gov.uk/About/Review/post-corroboration-safeguards)

Email: [Safeguardsreviewsecretariat@scotland.gsi.gov.uk](mailto:Safeguardsreviewsecretariat@scotland.gsi.gov.uk)

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**INTRODUCTION**

The Scottish Human Rights Commission (the Commission) welcomes the opportunity to comment on the Post-corroboration Safeguards Review. The Review has made a significant contribution to the ongoing work on the reform of the criminal justice system in Scotland.

The Commission considers that it is useful to reflect on the events and decisions that led to this Review and would like to reiterate the points made in its previous submissions to the various stages of reform process.

The Commission welcomed the decision of the Supreme Court in *Cadder v HMA* which confirmed that the Scottish practice of detaining and questioning suspects without providing the right to legal assistance was contrary to the right to a fair trial under the European Convention on Human Rights (ECHR). This deficiency in the protection of detainees had been highlighted by the European Committee for the Prevention of Torture in two prior reports on the United Kingdom.[[1]](#footnote-1)

Following the *Cadder* judgment, the Scottish Government made significant changes to criminal procedure in Scotland. While legislation enshrining the right to legal assistance is to be applauded, the Commission has consistently expressed serious reservations about some other aspects of the reform process.[[2]](#footnote-2)

The decision in *Cadder* did not provide a suspect with an additional advantage. The effect of the decision and the legislation which followed was to provide those suspected of crime in Scotland with the minimum protection necessary to secure a fair trial. The Commission rejects that a “rebalancing exercise” was required to be carried out in the form of removal of other procedural safeguards, such as corroboration. The Commission welcomes the purpose of this Review to ensure that adequate alternative safeguards are in place before the removal of existing safeguards.

The Commission would like to refer to a number of its previous contributions to the reform process:

1. Response to Lord Carloway’s Review, June 2011.

<http://scottishhumanrights.com/news/latestnews/carlowaynewsjune2011>

2. Response to the Scottish Government consultation on the Carloway Report. Reforming Scots Criminal Law & Practice, October 2012

<http://scottishhumanrights.com/resources/policysubmissions/criminallaw2012>

3. Response to the Scottish Government - Reforming Scots Criminal Law and Practice: Additional Safeguards following the Removal of the Requirement for Corroboration, March 2013.

<http://scottishhumanrights.com/resources/policysubmissions/corroborationmarch2013>

4. Response to the Scottish Parliament Justice Committee - Criminal Justice (Scotland) Bill, August 2013

<http://scottishhumanrights.com/resources/policysubmissions/crimjusticsubmissionaug2013>

The Commission’s response should be considered within the broad framework of the United Kingdom’s human rights obligations. In particular:

*United Nations Human Rights Treaties*

International Covenant on Civil and Political Rights (ICCPR)

Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT)

Convention on the Rights of the Child (CRC)

Convention on the Rights of Persons with Disabilities (CRPD)

*United Nations Rules*

United Nations Standard Minimum Rules for the Administration of Juvenile Justice (The Beijing Rules)

United Nations Rules for the Protection of Juveniles Deprived of their Liberty (the JDL Rules)

*European Convention of Human Rights (ECHR)*, as incorporated into domestic law by the Scotland act 1998 and Human Rights Act 1998

The following articles of ECHR are particularly relevant:

Article 2 – Right to life

Article 3 – Prohibition on Torture, Inhuman and Degrading Treatment

Article 5 – Right to liberty and security of person

Article 6 – Right to a fair trial

Article 7 – No punishment without law

Article 8 – Right to private and family life

Article 14 – Non-discrimination

**Consultation Questions**

**Question 1**

**Statutory Police Guidelines**

**Question 1) - Do you agree that Codes of Practice governing key aspects of the gathering of evidence by the police in criminal cases (such as interviewing suspects and conducting identification procedures) should be required by statute?**

