Submission to The Carloway Review Consultation Document

The Scottish Commission for Human Rights

The Scottish Human Rights Commission was established by The Scottish Commission for Human Rights Act 2006, and formed in 2008. The Commission is a public body and is entirely independent in the exercise of our functions. The Commission mandate is to promote and protect human rights for everyone in Scotland. The Commission is one of three national human rights institutions in the UK, along with the Northern Ireland Human Rights Commission and the Equality and Human Rights Commission.

1. Introduction

The Commission welcomes the opportunity to comment on The Carloway Review Consultation Document.

The decision of the Supreme Court in *Cadder v HMA* was welcomed by the Commission. It 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. This deficiency in the protection of detainees had also been highlighted by the European Committee for the Prevention of Torture in two prior reports on the United Kingdom.[1]

Following the *Cadder* judgement, the Scottish Government introduced, via emergency procedures, the Criminal Procedure (Legal Assistance, Detention and Appeals) Act 2010 ("2010 Act"). While legislation enshrining the right to legal assistance is to be applauded, the Commission is on record as expressing serious reservations about other aspects of this Act, and on the use of emergency procedures to introduce it.[2] In particular the Commission opposed the extension of periods of detention from 6 to 12 (and 24 hours) in the absence of empirical evidence that this was necessary to facilitate access to a solicitor. The Commission was also concerned about proposals for telephone consultations; the reasons for which detention periods could be extended beyond 12 hours; the potential restriction on access to justice as a result of the appeals provisions; and the interference with the statutory independence of the Scottish Criminal Cases Review Commission.

During the passage of the 2010 Act, the Cabinet Secretary for Justice described the legislation as "a temporary fix that allows us to deal with the consequences of

[1] CPT/Inf(96) 11, 5 March 1996, para 291; CPT/Inf(2005) 1, 4 March 2005, para 53

[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*

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Cadder".[3] The Commission therefore welcomes the opportunity for the Carloway Review to act as a "sunset clause" on that legislation.

In approaching its task, it is important that the Carloway Review recognises that the decision in *Cadder* has not provided a suspect with some added extra or advantage. The effect of the decision and the legislation which followed is to provide those suspected of crime in Scotland with the minimum protection necessary to secure a fair trial. In that regard, the Commission observes that, in particular, term of reference (c) has the potential for misunderstanding. It might appear to suggest that consideration be given to removing other current safeguards for a fair trial in order to carry out some sort of "rebalancing" exercise. It would be a mistake to proceed on that basis. The provision of legal assistance does not necessarily give rise to any such "implications".

It is essential that, so far as possible, Scots law does not repeat the experience of *Cadder*. The Carloway Review provides an opportunity to make sure that Scots law is fit for purpose in terms of meeting all relevant international human rights obligations. It is therefore important that the Carloway Review properly identifies the rights and duties at stake, as well as anticipating developing trends across the ECHR contracting states.

2. Legal Framework

- European Convention of Human Rights (ECHR)
- International Covenant of Civil and Political Rights (ICCPR)
- Convention on the Rights of the Child (CRC)
- Convention on the Rights of Persons with Disabilities (CRPD)
- Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT)
- 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)
- Scotland Act 1998
- Human Rights Act 1998
- Criminal Procedure (Scotland) Act 1995
- Criminal Procedure (Legal Assistance, Detention and Appeals) Act 2010

Under the Scotland Act, any legislation which follows on from Lord Carloway's recommendations must be compatible with Convention Rights. The following articles of ECHR are relevant to the topics considered in the Consultation Document:

- 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 8 – Right to private and family life
- Article 14 – Non-discrimination

[3] Scottish Parliament, *Official Report, 27 October 2010, Column 29661*

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3. General comments

The terms of reference of the Carloway Review refer to the rights of suspects, the rights of victims and witnesses, and the wider interests of justice.[4] It is correct that the rights of all those involved in the criminal justice system must be respected. It is important to understand what those rights are, which ones are absolute and which can be subject to interference.

Victims' Rights:

Over the last 15 years or so, the European Court of Human Rights (ECtHR) has clarified the positive obligations of the state to investigate and prosecute crime. Victims and witnesses, and society in general, can expect the state to have in place an effective system of investigation and prosecution into alleged violations of Article 2 (right to life) and Article 3 (where serious ill treatment is alleged). In certain circumstances Article 8 may give rise to an implied investigative obligation at least in relation to criminal offences which seriously impact on an individual's physical integrity.[5]

The existence of a positive duty to investigate and prosecute where possible does not necessitate the introduction of a particular evidential or procedural regime. These positive obligations, even when concerned with absolute rights such as the right to life, require a balance to be struck between the interests of the individual victim alleging the violation and the community as a whole. The ECtHR has stated, "It stands to reason that while states may be absolutely forbidden to inflict the proscribed treatment on individuals within their jurisdictions, the steps appropriate or necessary to discharge a positive obligation will be more judgemental, more prone to variation from state to state, more dependent on the opinions and beliefs of the people and less susceptible to any universal jurisdiction."[6]

So in relation to victims of crime, whatever regime is proposed by the Review must be "fit for purpose" in terms of providing an effective investigation and, where possible, prosecution for serious offences. The ECtHR does not dictate how that is to be achieved in individual jurisdictions.

Suspects' Rights:

The principal right at stake in *Cadder* was the right to a fair trial under Article 6(1) of ECHR. That right is absolute. In other words, it must be respected and cannot be compromised or watered down. In establishing and implementing a system for the effective investigation and prosecution of crime, the state must guarantee a fair trial and has a positive obligation to have a system in place to protect the right to a fair trial.

Article 6 sets out a number of constituent rights. These are designed to guarantee the fulfilment of the overall right to a fair trial. The issues being considered by the Review principally arise from Article 6(3)(c), the right to legal assistance. However the Review should also bear in mind the other A6(3) rights because the state has a positive obligation to ensure that there is a sufficient system in place to make these rights practical and effective.

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[4] Term of reference (e)

[5] For example in relation to rape – *MC v Bulgaria* App. No. 39272/98 Judgment 4 December 2003

[6] *Pretty v UK* (2002) 35 EHRR 1 para 15

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The topics under consideration by the Review impact upon a number of other rights held by suspects and accused persons aside from A6. The topics under consideration by the Review in particular give rise to issues under Articles 5 and 8. These are briefly described below. Other human rights are potentially engaged by the areas under consideration and these will be discussed as appropriate in responding to particular questions.