Yes  No

*Please feel free to provide any additional comments to support your answer*

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| The exercise of power by public officials must be governed by clear and publicly accessible rules of law. The practice and procedure relating to that law should be set out in a way that is accessible, foreseeable and precise (Article 7 ECHR).  Interference with the rights of individuals is inherent in the processes related to gathering evidence. It is essential that those affected must be able to foresee the circumstances in which the law applies, how public officials will exercise powers, and the extent to which the individual’s rights will be interfered with by public officials in a given situation so that the individual can take advice and make choices accordingly.[[3]](#footnote-3) There must also be sufficient safeguards to avoid the risk of the power being abused or exercised arbitrarily. The experience of *Cadder* tells us that fair trial rights can be affected by the manner in which evidence is gathered during an investigation and therefore it is also important to ensure that sufficient safeguards are in place to protect the rights expressed in Article 6 of ECHR. In this regard, the Commission has previously expressed a concern, which it continues to have, about the protection afforded to suspects who are questioned other than at a police station and without legal assistance having been facilitated.  The Commission endorses the Academic Expert Group’s references to the value of statutory requirements in other jurisdictions, such as through the Police and Criminal Evidence Act 1984 (PACE). A statutory requirement for Codes of Practice relating to police functions is a useful way of improving the standard and consistency of police practices, and ensuring that both the police and the public understand the limits of the exercise of police power.  In 2012 the Commission published the findings of a three year research project on the realisation of internationally recognised human rights in Scotland.[[4]](#footnote-4) That research raised a number of concerns in relation to police practice, including in relation to the use of stop and search powers. The research provided an evidence base for the development of Scotland’s National Action Plan (SNAP). As part of SNAP Police Scotland has made a number of commitments for 2014 including identifying opportunities to further embed human rights within the structures and culture of policing. The Commission considers that a statutory requirement for Codes of Practice would help support this commitment.  The Commission notes that there are a significant number of specialist reporting agencies in Scotland who investigate crime. It is essential that an individual's rights are equally protected during such investigations and therefore the Commission would recommend that such agencies also comply with a statutory code of practice similar if not the same as that proposed for the police. |

**Question 2**

**Dock Identification (Report of the Academic Expert Group – Chapter 5)**

**Question 2A) - Do you agree that dock identification evidence should be generally inadmissible?**

Yes  No

*Please feel free to provide any additional comments to support your answer*

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| The right to a fair trial is a fundamental principle of the rule of law which lies at the heart of a democratic society. Article 6 of the European Convention on Human Rights (ECHR) guarantees the right to a fair trial to everyone charged with a criminal offence. It is the duty of the courts to ensure that a fair trial is achieved in any given case. Courts must therefore be in a position, as a matter of domestic law, to ensure the trial is fair and meets the requirements of Article 6. A conviction based on evidence of insufficient quality should not be the outcome of a fair trial and may violate Article 6 of the ECHR. It is the responsibility of the State to put in place rules of procedure and evidence that provide an effective means whereby the courts can perform their duty.    While reliance on dock identification may not in itself breach Article 6, it does raise serious concerns about reliability. It lacks the safeguards that are offered by an identification parade, and increases the risk of a wrong identification. Without a number of other safeguards in place the reliance on dock identification risks an unfair trial. The Commission notes that previously the requirement for corroboration has been considered an important protection (in combination with other safeguards) against a violation of Article 6 where dock identification has been used. The Commission agrees that the best way to guard against unfair trial would be a presumption of inadmissibility. By contrast, a properly conducted pre-trial identification procedure (in particular VIPER), with its attendant safeguards, provides a proper opportunity for a reliable and accurate identification to be made. |

**Question 2B) - In what circumstances should dock identification evidence be admissible?**

*Please provide comments*

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| The Commission agrees that there may be situations where the dock identification evidence could be admitted, such as where the accused chooses not to co-operate with a pre-trial identification procedure. The Commission notes, however, that there are a number of mechanisms which can be employed in order to secure the accused's compliance, such as making an order to co-operate a condition of bail or seeking a warrant from the Sheriff to bring the accused before a parade. These means should be employed wherever practicable, making exceptions to the general presumption of inadmissibility very rare. Where dock identification is sought by the Crown, the Court should have the means to refuse to allow it if it considers, in the particular context of the trial, that its use would render the proceedings unfair. This could be achieved by means of a general exclusionary rule such as that contained in section 78 of PACE. It would be expected that such a power would rarely be exercised but it would provide an additional protection of the accused's Article 6 rights.  In relation to the proposal that the prosecutor could be required to issue a notice such as a Statement of Uncontroversial Evidence, with the defence then highlighting where identification is at issue, the Commission suggests further consideration be given to situations where the defence misses the opportunity to raise identification as an issue. There may be cases where the accused is representing themselves, where appropriate legal advice is not given, or where there is a failure of disclosure. Any procedure to establish at an early stage whether identification is an issue will need to allow for the possibility of a change in position with regard to identification. In summary cases, intermediate diets are compulsory and this provides a further opportunity to confirm whether identification is agreed. If it is by that stage to be challenged, the Crown should carry out a proper pre-trial procedure. |

**Question 3**

**Confession Evidence (Report of the Academic Expert Group – Chapter 6)**

**Question 3A) - Should corroboration be required in cases where otherwise a confession would be the sole evidence?**

Yes  No

*Please feel free to provide any additional comments to support your answer*

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| The Commission shares the Reference Group’s concerns that there are a variety of reasons why a person may make statements against their own self-interest where they have not in fact committed the crime.  The Commission’s view throughout the process of reform of Scots Criminal Law and Practice has been that corroboration acts to safeguard the quality of evidence. It is a means by which the reliability and credibility of evidence can be tested by the fact finder. Corroboration plays an important role in Scots law in preventing an accused from being convicted on evidence of insufficient quality. Thus it assists in preventing violations of fundamental rights.  The ECtHR recognises the existence of corroborating evidence as a procedural safeguard of a fair trial. The availability (or not) of corroborating evidence often plays a role in determining whether a trial has been fair. The ECtHR will have regard to the quality of evidence, including whether the circumstances in which it was obtained cast doubt on its reliability or accuracy. Where there is a risk of evidence being unreliable, the need for supporting evidence is greater in order to secure a fair trial.[[5]](#footnote-5) Given the doubts raised in relation to confession evidence, the Commission considers that a requirement for corroboration would provide an essential safeguard.  If the Review concludes that corroboration should not be a legal requirement in cases where otherwise a confession would be the sole evidence, then the Commission takes the view that the standard of proof for admissibility of beyond reasonable doubt (such as found in s76 of PACE) could provide a measure of protection against the dangers of false or unreliable confessions. |

**Question 3B) – Where a confession is corroborated by way of special knowledge, do you consider that the defining characteristic of special knowledge should be: (a) knowledge of a fact or facts relating to the crime which could only be known by the accused if he was the perpetrator; (b) knowledge of a fact or facts relating to the crime which were not in the public domain; (c) some other formulation?**

*Please provide comments*

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| Given the risks of unreliable or false confessions, corroboration by 'special knowledge' must be meaningful in order to provide an effective safeguard. Ensuring that knowledge is "special" will depend to some extent on other protections in place. For example, if there is recording of all interaction between suspects and police, the opportunity for knowledge to be gleaned by the suspect from information provided (inadvertently or otherwise) by police will be capable of scrutiny. Absent such protections, there is greater need for the information to be known only by the offender. |

**Question 4**

**Hearsay Evidence (Report of the Academic Expert Group – Chapter 8)**

**Question 4A) Should corroboration be required in cases where hearsay evidence would be the sole or decisive evidence on which a conviction would be based?**

Yes  No

*Please feel free to provide any additional comments to support your answer*

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| The right to examine witnesses as expressed in Article 6(3)(d) of the ECHR is one of the minimum rights which must be accorded to anyone who is charged with a criminal offence. The ECtHR has addressed the inherent danger of unreliability of hearsay evidence and the fact that it offends against the fundamental right of the accused to cross examine witnesses (and thus challenge the truth and reliability of the evidence). In *Al-Khawaja and Tahery v United Kingdom*,[[6]](#footnote-6) the ECtHR had to consider the fairness of trials in which hearsay evidence was admitted and formed the basis of conviction.  The safeguards highlighted by the Court included[[7]](#footnote-7):   * Safeguards contained in section 23 of the Criminal Justice Act 1988 and section 116 of the Criminal Justice Act 2003 (which provide limited exceptions to the use of hearsay); * The power of a trial judge under section 125 of the 2003 Act to stop proceedings which was based wholly or partly on a hearsay statement where he is satisfied that the statement is so unconvincing that, considering its importance in the case, a conviction would be unsafe. This power does not exist in the equivalent Scottish legislation; * The discretion of the trial judge in terms of section 126 of the 2003 Act to refuse to admit hearsay evidence if the case for its exclusion substantially outweighs the case for inclusion. This discretion does not exist in the equivalent Scottish legislation. * The general discretion to exclude evidence under section 78 of PACE, which does not exist in Scotland; * Jury directions on the burden of proof and directions on the dangers of relying on a hearsay statement.   It is important to note that, even with these strong procedural safeguards in place in England, the existence (or absence) of corroboration was the decisive factor for the ECtHR in determining whether or not there had been a violation of Article 6 in each case.  The Commission considers that corroboration should be required in such cases, along with other safeguards. As set out in answer 4B below, the Commission consider corroboration by itself may provide insufficient protection and that the ECtHR may consider that more effective procedural safeguards than currently exist are necessary in order to allow effective challenge by the defence. |