Article 5:
This is the right to liberty and security of person. Article 5 is engaged when a person is deprived of their liberty. It has in mind liberty in the classic sense, meaning physical liberty of the person. A distinction is drawn between being deprived of liberty and having one's freedom of movement restricted (which is protected by Article 2 Protocol 4). The distinction between deprivation of liberty (which engages A5) and restriction of freedom of movement (which does not) is one of degree and intensity, not one of nature and substance. In other words, in determining whether Article 5 is engaged or not, the court will look at the reality of the concrete situation rather than focussing on the particular procedure employed.

Article 5 does not set out an absolute right, meaning that the state can interfere with an individual's liberty in certain circumstance. Interference is only permissible if it is for one of the purposes set out in Article 5(1). This is an exhaustive list.

In the context of the police taking a suspect into custody, the Review is particularly concerned with A5(1)(c) and 5(3).

Where a person is deprived of liberty under for one of the purposes under A5(1), Article 5 provides for certain other rights that are of relevance to the Review. In particular under A5(2) there is an absolute right to be informed promptly in a language one understands of the reason for deprivation of liberty and of any charge. Any system put in place based on the Review's recommendations will need to ensure that the means are in place to do this. The Commission understands, for example, that there may be difficulty with the quality and number of interpreters available to the police and (separately) to defence lawyers. There may also be issues concerning availability of funding for interpreters to assist in the provision of legal advice to suspects. Such matters will have to be addressed in terms of the positive obligations under A5 and A6. The Review should gather empirical evidence about such matters to ensure that the system is capable of meeting the obligation under A5(2).[7]

Article 8:
Article 8 protects private and family life. It is not an absolute right and interference by the state is permitted. It gives rise to both positive and negative obligations. The negative obligations mean that interference is only permitted where it is in accordance with law. It must pursues one of the legitimate aims set out in A8(2). The aims set out in A8(2) are an exhaustive list. The interference must also be necessary in a democratic society to achieve that aim. Assessing what is "necessary" involves consideration of whether the measure is justified by a "pressing social need" and, in particular, whether the interference is proportionate to the aim pursued. "Necessary" is not synonymous with "indispensable", neither does it have the flexibility of expressions such as "useful", "reasonable" or "desirable". A8(2) is to be construed

[7] Note, a similar obligation arises under A6(3)(a) and 6(3)(c)

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narrowly. Interference with private life must not be arbitrary and must be justified in the circumstances of each individual case.

The positive obligations mean that the system needs to be designed with a view to protecting A8. An example was given above under Victims' Rights of a positive obligation on the part of the state to provide a system of effective investigation and prosecution in order to protect the right to private and family life. In the context of suspects, the state's positive obligation may mean, for example, that the system for taking a suspect into custody limits the time for which someone can be held in custody to the minimum shown by proper evidence to be necessary; or by ensuring the extensions to detention periods are only permissible on specified and narrow grounds.

The concept of "private life" protected under A8(1) is a broad one which is not susceptible to exhaustive definition. Its scope includes physical and psychological integrity. It can embrace multiple aspects of a person's physical and social identity, such as gender identification, name, sexual orientation, sexual life. Article 8 protects a right to personal development, and the right to establish and develop relationships with other human beings and the outside world.

Article 8(1) protection is not limited to the sphere of "home" life but can include professional or business activities.

There is a zone of interaction of a person with others, even in a public context, which may nonetheless fall within the scope of "private life". The ECtHR has identified a number of elements relevant to considering whether a person's private life is affected by measures taken outside the person's home or private premises. It is in this context that a person's reasonable expectation of privacy will be a significant, though not necessarily conclusive, factor in determining whether A8 is engaged.

4. Response

1.0 – Key elements of Custody

1. Should the terms of Article 5 be incorporated into Scots Law to provide the sole grounds for taking a person into custody?
It is not entirely clear what is meant by this question and there appears to be significant overlap with the matters considered in section 2 (Key stages of custody) and question 15.

Any procedure (whether detention or arrest) which results in deprivation of liberty must comply with Article 5. Therefore it can only be done for one of the purposes listed under A5(1). This is an exhaustive list. Where the purpose is to bring someone before a court, it must, at the very least, be based on grounds of reasonable suspicion of having committed an offence (Article 5(1)(c)) or it will not be Convention compliant.

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The question may be designed to elicit views on what should be the threshold for depriving someone of their liberty – in other words, what are the minimum grounds for taking a person into custody.

In Article 5 terms, the threshold is reasonable suspicion of having committed an offence.

In Scots law there are two procedures by which someone is taken into custody – s.14 detention[8] and arrest.

Section 14 detention is designed as an investigative tool. The threshold for detaining someone is reasonable grounds to suspect the commission of an imprisonable offence.

Arrest usually requires evidence of the commission of an offence by the person arrested. Arrest is (or ought to be) ordinarily used after the investigation is complete in order to initiate court proceedings.

Because the context of this section is "suspects", arrest is not further considered here but will be addressed in relation to section 2.

It is the Commission's view that section 14 detention appears to place the threshold for deprivation of liberty slightly higher than is required under A5. Section 14 requires that the suspected offence be capable of being punished by *imprisonment*, rather than that a suspect can be deprived of his liberty in respect of any offence, however trivial.

It should be borne in mind that Article 5 is not the only Convention right engaged by the process of taking someone into custody. Detention also constitutes an interference with the right to private and family life under A8. As such it must be justified in terms of A8(2) as being lawful, necessary and proportionate.

There is no evidence of which the Commission is aware that the present inability of police to detain a suspect for non-imprisonable offences hampers the effective investigation and prosecution of crime in Scotland. Therefore, in terms of complying with A8(2), it could be argued that lowering the threshold for deprivation of liberty, to require only suspicion of *any* offence however trivial, might be unnecessary and disproportionate in a Scottish context.

From an A8(2) perspective, section 14 detention has another advantage. Namely that it is time limited. A5 is less precise. It speaks only of being brought "promptly" before a court. As the Review recognises the outer limits of "promptly" can amount to a number of days. While deprivation of liberty for 3-4 days may have been held not to violate A5, it would be preferable, from an A8 perspective, to build in an opportunity to consider the necessity and proportionality of continued detention. The advantage of the current detention regime is that a decision must be made by the police at a fixed identifiable stage as to whether there is sufficient evidence to charge a suspect and whether the deprivation of liberty continues to be justified (in both A5 and A8 terms).[9]

[8] Section 14 Criminal Procedure (Scotland) Act 1995 as amended
[9] This is discussed more in section 2 below.