**Question 4B) What additional (or alternative) counterbalancing measures should be required where hearsay evidence would be the sole or decisive evidence on which a conviction would be based?**

*Please provide comments*

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| The ECtHR has confirmed that whatever the procedural safeguards may be, they must provide a real chance of effectively challenging the reliability of decisive evidence.[[8]](#footnote-8) The safeguards set out above are of particular relevance. While in Scots law an accused person can challenge the reliability of evidence in a variety of ways, most often through cross-examination, the Commission is concerned that the absence of an express statutory discretion on the part of the trial judge to exclude a particular piece of evidence of such poor quality that relying upon it for a conviction would be unsafe or might render the trial unfair, may be a deficiency.  For example, in *N v HMA* , dealing with whether a trial judge could exercise a common law power to exclude evidence that would otherwise be admitted under section 259 of the 1995 Act (hearsay), the Lord Justice Clerk (Gill) concluded that the trial judge had no such discretionary power.[[9]](#footnote-9) The Justice Clerk went on to commend the legislative safeguards in the equivalent English legislation as “prudent”.[[10]](#footnote-10)  The court has an obligation to ensure a fair trial under Article 6. If the court considers that the admission of certain evidence would render the trial unfair, it should exclude it[[11]](#footnote-11) or if it has already been admitted, it should stop the proceedings. It appears to the Commission that *N v HMA* remains one of the only cases in which the court has recognised the connection between excluding evidence and protecting a fair trial under Article 6.  The Commission therefore considers that it may be valuable to provide judges with clear statutory powers both to exclude particular pieces of evidence where they consider that to admit them may render the trial unfair, and to stop proceedings which are based wholly or partly on evidence that is so unconvincing that, given its significance to the case, the trial would be unfair.  Such powers should include provisions akin to section 78 of PACE, and sections 125 and 126 of the Criminal Justice Act 2003. In addition a judge should have the power to stop proceedings if no reasonable jury could convict on the strength of the evidence, or if the prejudice caused by the restriction on the rights of the defence jeopardises a fair trial. |

**Question 5**

**Jury Directions (Report of the Academic Expert Group – Chapter 9)**

**Question 5) - Do you have any suggestions as to how jurors should be instructed on the law and how to consider the evidence in a trial? For example, should they be given written instructions from the judge?**

*Please provide comments*

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| The Commission’s view is that consideration should be given to requiring specific directions to the jury in cases where the rights of the defence are restricted because of the nature of the evidence relied upon. In other words, consideration should be given to requiring specific directions in cases involving matters such as hearsay statements admitted under section 259, evidence obtained unlawfully, evidence from anonymous witnesses or undercover police officers, and cases involving dock identification. The directions should discuss such things as the inherent danger of this type of evidence and the limitations on testing it.  While requiring such directions is a safeguard, it may not be a particularly strong one. A judge may, for example, direct the jury on the inherent dangers of hearsay evidence, which can assist in consideration of that evidence, but a direction cannot go further than provide a warning in that regard. It cannot, as other safeguards, such as corroboration do, provide a practical tool to assist in the process of assessment of reliability of evidence.  The issue of jury direction raises wider issues in terms of the role of the jury within the criminal justice system and the need to improve the way in which the system supports jury members in their role. In a jury system such as Scotland, the Article 6 requirement of a reasoned verdict is achieved through a combination of measures, including the judge's directions and the jury's consequent verdict. It is therefore important that there is confidence that judicial directions are properly understood and applied. Written directions would assist with this. It is equally important that jurors are facilitated to participate effectively in trials. It is a serious concern that evidence suggests that significant numbers of jury members do not understand important elements of the trial and of instructions given. The Commission notes the research of the Academic Expert Group, and the example of the plain English approach taken in the New Zealand Criminal Jury Trial Bench Book. Such an approach would be useful as part of a wider programme of making the criminal justice system more accessible for all of those involved. Regard will have to be had to those jurors who may have literacy or other challenges and measures will be required to be in place to support those jurors.  The Commission considers that the provision of accessible written jury directions could provide additional clarity as to how to consider evidence at trial. |

**Question 6**

**Recording of Police Interviews (Report of the Academic Expert Group – Chapter 10)**

**Question 6A) - Do you agree with the general principle that all questioning/interviewing of a suspect should be recorded by audio visual means?**

Yes  No

*Please feel free to provide any additional comments to support your answer*

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| A suspect in police custody or undergoing questioning by another authority is in a particularly vulnerable position. The Commission strongly supports the general principle that questioning/interviewing should be recorded, but reiterates that the provision of legal assistance is also essential. These safeguards have two main purposes. Firstly, they protect the suspect’s right against self-incrimination. Secondly, they provide a fundamental safeguard against ill treatment at the hands of the authorities.  Rules of criminal procedure, gathering and use of evidence are increasingly complex. The ECtHR has held that this particular vulnerability can only properly be compensated for by the assistance of a lawyer whose task it is, among other things, to ensure respect of the right of the individual not to incriminate himself. In other words, the defence lawyer provides an important check on the conditions of detention and that the rules of procedure are being properly followed. This helps ensure fairness for the suspect but it is also important in the public interest. Therefore, the Commission recommends that access to a lawyer is provided as soon as practicable after detention, regardless of questioning.  The Commission further recommends that legal assistance be provided to those not in custody. This is in the interests, not only of the suspect, but of society as a whole.  The Commission remains concerned at the reliance on telephone advice which is not a substitute for a lawyer who is able to properly assess the situation. The Commission is also concerned at the high rate of waiver in relation to legal advice. The Commission refers to its previous submissions on this point as set out in the introduction.  International mechanisms concerned with the prevention of torture have consistently found that audio-video recording in the interrogation rooms of police stations have been a significant contributing factor to reducing the amount of ill-treatment alleged by persons detained.  In his 2003 Annual Report to the General Assembly, the UN Special Rapporteur on Torture stressed that ‘all interrogation sessions should be recorded and preferably video-recorded, and the identity of all persons present should be included in the records. Evidence from non-recorded interrogations should be excluded from court proceedings’.[[12]](#footnote-12)    The United Nations Committee Against Torture in its General Comment No.2 on Article 2 of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, stated that ‘[a]s new methods of prevention (eg. videotaping all interrogations […]) are discovered, tested and found effective, article 2 provides authority to build upon the remaining articles and to expand the scope of measures required to prevent torture’.  The European Committee for the Prevention of Torture (CPT) Standards provide that ‘The electronic (i.e. audio and/or video) recording of police interviews represents an important additional safeguard against the ill-treatment of detainees. The CPT [European Committee for the Prevention of Torture] is pleased to note that the introduction of such systems is under consideration in an increasing number of countries. Such a facility can provide a complete and authentic record of the interview process, thereby greatly facilitating the investigation of any allegations of ill-treatment. This is in the interest both of persons who have been ill-treated by the police and of police officers confronted with unfounded allegations that they have engaged in physical ill-treatment or psychological pressure. Electronic recording of police interviews also reduces the opportunity for defendants to later falsely deny that they have made certain admissions.’[[13]](#footnote-13)  While the use of recording is an important safeguard, the right to respect for private and family life requires that there is a clear framework around the use recording, storage and accountability in relation to the footage.  When recording is used during interrogations, it should not be possible to stop recording randomly during questioning. The whole interrogation should be taped. If it is possible for investigating officers to interrupt recording, there is an increased risk of a confession or statement being coerced and abuse going unrecorded.[[14]](#footnote-14)  Again the Commission notes the number of specialist reporting agencies which carry out investigations, including interviews. Similar protections should be in place in such contexts. |

**Question 6B) Do you consider that any breach of the Codes of Practice governing interview procedure should normally result in that evidence being inadmissible?**

Yes  No

*Please feel free to provide any additional comments to support your answer*

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| There should be a presumption against admissibility in cases of breach of the Code of Practice in line with the above recommendations. As noted by the Reference Group, a robust approach can lead to significant changes in culture within criminal justice agencies. |

**Question 6C) If you answered no, what do you consider should be the test for admitting evidence where the Code has been breached?**

*Please provide comments*

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| While the Commission agrees with the proposition in 6B, it recognises that there is a balance to be struck in terms of the interests of justice, and there may be rare occasions where the Code has been breached due to technical issues, and it is important in the interests of justice to admit the evidence. The Commission does not have a strong view on the formulation of such a test, although it may be useful to consider a standard of requiring the Crown to have to establish beyond reasonable doubt that there is no unfairness caused. Whatever the formulation, the test for such occasions should be a high one, and it must be clear that admitting evidence in such situations should be in very limited circumstances at address rare situations rather than as a general discretion. |