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Clearly, any procedure which the Review may recommend to replace s.14 detention and arrest must comply with A5 in terms of the grounds for deprivation of liberty and the purpose of it. Article 8 must also be respected.

We would therefore recommend that the threshold of the grounds for deprivation of liberty be set at the arguably higher level of reasonable grounds to suspect the commission of an imprisonable offence.

It is important to recognise that while this part of the consultation document envisages taking people to the police station, there may be other situations in which Article 5 is engaged but in which the person deprived of their liberty is not taken to the police station or "other premises". An example of such a situation which may engage A5 is found in *Gillan & Quinton v UK*[10]. This was a case challenging stop and search powers under s.44 of the Terrorism Act 2000. Although the ECtHR did not need to determine whether A5 was engaged (they disposed of the application by finding a violation of A8), the judgement suggests they would have concluded that there was a deprivation of liberty.

The Consultation Document contains a caveat at page 12 indicating some cases have been referred by the Lord Advocate directly to the Supreme Court. The Commission understands one of these to relate to detention for the purposes of search under s.23 of the Misuse of Drugs Act 1971. It may be that an analogy can be drawn between s.23 detention and the stop and search measures scrutinised in *Gillan & Quinton*.

If the effect of the measure employed in reality deprives the suspect of liberty, then in the Commission's view, if questioning is undertaken by the police at that time, then it is likely that the ECtHR would hold that the suspect is entitled to legal assistance.

Therefore, when addressing the grounds upon which someone can be taken into custody, the length of time for which that is permitted, and the rights which may be afforded to such a person, the Review should not ignore that there may be a number of mechanisms (other than arrest or s.14 detention) which arguably deprive a person of their liberty and may trigger certain other rights (such as the right to legal assistance).

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

The Commission would encourage a statutory definition of who is a suspect and what their rights are. This provides clarity for both individuals being investigated for crimes as well as for police officers carrying out inquiries. Such a provision guards against the danger of inconsistent police practice and maximises the opportunity to ensure that Convention rights are respected in every case. If a person's status and their rights are properly and comprehensively defined, this will assist in ensuring that evidence obtained from a suspect in compliance with the statutory procedures will be admitted at the trial.

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

[10] (2010) 50 EHRR 45

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There are two questions to be considered here. When is Article 6(1) of ECHR engaged? Second, once Article 6 is engaged, at what point does the right to legal assistance under A6(3)(c) arise? The engagement of A6(1) and the trigger for A6(3)(c) may or may not occur at the same moment. A6(1) embodies the basic rule of the right to a fair trial. A6(2) and 6(3) represent specific applications or elements of that rule.[11] There have been cases in which the ECtHR has held that A6(1) was engaged, but the right to legal assistance had not yet arisen.[12]

It is necessary to understand the purposes of A6(1) and its constituent rights.

Article 6(1) is primarily concerned with guaranteeing the fairness of trials. It does, however, cover the pre-trial or investigative stage where that procedure can have an adverse impact on the fairness of the trial. A6(1) is engaged when a person is subject to determination of a criminal "charge". "Charge" has an autonomous meaning in the Convention, rather than being used in the sense we understand it in Scots law. Broadly speaking, a criminal charge is the "official notification given to an individual by the competent authority of an allegation that he has committed a criminal offence". A6(1) can also be engaged by official measures implying such an allegation which "substantially affect" the situation of the suspect.[13] In the context under discussion in the Consultation document, detention or arrest will undoubtedly engage A6(1).

Article 6(3)(c) is a constituent part of the right to a fair trial. The right to legal assistance fulfils a number of functions. It is designed to ensure adequate representation in the case, to prevent abusive coercion by the authorities, to ensure equality of arms to the accused, to provide vigilance by the defence over procedural regularity on behalf of his client and of public interests generally. This right is important to prevent miscarriages of justice.

When is A6(3) engaged?

The jurisprudence of the European Court of Human Rights is, in the Commission's view, clear that, at least, when a suspect is to be questioned while deprived of liberty in police custody, then the right to legal assistance arises. In other words, where A5 is engaged, so too is A6(3)(c). That conclusion necessarily follows from *Salduz* and *Cadder*. In *Salduz* the rule set out was "access to a lawyer should be provided as from the first interrogation of a suspect by the police".

Understanding why that is the case requires an understanding of what it is that A6(3)(c) is designed to protect.

A suspect in police custody for questioning finds himself in a particularly vulnerable position. There are two main aspects to this. First of all 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. Second, access to legal advice is a fundamental safeguard against ill-treatment by the authorities.[14] Both these aspects are designed to ensure that the rights under A6 are practical and effective.

[11] *Lutz v Germany* App. No. 9912/82 Judgement 25 August 1987, para 52
[12] See e.g. *Zaichenko v Russia* App. No. 39660/02, Judgement 18 February 2010
[13] *Deweer v Belgium* (1980) A 35, para 46; *Eckle v Germany* (1982) A 51, para 73
[14] *Salduz v Turkey* para 54.

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Does the right to legal assistance arise earlier than "from the first interrogation"?
In *Salduz* Judges Bratza and Zagrebelsky took the view that in order to ensure that the right to a fair trial was practical and effective, legal assistance should be afforded to a suspect at the very beginning of police custody, not only while being questioned.

The judges in *Cadder* commented that this may present very practical difficulties.

In the Commission's view, what Judges Bratza and Zagrebelsky may have had in mind was the need to ensure against ill-treatment in custody (which of course can arise at any time) which may have an impact on statements made later during interrogation. Other procedures which occur following detention but prior to questioning may also impact on the subsequent interrogation (for example, the length of time the suspect is held incommunicado).

Accordingly, it may be that the ECtHR will, in the appropriate case, decide that A6(3)(c) has been violated by failure to provide legal assistance at some earlier stage of custody.

What about legal assistance for those outside the police station?
It is the Commission's view that the jurisprudence of the ECtHR is not yet clear on whether/when the right to legal assistance arises for those not in police custody.

In *Salduz* the ECtHR stated that as a rule it should be provided from the first interrogation of a suspect by the police. It appears, as just stated, that the court envisaged a suspect in custody in the police station.

Salduz and *Cadder* refer to a suspect being "interrogated" by police. The Consultation Document mentions that *Cadder* does not explain what is meant by "interrogation". In our view, in the context of ECHR, "interrogation" does not refer to the manner of questioning, which is how the expression is traditionally understood in Scots law.

In the context of a suspect in custody, the Commission considers that the term refers simply to questioning about the suspect offence which may result in incriminating statements.

Where someone is not in custody in the police station, it is the Commission's opinion that the right of legal assistance prior to first "interrogation" may arise where a suspect is questioned by police in a context where there is some significant measure of compulsion or coercion. The jurisprudence of ECtHR is not currently of this view. This is because of the case of *Zaichenko v Russia* which is discussed below. This case is somewhat problematic to analyse because of its peculiar and individual circumstances, in particular concerning the existence of waiver and the domestic procedure involved. However, on one view, the judgement suggests that a suspect questioned other than in police custody does not have the right to legal assistance. In the Commission's view, the matter ought to be revisited by the ECtHR in an appropriate case.

In *Zaichenko*, the ECtHR held that the right to legal assistance did not arise when the suspect was questioned by police at the road side, in spite of the fact that A6(1) was engaged. While the case is undoubtedly complicated by the way the applicant's complaint was framed and also by questions of waiver, the ECtHR said that the right to legal assistance did not arise because in the circumstances there was "no

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significant curtailment of the applicant's freedom of action" during the stop at the roadside.[15] The Court noted that this case was different to earlier cases (including *Salduz*) in that the applicant had not been formally arrested or interrogated in police custody. The Court did not say that it was only when there had been formal arrest or interrogation in custody that the right to legal assistance would arise. What appears then to be critical to the question of whether the right to legal assistance arises is that the suspect is subject to some "significant curtailment of his freedom of action" when he is questioned by police.

The view taken by the Court in *Zaichenko* in relation to what amounts to significant curtailment of freedom of action is difficult to reconcile with what appeared to be its inclination in *Gillan & Quinton*. What can be said is that the expression in *Zaichenko* – "curtailment of freedom of action" – is different from that used in an Article 5 context – "deprivation of liberty". It would appear to suggest some lesser coercion or compulsion than deprivation of liberty. Perhaps something more in the way of a restriction. The precise contours of that are unclear since the Court in *Zaichenko* recognised that the applicant was not free to leave. It may be that in a future case the Court will be seized with this issue directly (*Zaichenko* was decided on a different basis).

Meantime, the Commission takes the view that it would be sensible to consider that a curtailment of freedom of action, short of deprivation of liberty such as to engage A5, could trigger A6(3)(c). Similarly measure that amounts to a deprivation of liberty, but which does not involve being held in police custody (meaning, in the police station or similar) could trigger A6(3)(c).

Recommendations for Scotland

The Thomson Committee recommendations were reasonably successful in removing opportunities for unfair procedures and improper confessions. For example, the routine audio and video recording of police interviews appears to have reduced the scope for complaints of fabricated confessions. The Commission is anxious to ensure that any new regime for the questioning of suspects does not create new grey areas in which rights may not be properly respected. The Commission is also anxious to ensure that any interference with a suspect's private life or liberty is the minimum necessary.

The most obvious grey area is where the police have grounds to detain a suspect and take him to the police station for questioning, but choose not to do so. Instead they decide to question him where they find him – for example his home. Whether that suspect can have the right to legal assistance is currently subject to the whim of the police officers in deciding whether or not to take him into custody.

Under the amendments to the 1995 Act introduced by the Criminal Procedure (Legal Assistance, Detention and Appeals) Act 2010, a suspect who attends voluntarily at the police station has the right to legal assistance. It would seem that Parliament, in providing such a right, has recognised that while a voluntary attendee may strictly be free to leave the station at any time, in reality if he stops co-operating, he will be detained or arrested. This implied measure of compulsion or coercion or curtailment of freedom of action has been recognised by the legislature. There would seem little logical difference between the voluntary attender being questioned at the police

[15] para 48

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station, and the suspect questioned elsewhere whom the police could detain but choose not to do so.

Some may say that the issue is one of practicality. It may be said that the right to legal assistance cannot be offered or facilitated by the police other than in a police station or similar premises. Against that, it can be said that requiring every suspect who wants to avail himself of legal assistance to go to the police station in order to do so may be an unnecessary interference with his private and family life.

There are other jurisdictions in which the right to legal assistance arises at an early stage and can be facilitated without being taken to the police station. For example, there is reference to this occurring in practice in Canada where a police officer, at a roadside stop, offered the driver the opportunity to phone a lawyer and offered him use of a mobile phone.[16] A similar practice exists in New Zealand.[17] It would appear that the practicalities are not a bar. There may be an issue of availability of a lawyer to provide advice at the necessary time. That is no different to the problem which may arise if the individual is taken into custody. It is part of the state's positive obligations under A6 to ensure that there is a sufficient system in place to provide timely legal assistance for those who require it.

The Commission welcomed the recognition by Parliament of the need for legal assistance by a suspect who attends voluntarily at the police station, not just for those detained and arrested. We would invite the Review to recommend that any suspect, whatever his location, who is to be questioned under caution is afforded the right to legal assistance, is advised of that right at the time he is first cautioned, and is given an opportunity to avail himself of that right prior to questioning. Practically speaking, it would not seem an insurmountable challenge to facilitate the provision of advice over the telephone. Thereafter, if the suspect wishes to exercise his right further by receiving assistance in person, he will be able to choose to attend voluntarily at the police station. Such a regime would allow the individual greater control over the level of interference with his private life and liberty. It will also protect the police from criticism that might otherwise arise where they could have taken a suspect to the police station (thereby triggering his right to legal assistance) but chose not to do so (for reasons which may be the subject of later dispute).

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

It is of concern to the Commission that so many suspects apparently waive their right to legal assistance. This may change over time as the post-*Cadder* culture beds in. It may be that suspects are not aware of the significance of the right to legal assistance and the consequences of waiving it. It may be that practical concerns about the length of time it might take to obtain legal assistance override what might otherwise be the suspect's choice to exercise his right.

The Review should look at the data being collected by the police in order to ascertain at what stage following detention the police first offer a suspect the right to legal assistance and the average length of time it takes to give effect to that right when assistance is requested. In addition the Review should explore when and why waivers occur.

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[16] *R v Orbanski, R v Elias* [2005] 2 SCR 3, 2005 SCC 37, para 6, judgement of majority delivered by Charron, J.

[17] s 23(1)(b) New Zealand Bill of Rights Act 1990; *MOT v Noort, Police v Curran* [1992] 3 NZLR 260

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There are advantages to having a statutory provision on the waiver of rights. It would help ensure that the suspect's waiver is express and not implied; that it is informed in the sense of being knowing and intelligent; and that it is unequivocal. In practice it will provide consistency by the police. It can serve to minimise subsequent challenges to the circumstances in which a waiver was said to have been given.