**Question 7**

**No Case to Answer Submission (Report of the Academic Expert Group – Chapter 12)**

**Question 7A) - Do you agree that the circumstances in which the no case to answer submission can be made should be broadened, and that a judge should be empowered to uphold a submission of no case to answer if he or she considers that no jury or judge acting reasonably could find the charge proved beyond reasonable doubt on the evidence presented?**

Yes  No

*Please feel free to provide any additional comments to support your answer*

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| The Commission considers it to be essential that in the absence of corroboration there is a much broader scope for trial judges in both solemn and summary cases to uphold a submission of no case to answer where he or she considers that no jury or judge acting reasonably could find the charge proved beyond reasonable doubt on the evidence presented.  As set out above, the State has a positive duty under Article 6 to put in place a domestic system that meets the requirements of a fair trial. Courts must therefore be in a position, as a matter of domestic law, to ensure the trial is fair and meets the requirements of Article 6. As a matter of law, it is for the judge to consider. Allowing a jury to consider convicting an accused on the basis of poor evidence, or evidence where the ability of the defence to challenge it has been significantly restricted, jeopardises a fair trial.  The proposed introduction of a power to allow a judge to uphold a submission of no case to answer, and withdraw a case from the jury if no reasonable jury could convict on the basis of the evidence before it, is a good procedural safeguard. It is a safeguard that addresses the quality of evidence, which in the absence of corroboration, is particularly important. The question of whether the particular evidence can bear the weight of a fair conviction is a matter of law, not one of fact. Further, since the Appeal Court applies a “no reasonable jury” test in determining miscarriages of justice, it would seem to strengthen that safeguard if the same power is given to the trial judge who has had the benefit of seeing and hearing the whole of the case.  It should be noted, however, that the introduction of a “no reasonable jury” test will not, of itself, guarantee a fair trial. In *Al-Khawaja & Tahery*, in respect of Mr Tahery, the ECtHR considered that the English system (which includes an analogous power) did not prevent the trial from being unfair. The Court stated, “The absence of any strong corroborative evidence in the case meant the jury in this case were unable to conduct a fair and proper assessment of the reliability of T’s evidence [which was admitted through the statutory provisions allowing exceptions to hearsay]. Examining the fairness of the proceedings as a whole, the Court concludes that there were not sufficient counterbalancing factors to compensate for the difficulties to the defence which resulted from the admission of T’s statement.”[[15]](#footnote-15) |

**Question 7B) – Should the accused be allowed to make a no case to answer submission at the close of the whole of the evidence?**

Yes  No

*Please feel free to provide any additional comments to support your answer*

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| As set out above, the court must be in a position, as a matter of domestic law, to ensure the trial is fair and meets the requirements of Article 6. At the close of prosecution case, the submission assists in reflecting the presumption of innocence and the obligation on the State only to require its citizens to answers a sufficient case (i.e. a case which could result in a reasonable conviction).  Providing the opportunity to consider a submission of no case to answer at the close of the whole evidence as well as at the close of the prosecution case would provide an additional safeguard. It allows the judge to assess the totality of evidence to consider whether there remains a proper evidential basis on which an accused could reasonably be convicted. The Academic report highlights the rare instances in which such a power would be important. |

**Question 8**

**Jury Size, Majorities and Verdicts (Report of the Academic Expert Group - Chapter 13)**

**Question 8A) – Should a jury be required to strive to achieve a unanimous verdict or is a verdict by a weighted majority acceptable?**

Unanimous verdict  Verdict by weighted majority

*Please feel free to provide any additional comments to support your answer*

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| The Commission notes the broad evidence contained in the Report of the Academic Expert Group. In particular, the Commission notes that most comparable jurisdictions do allow for situation of “rogue” or intimidated juror(s).  The Commission notes that the quest for unanimity may encourage greater deliberation and therefore enhance the prospects of a properly reasoned verdict.  The requirement for a unanimous verdict or a greater majority for a guilty verdict by its nature provides a stronger procedural safeguard in terms of a fair trial as protected by Article 6 of ECHR. However, requiring the same for an acquittal does not in any way operate to safeguard a fair trial. |

**Question 8B) - If you answered “unanimous verdict” to question 8A, what do you think the qualified majority should be, should the jury be unable to reach a unanimous verdict?**

-1 less than the total number of jurors

-2 less than the total number of jurors

Other

*Please feel free to provide any additional comments to support your answer*

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**Question 8C) – if you answered “weighted majority” to question 8A, what do you think that weighted majority should be?**