There are also challenges in codifying provisions for waiver. In the context of rights, one size does not fit all. When procedural rights are at issue, any waiver must be attended by minimum safeguards commensurate with the importance of the right being waived.[18] In the context of the right to legal assistance, the necessary safeguards will also depend on the vulnerabilities of the suspect. For example, the ECtHR has held that where the detainee was illiterate and a non-native speaker of the Turkish language, the right to legal assistance was not sufficiently safeguarded by accepting a pro-forma waiver in Turkish marked by the accused's fingerprint in signature.[19] Similar concerns arise in relation to children and vulnerable adults and here additional safeguards are likely to be required. Any statutory provision on the waiver of rights must take into account such differing vulnerabilities.

In relation to ensuring that waiver is an informed decision, the Commission notes the recent case of *Jude, Hodgson and Birnie v HMA*[20] in which the Lord Justice Clerk held "a valid waiver can proceed only on the basis of an informed decision. Since the rights allegedly waived was that of access to legal advice, I cannot see how any of the appellants could waive that right when, *ex hypothesi*, he had no reason to think he had any such right *and had not had access to legal advice on the point.*"[21] A very real concern arises whether one can waive the right to legal assistance without having legal advice on the consequences of that decision. Such advice could be given in a variety of ways. At present, there would seem to be no means by which the consequences of the decision are communicated to a suspect prior to him being asked whether he wants to exercise or waive his right to legal assistance. The Review should give thought to processes to ensure that suspects are advised of the consequences of deciding to waive their right. Such processes will require to take into account the differing vulnerabilities of suspects, in particular children and vulnerable adults.

5. What forms of legal advice are sufficient?

This question ties in with that concerning waiver. It is important that a suspect is properly and fully advised of their right to legal assistance, including what the purpose and benefit of legal assistance is. That enables the suspect to make an informed choice as to whether to exercise his right.

Where a suspect decides to exercise his right to legal assistance, the Commission has previously expressed concern about cases in which legal assistance is limited to a short telephone conversation with a solicitor. In order to comply with A6(3)(c) it is not necessarily enough simply to appoint a lawyer. The right must be effective. Given the purposes behind the right to legal assistance (discussed above), it would appear self-evident that cases will arise where a telephone call is inadequate to protect the

[18] *Pishchalnikov v Russia* App. No. 7025/04, Judgement 24 September 2009
[19] *Salman v Turkey* App. No. 35292/05, Judgement 5 April 2011
[20] [2011] HCJAC 46
[21] para 34 [emphasis added]

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suspect's right to a fair trial. In particular concerns arise where a suspect is vulnerable in some way beyond simply being in custody. This may not become apparent to the solicitor during a short phone call. In addition, there is no opportunity to check on the conditions of detention and to guard against ill-treatment if the lawyer does not attend in person. Attendance in person provides greater opportunity to learn more about the investigation (in particular via presence at interview) in order properly to be able to advise the suspect on how best to proceed. It may not always be that the best advice is to remain silent particularly where it becomes clear there is sufficient evidence and there is a stateable defence or answer to the allegation.

There are obviously greater resource implications if in person assistance becomes the norm and this may be the argument against it. However, the state has a positive obligation to ensure the right to legal assistance is practical and effective. While the state cannot be held responsible for every shortcoming on the part of a legal aid lawyer, there will be an obligation to intervene if inadequacies in the availability of proper legal assistance are systemic or sufficiently brought to its attention, for example in police non-disclosure practices which prevent informed and professional legal assistance being capable of being provided to the suspect, ref Q7.

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

Article 6(3)(C) does not provide an absolute right to solicitor of choice where it is being publicly funded. The general rule is that the individual's choice should be respected.[22] Where legal assistance is appointed by the state, the individual's choice should be respected unless there are relevant and sufficient grounds to hold that it is in the interests of justice to override his wishes.[23]

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

Article 6(3)(a) requires that the suspect be informed of the nature of the allegation against him. A6(3)(b) guarantees him adequate time and facilities to prepare his defence. Under the Scots system, his decision whether and how to respond to questioning by police is part of his defence. The police need to provide sufficient disclosure to ensure that Article 6(1) is respected and that the constituent rights under Article 6 are practical and effective. What is necessary for that depends on other matters such as rules of evidence and the circumstances of a particular case. The Commission would encourage the Review to consider setting out obligations of disclosure in particular in relation to the nature of the accusation and whether the grounds for suspicion result from more than one source of information, though not necessarily what those sources are. That way, the suspect and his lawyer can make an informed decision as to how to proceed.

8. Are the parameters of legitimate police questioning clear?

The police have an obligation to respect Convention rights. This includes A3 and A8. Improper police questioning could result in breaches of these rights. What will constitute a breach will depend on the circumstances. Therefore the Commission would encourage training of police officers in the content of these rights, continued

[22] *Pakelli v Germany* App. No. 8398/78 Judgement 25 April 1983, para 31
[23] *Croissant v Germany* App. No. 13611/88 Judgement 25 September 1992

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recording of police questioning on video and audio tape, and proper human rights scrutiny of any evidence obtained through such questioning by the courts.

9. When must questioning stop?
There are no rules under ECHR that an accused person cannot be questioned beyond a particular point in proceedings, provided his rights under A6 are met. This reflects the fact that there are very different legal systems which exist among the Convention states, including inquisitorial systems.

Scots law traditionally has prohibited any questioning following police charge. It views the individual then as an accused person under the protection of the court. The origins of this rule may lie in respect for the right to silence at trial.

Under A6, the right against self-incrimination applies at all stages of proceedings. The ECtHR jealously guards this right, especially during trial proceedings. The prosecution must prove its case without the assistance of the accused.

In Scots law, proceedings should not commence without a prima facie case. In a summary complaint, this will mean corroborated evidence. On petition, at least at Committal for Further Examination stage, the prosecution may only have one source of evidence.

In deciding whether or not questioning following charge would be compatible with Convention rights, it is important to consider its purpose and how it might be done. If it is designed to obtain incriminating evidence from an accused, then it may fall foul of ECHR in that it may operate so as to extinguish the very nature of the right against self-incrimination.

Once proceedings are underway, there are many ways in which an accused person can provide further information if he wishes to do so in light of newly disclosed evidence or material. He can provide a voluntary statement to independent police officers. In solemn proceedings he can make a judicial declaration. He can give evidence at his trial. He can change his plea to one of guilty at any time. It would seem, therefore that there is no need to allow questioning of an accused following charge in order to provide him with the opportunity to exculpate himself or admit the allegation.

In solemn proceedings, an accused can be compelled to submit to judicial examination.

In light of the existing system, careful consideration should be given to the purpose of allowing questioning after charge. There is a danger that it may, in certain circumstances, fall foul of A6.

10. What age should define the child suspect? Should any distinction be drawn between older children and younger children?
In order to comply with the UK's international human rights obligations, a child must be defined as anyone under 18.

In terms of procedures, it is permissible to differentiate between younger and older children in order to reflect their different levels of maturity and capacity. Older children should not, however, be treated as adults.

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There are a series of international instruments in relation to children in the criminal justice system that must be considered, including the United Nations Convention on the Rights of the Child 1990, UN Minimum Rules for the Administration of Juvenile Justice: the 'Beijing Rules' (1985) and UN Rules for the Protection of Juveniles Deprived of their Liberty : the 'JDLs' (1990).

The deprivation of the liberty of a child should be a disposition of last resort and for the minimum necessary period and should be limited to exceptional cases. [24]

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?

In the Commission's view, there is a fundamental problem that the age of criminal responsibility is far too low. The UN Committee on the Rights of the Child has highlighted this issue both in its 10th General Comment and in relation to Scotland in particular in its Concluding Observations on the United Kingdom.[25] The introduction of a statutory provision preventing prosecution of children under 12 does not address the issue since children under 12 can still be referred to the children's hearing system on offence grounds.

Rule 4 of the Beijing Rules invites states to ensure that the age of criminal responsibility is not set too low, bearing in mind the facts of emotional, mental and intellectual maturity. The commentary to Rule 4 states that "in general there is a close relationship between the notion of responsibility for delinquent or criminal behaviour and other social rights and responsibilities (such as marital status, civil majority etc). The age of criminal responsibility ought to be reviewed as a matter of urgency and the Review should recommend such.

The ECtHR has held that "it is essential that a child charged with a criminal offence is dealt with in a manner which takes full account of his age, level of maturity and intellectual and emotional capacities, and that steps are taken to promote his ability to understand and participate in the proceedings."[26]

A6 will be engaged when a child suspect is questioned by police. Accordingly, the procedures will need to take account of the factors mentioned and promote participation. The case of *T v UK* is an example of a situation in which the provision of skilled legal assistance was insufficient to overcome the unfairness resulting from the intimidating way in which proceedings were conducted in relation to a vulnerable child.

The right to a fair trial belongs to the child. While there may be legitimate concerns about the stress caused to a child by the presence of a number of adults providing advice (e.g. parent, lawyer, perhaps social worker), the priority must be providing a system that maximises the opportunity for the child to understand and effectively exercise his rights on his own behalf. Consideration may also be given, as in court and children's hearing settings, to ensuring the availability of appropriate settings for questioning of a child within a police station.

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[24] JDL Rule 2
[25] CRC/C/GBR/CO/4, 3 October 2008, para 77a
[26] *T v UK* App. No.24724/94, Judgement 16 December 1999, para 84

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12. How should the question of waiver be approached in respect of children?
The provision of legal assistance to children has been held by ECtHR to be of fundamental importance.[27] There is no Strasbourg authority to the effect that a child cannot waive the right to legal assistance. However, the ECtHR considers that the vulnerability of an accused minor is such that "a waiver by him or on his behalf of an important right under A6 can only be accepted where it is expressed in an unequivocal manner *after the authorities have taken all reasonable steps to ensure that he or she is fully aware of his rights of defence and can appreciate, as far as possible, the consequences of his conduct."*[28] While this does not differ substantially from what is required for waiver by an adult, the case does suggest that the Court will look particularly critically at the circumstances in which a waiver is given by a child or the guardian of a child.

The validity of allowing waiver of the right to legal assistance by or on behalf of a child may be called into question having regard to Articles 3 and 37 of the Convention on the Rights of the Child. Article 3 is the "best interests" provision. Article 37 provides the right to legal assistance. It is questionable whether it is ever in a child's best interests to waive the right to legal assistance given their vulnerabilities. Consideration should be given to how to enact procedures which ensure that a child receives appropriate legal advice on the consequences of waiving the right to legal assistance. Such advice cannot be given by a parent or guardian. It may be that a lawyer should be required to attend for, at least, that purpose.

13. How should the vulnerable adult suspect be defined?
There is a problem in providing a comprehensive definition of vulnerable adult. Vulnerability may exist for a variety of reasons. The measures to deal with vulnerable adults will vary depending on the nature of the vulnerability.

From an ECHR perspective, what matters is that anyone charged with a criminal offence is able to exercise their rights effectively. Some people will require support in order to be able to do that. The nature of that support will vary according to the particular vulnerability. The support required by someone with a learning disability will be very different to that needed by a person with a physical disability. The support needed by someone who does not speak English will be very different to the needs of, for example, a drug addict in withdrawal.

It is important is that police are adequately trained and supported to be able to identify vulnerability and that mechanisms are available to provide the necessary support to the suspect. Adequate training is the best means to avoid both failing to identify a vulnerable suspect as well as wrongly labelling a suspect as vulnerable.

In relation to vulnerable adults, the need for a lawyer to fulfil the function of safeguarding against improper compulsion or ill-treatment may be greater than for a non-vulnerable suspect.

Consideration should again be given to how to ensure that a vulnerable adult understands the consequences of waiving the right to legal assistance. This cannot

[27] *Salduz v Turkey*; *Halil Kaya v Turkey* App. No. 22922/03 Judgement 22 September 2009; *Adamkiewicz v Poland* App. No. 54729/00 Judgement 2 March 2010
[28] *Panovits v Cyprus* App. No. 4268/04 Judgement 11 December 2008 [emphasis added]

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be done by an appropriate adult as it requires to be based upon legal advice and informed by appropriate medical advice.

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?
Regard should be had in particular to the Convention on the Rights of Persons with Disabilities (the general principles are set out in Article 3 and Article 12).

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?
The Commission's view is that s.14 detention serves a functionally useful purpose. It is time limited and provides certainty. At the end of the detention period (which is relatively short) the police must make a decision about the continued detention of the suspect. There is certainty as to when that decision must be made and on what grounds. It provides the suspect with the reassurance of knowing when questioning will cease. This system, or a system that provides the same opportunities for release, should be retained.

The Commission criticised the 2010 Act for doubling (and potentially quadrupling) detention periods across the board in the absence of proper evidence that this was necessary in order to secure the provision of legal assistance. The Review is to act as a sunset clause on this legislation. The Review should therefore look at the evidence gathered by police since the introduction of the 2010 Act in order to ascertain how long it takes on average to provide legal assistance.