Two thirds (2/3) of the jury

Three quarters (3/4) of the jury

Other

*Please feel free to provide any additional comments to support your answer*

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**Question 8D) - Should the same number of jurors as is required for a guilty verdict also be required for an acquittal verdict?**

Yes

No

*Please feel free to provide any additional comments to support your answer*

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| The requirement for a unanimous verdict or a greater majority for a guilty verdict by its nature provides a stronger procedural safeguard in terms of a fair trial as protected by Article 6 of ECHR. However, requiring the same for an acquittal does not in any way operate to safeguard a fair trial. |

**Question 8E) - Do you agree that the size of a jury in Scotland should be reduced from 15 to 12 persons?**

Yes  No

*Please feel free to provide any additional comments to support your answer*

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| In *Pullar v. The United Kingdom*[[16]](#footnote-16) the ECtHR referenced the fact that it was a significant safeguard that a potentially biased juror was only one of fifteen jurors, all of whom were selected at random from amongst the local population.  The Commission notes the broad evidence contained in the Report of the Academic Expert Group, in particular the lack of evidence that a number larger than twelve is more effective, but that there was evidence to caution against having fewer than twelve. |

**Question 8F) - Do you think there should be 2 or 3 verdicts in criminal trials?**

2  3

*Please feel free to provide any additional comments to support your answer*

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| The presumption of innocence is a fundamental right guaranteed by Article 6. The Not Proven verdict in and of itself is not incompatible with ECHR. However the system must not allow for lingering doubts about the acquitted person’s innocence when such a verdict is returned.  If there is a need for clarity, in order best to reflect the *presumption* of innocence, it may be that verdicts of proven and not proven best describe whether the Crown has brought home the allegation to the requisite standard or not.  The ECtHR has considered whether, after a determination which acquits an accused of a criminal charge, there can or should be any doubt as to the presumption of innocence by a court (in that case, assessing whether he was entitled to damages).[[17]](#footnote-17) The national court had concluded that the jury had taken the view that the suspicion was not sufficient to reach a guilty verdict but that there was no question of that suspicion having been dispelled. The ECtHR said this approach left open a doubt as to the applicant’s innocence and the correctness of the verdict. The Court went on to say that “The voicing of suspicions regarding an accused’s innocence is conceivable as long as the conclusion of criminal proceedings has not resulted in a decision on the merits of the accusation. However it is no longer admissible to rely on such suspicions once an acquittal has become final.” The Court held that the approach taken by the national court was incompatible with the presumption of innocence.[[18]](#footnote-18)  In *Rushiti v Austria*,[[19]](#footnote-19) the ECtHR affirmed the general rule that following a final acquittal even the voicing of suspicions regarding an accused’s innocence is no longer admissible, stating, “The Court thus considers that once an acquittal has become final – be it an acquittal giving the accused the benefit of the doubt in accordance with Article 6(2) – the voicing of any suspicions of guilt, including those expressed in the reasons for the acquittal, is incompatible with the presumption of innocence.”[[20]](#footnote-20)  In *Weixelbraun v Austria*[[21]](#footnote-21) the ECtHR considered the issue of a “full acquittal and an acquittal *in dubeo pro reo*” (which means where the accused receives the benefit of the doubt – arguably similar to our not proven verdict). The Court affirmed that once an accused was acquitted on either basis, he was entitled to the presumption of innocence.[[22]](#footnote-22) |

**Question 8G) If you answered 2, what should these verdicts be?**

Guilty and Not Guilty

Guilty and Not Proven

Proven and Not Proven

*Please feel free to provide any additional comments to support your answer*

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**Questions 9, 10 and 11**

**Additional Comments**

**Question 9) - Do you have any comments to make on proposals raised in the Report of the Academic Expert Group that have not been mentioned in the consultation document?**

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| The Commission is aware of issues concerning the protection of privacy rights of complainers and notes the Academic Expert Report's discussion of Independent Legal Representation. While at this stage no view is expressed on the issue of Independent Legal Representation, it would appear to the Commission that some measures already exist which could allow for greater protection of complainers but that there may be practical obstacles to their being exercised. These would include lack of information to complainers about their rights as owners of their own confidential records; lack of public funding for advice and representation for complainers whose records are sought to be recovered; inconsistent practice in serving petitions for recovery of documents on complainers. Consideration should be given to recommending that the Scottish Government look at such matters in more detail. |

**Question 10A) - Do you think there are any additional matters to be considered in relation to safeguards in solemn cases that are not raised in the consultation document or in the Report by the Academic Expert Group?**