Taking someone into custody engages A8 of ECHR and as such has to be justified under A8(2). This justification must be on the basis of evidence, not anecdote. It has not, to date, been shown to be necessary to keep a suspect in custody for longer than 6 hours in order to furnish him with legal assistance. If the evidence shows that legal assistance, as a matter of routine, can be provided within 6 hours, the Review should recommend a return to the pre-2010 Act time limits. Extensions of time should be allowed only in exceptional circumstances where a lawyer cannot be provided within the normal period. Review of the evidence will also reveal any systemic issues resulting from failure by the state to provide sufficient legal assistance in any particular area or at any particular time. The state has a positive obligation to address such systemic problems.

The doubling of detention times under the 2010 Act is, it might be suggested, not intended to allow sufficient time to provide legal assistance, but rather to give the police longer to carry out inquiries. The Commission is unaware of any evidence which suggested that prior to October 2010 the police were systematically hampered in their efforts to investigate crime by the limits of the 6 hour detention period. Unless such evidence is produced, the greater interference with individual's private lives may not be justified.

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16. Does the police charge serve any useful practical function?
The police charge serves a useful function in that it is an early opportunity to provide the suspect with clear notification of the allegation against him (required by Article 6(3)(a)). This enables him, from an early stage, to begin to prepare his defence (in line with A6(3)(b)). Under the present law, it also means that suspects are aware they can no longer be subjected to questioning or certain other evidence gathering procedures against their will. Thus it serves a useful purpose in protecting the right against self-incrimination. Any further questioning or gathering of evidence from the suspect (accused) will be subject to independent scrutiny by the courts (in the form of judicial examination or granting of warrants).

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?
This proposal would not result in the same benefits as are described under Q16, which ought to be retained.

2.2 Length of custody

18. What should the time limits for custody be and under what circumstances should they be extended?
This has been dealt with to a large extent under Q15. The Commission would urge the Review to evaluate the evidence base relating to detention in order to determine whether there was any need to extend the detention period beyond 6 hours in order to provide legal assistance.

Extensions to the period in custody must be the exception, not the rule. They should not be granted unless they are required to fulfil the right to legal assistance.

It might be suggested that extensions be allowed for “investigative purposes”. The Commission would be concerned that investigations which could equally be carried out while a suspect is at liberty might result in extensions of the detention period. That would, in our view, not be justified.

The Review should recommend the reinstatement of a maximum 6 hours detention period with extensions only to provide legal assistance or meet other A6 requirements (such as provision of an interpreter). If the Review considers allowing extensions for investigative purposes, these should be tightly defined and controlled and should only be permitted where the investigation could not have been carried out before he was taken into custody and cannot be carried out with the suspect at liberty.

Further the Review should determine how many children are subject to detention and for what periods. It would be of concern if children are routinely detained for longer than adults. The length of time and the purposes for which a child can be taken into custody should be tightly controlled. The Review should consider whether it is appropriate to allow extensions of detention in relation to children in any circumstances.

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

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Such a measure potentially provides an opportunity for greater respect for A8 rights by ensuring that people are only in custody when the aspect of the investigation being carried out requires them to be there. The purposes for which persons can be taken into custody should be strictly defined - such as interview, search, recovery of evidence that might otherwise be destroyed. In addition there should be overall limit on the amount of time a person can be kept in custody. This period would have to justified by evidence as being necessary in terms of A8(2).

20. Should a Saturday Custody Court be reintroduced?
The Commission would encourage any measure to ensure that persons are deprived of their liberty for as short a period as possible.

3.1 Sufficiency of Evidence

21. Should the requirement for corroboration be abolished?
This question appears to stem from the notion that following the introduction of the right to legal assistance, there has to be some rebalancing of the system of criminal justice. This is a misconception. The provision of legal assistance is not giving a suspect an extra or unfair advantage. It has done nothing more than bring Scots law up to the *minimum* standard necessary to ensure a fair trial. There is no need to remove something else that provides a safeguard for a fair trial.

The abolition of corroboration for some or all offences would mark a major change in Scots law. In the Commission's view the advantages, disadvantages and consequences of such a move ought to be considered in far more detail than is possible within the Carloway Review. It gives rise to detailed and complex issues. For example, the assumption may be that the requirement of corroboration provides a safeguard in favour only of an accused person. It may, however, also safeguard victims and witnesses. In particular, were corroboration to be removed, there would have to be greater scrutiny of the quality of evidence before prosecutions would proceed and before courts would convict. In the context of sexual offences (where it is sometimes suggested corroboration ought to be abolished), further exploration and research may conclude that the requirement of corroboration also acts as a protection to the complainer – in that it provides an independent check on credibility and reliability which would otherwise be absent. Thought should be given as to whether abolishing corroboration may result in a complainer who was the only source of evidence being subject to far greater scrutiny in terms of quality than would otherwise be necessary.

Similarly in the Commission's view, a great deal more research may need to be done to ascertain the extent to which the requirement of corroboration impedes the fulfilment of the obligation to have effective investigation and prosecution of rape, if it does so at all.

Corroboration should not be considered in isolation. If it is abolished, there will necessarily have to be a test of sufficiency relating to quality of evidence. That may involve new tests for the admissibility of evidence. There may also have to be changes to the grounds for an appeal against conviction to include one based on "safety" of the conviction.

Thorough consultation on this topic is appropriate and, if the Review concludes that the abolition of corroboration should be considered, it should recommend that the

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matter is taken up in detail by the Scottish Law Commission or by a Royal Commission.

22. What should the test for sufficiency of evidence be?
Reference is made to Q21 – a more detailed and thorough consultation would be required.

3.2 Admissibility of statements

23. If exclusionary rules exist, should they be set out in statute?
It is apparent from *Salduz* and *Cadder* that failure to respect the constituent rights of A6 can result in irretrievable prejudice to the right to a fair trial. Setting out the exclusionary rule in statute makes clear the importance of respecting rights and is part of the means to make Article 6 rights practical and effective.

24. Should the Common Law fairness test for the admissibility of statements be clarified in statute?
It should be noted that the ECtHR is not generally concerned with domestic rules of evidence provided the rights contained within the Convention are respected. Therefore the Commission has no submission on this or the following question.

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?
Again the ECtHR is not concerned with domestic rules of evidence. However in considering this question, the Review should think about whether not allowing exculpatory/mixed statements by an accused to be relied upon by him as proof of fact is best practice in terms of respecting the right to silence at trial.