**Question 10B) - Do you think there are any additional matters to be considered in relation to safeguards in summary cases that are not raised in the consultation document or in the Report by the Academic Expert Group?**

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| There are certain types of evidence which the ECtHR has recognised as causing a restriction on the rights of the defence which are guaranteed by Article 6 of the ECHR. While the consultation document and Academic Expert Report discuss a number of these, the Commission would also draw attention to evidence of anonymous witnesses, evidence of undercover police officers, and unlawfully obtained evidence as being in the same category. That is, the nature of the evidence or how it is obtained restricts the opportunity for the defence to challenge its provenance, authenticity, reliability and credibility, and to have it excluded if appropriate. Scots law has to date relied heavily on corroboration to safeguard all such situations. While the consultation document suggests particular safeguards for specific types of evidence, and the Commission agrees with those proposed, the Commission would urge the Review to consider making proposals which have a general application across different types of problematic evidence. The proposal of no case to answer/no reasonable jury is one such measure. Another would be an exclusionary rule of the type found in section 78 of PACE. Scots common law has of course a rule relating to admissibility of unfairly obtained evidence. The Commission notes that, if there is to be greater statutory control over rules of evidence and procedure, including Codes of Practice for investigations, there may be merit in considering codifying the common law rule and considering the extent to which breaches of Codes ought to be tolerated. The commission notes the approach taken in *Lawrie v Muir* to determine whether a breach is excusable and considers that this may not be sufficiently robust to engender the culture change the Review clearly seeks to achieve. |

**Question 11) - Do you believe that there would be any unforeseen consequences arising from the changes discussed in the consultation document or the Report of the Academic Expert Group? These could be in relation to any aspect of the criminal justice system, for example the effect of any possible changes identified on the position of victims and witnesses. If so, what might these be?**

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1. CPT/Inf(96) 11, 5 March 1996, para 291; CPT/Inf(2005) 1, 4 March 2005, para 53 [↑](#footnote-ref-1)
2. <http://scottishhumanrights.com/news/latestnews/article/cadder>; <http://scottishhumanrights.com/news/latestnews/article/cadderlegislationcomment>

   The Commission reiterated this concern in evidence to post legislative review of the 2010 Act.

   Scottish Parliament Justice Committee. *Official Report 8 March 2011, Col**4267.* [↑](#footnote-ref-2)
3. *Malone v United Kingdom* (1984)7 EHRR 14; (*S. and Marper v. the United Kingdom* [GC], nos. 30562/04 and 30566/04, §§. [↑](#footnote-ref-3)
4. <http://www.scottishhumanrights.com/actionplan/evidence> [↑](#footnote-ref-4)
5. See for example, *Allan v United Kingdom* (App. No. 48539/99), para.43. [↑](#footnote-ref-5)
6. Applications nos. 26766/05 and 22228/06, Grand Chamber judgment 15 December 2011, para.147. [↑](#footnote-ref-6)
7. See paras.148-151. [↑](#footnote-ref-7)
8. *Papadakis v The Former Yugoslav Republic of Macedonia*, App. No. 50254/07. [↑](#footnote-ref-8)
9. 2003 JC 140, para 22. [↑](#footnote-ref-9)
10. See para. 27. [↑](#footnote-ref-10)
11. As indicated by Lord Gill in *N v HMA*, paras. 35-36. [↑](#footnote-ref-11)
12. Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment, 17 December 2002, E/CN.4/2003/68, para. 26(g). [↑](#footnote-ref-12)
13. European Committee for the Prevention of Torture (CPT) Standards, [CPT/Inf/E (2002) 1 – Rev. 2011], para. 36, p9. [↑](#footnote-ref-13)
14. See: Video recording in police custody: Addressing risk factors to prevent torture and ill-treatment, Penal Reform International and the Association for the Prevention of Torture (APT) 2013. [↑](#footnote-ref-14)
15. *Al-Khawaja & Tahery v United Kingdom*, para.165. [↑](#footnote-ref-15)
16. App. No. 22399/93 [↑](#footnote-ref-16)
17. *Sekanina v Austria* App. No. 13126/87. [↑](#footnote-ref-17)
18. Paras 29-30. [↑](#footnote-ref-18)
19. App. No. 28389/95. [↑](#footnote-ref-19)
20. See para.31. [↑](#footnote-ref-20)
21. App. No. 33730/96. [↑](#footnote-ref-21)
22. See paras.21-31. [↑](#footnote-ref-22)