3.3 Inferences from silence

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

The right against self-incrimination is central to a fair trial under A6. To date, the ECtHR has held that there are circumstances in which an adverse inference from silence during police questioning can be drawn without violating A6. However it has held that the inference cannot be the sole or main basis for conviction.[29] In a system requiring corroboration, this would likely mean that the silence should not be treated as an independent source of evidence for sufficiency purposes.

The ECtHR has described the Convention as a living instrument and it looks to emerging trends and practices across Convention states in order to interpret the rights and obligations in ECHR. Following the introduction of adverse inference in England, there are a significant number of cases from the Court of Appeal which interpret the provisions. There has been criticism that in the context of a suspect who

[29] *Condron v UK* App. No. 35718/97 Judgement 2 August 2000, para 56

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has the benefit of legal advice, the Court of Appeal has failed to give sufficient weight to the importance that the ECtHR gives to access to legal advice.[30] It may be that a trend is developing or will develop against permitting adverse inference to be drawn.

It should be noted that in England there is no general adverse inference to be drawn from silence. Rather the possibility of drawing an adverse inference arises where an accused has, prior to charge or on being charged, failed to mention a fact which he later relies on in his defence. The ability to draw an adverse inference only arises if the fact was one which the accused might reasonably have been expected to mention.

The Commission would advise against the introduction of an adverse inference.

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

The Commission's view is that the introduction of such a provision would make little practical difference given the ECtHR's view that the provision of legal advice to remain silent must be given appropriate weight.[31]

The Commission notes that the introduction of adverse inference in England was primarily directed at the mischief of a positive defence being mounted following a no comment interview, or defence by "ambush".[32] The judicial examination process in Scotland already serves a similar purpose – of identifying at any early stage positive defences that may be relied upon by an accused – and an adverse inference is able to be drawn should the accused remain silent.

4.0 – Appeals

The right to a fair trial extends to a fair hearing on appeal under Article 6 of ECHR.

It should be noted that the decision in *Cadder* did not necessitate any measures being introduced to deal with appeals. Therefore the 2010 Act went beyond whatever the Government may have considered necessary to be dealt with by emergency procedures. It is of great concern to the Commission that the appeal provisions which were introduced were not even restricted to past cases raising "Cadder points" but rather will apply to all cases. The appeal provisions in the 2010 Act by-passed any proper consultation and scrutiny. The Review should consider whether there is any identified and evidenced need for these provisions to continue or whether they should now be repealed as unnecessary.

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] Clayton & Tomlinson: The Law of Human Rights, 2nd Ed. @11.244
[31] *Condron* para 60
[32] Clayton & Tomlinson @11.243 citing *R v Brizzalari* [2004] EWCA Crim. 310

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The right to an appeal is enshrined in international law. Article 14(5) of the International Covenant on Civil and Political Rights provides that "Everyone convicted of a crime shall have the right to have his conviction and sentence reviewed by a higher tribunal according to law."

Article 6 ECHR applies to appeals as it does to trials. A6 has as part of its aims the prevention of miscarriages of justice. Provisions restricting the ability of a convicted person to appeal raise potential issues of access to justice. In discussing late appeals, regard should be had to the importance of the rights at stake and to the legal obligation to provide effective remedies for violations of A6.

The principle of finality of judgement is not absolute. It is important to maintain a right of access to the court to remedy miscarriages of justice. The Commission has no strong view on whether that right is fulfilled by a late appeal mechanism or by an application to the SCCRC provided it is practical and effective. The Review should consider the implications for access to justice resulting for the time and resources of the SCCRC which would be taken up were the route of an extension of time from the court (prospective or retrospective) to be closed off.

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?
Any test should be formulated in such a way so as not to unduly restrict access to the court.

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?
The important point is that the state meets all its obligations under A6 and the court provides an effective remedy for miscarriages of justice. Barring a convicted person from a remedy for violation of the right to a fair trial because he (or his lawyers) have failed to comply with procedural rules of court runs counter to the obligation to provide an effective remedy. Similarly the imposition of sanctions such as ruling that particular procedural stages should not be paid out of public funds risks violating the obligation on the state to provide free legal assistance under A6(3)(c). The Commission would advise against the introduction of such sanctions.

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?
The petition to the nobile officium should be retained. The High Court of Justiciary has decided that a petition to the nobile officium is the appropriate mechanism to remedy a violation of Convention rights by the court during an appeal hearing.[33] Without such a mechanism, an individual whose Convention rights have been breached, for example because he did not receive a fair hearing on appeal, would require to make an application to the SCCRC in order to try to achieve a remedy. The abolition of the petition to the nobile officium would accordingly introduce a barrier to direct access to justice. The SCCRC has a statutorily defined test for making a reference whereas the nobile officium allows a great deal of flexibility in determining the scope of the court's jurisdiction over any given case. Requiring application to SCCRC would also cause unnecessary delay and expense.

[33] *Beck Petitioner* 2010 SCCR 222

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Therefore there ought to be a direct route to the High Court of Justiciary, via the nobile officium, to ensure effective access to justice.

Advocation and suspension appear to serve a useful function in providing access to the court and as a means of resolving procedural irregularities quickly and efficiently, rather than having to wait until the end of proceedings. They can provide a remedy which may not otherwise be available.[34] The Commission is not aware of any compelling argument for their abolition.

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?
The SCCRC provides a vital and effective mechanism for access to the court for those who allege they have been the victims of miscarriages of justice. To date, the SCCRC has shown itself to be relatively successful in identifying miscarriages of justice. The SCCRC takes account of "interests of justice". Should an individual applicant be dissatisfied with the SCCRC's interpretation or application of the interests of justice test, he can petition for judicial review of the decision. The Commission is unaware of any widespread criticism of the SCCRC's interpretation of that test in the sense of making a reference in circumstances contrary to the interests of justice (indeed its success statistics would militate against such a view). Such a legislative provision is unnecessary and may inappropriately constrain the SCCRC in carrying out is functions, with the effect of limiting access to the court for those who have been victims of miscarriages of justice.

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?
The Commission is opposed to the High Court having such a power. While the 2010 Act purported to deal with the consequences of the *Cadder* it went far beyond that, extending a power to the High Court to refuse any reference from the SCCRC. This is an unjustified interference with the statutory independence of the SCCRC. It is unnecessary given the tests which must be applied by the SCCRC in making a reference and the new restrictions on what can be argued once a reference is made. The interests of justice test applied by the SCCRC adequately takes account of finality of judgement. Access to the court must be maintained for those who are victims of miscarriages of justice.

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[34] See e.g. *Parracho v HMA (No.2)* [2011] HCJAC 11