

Justice Committee

Criminal Justice (Scotland) Bill

Written submission from the Scottish Human Rights Commission

The Scottish Human Rights Commission is a statutory body created by the Scottish Commission for Human Rights Act 2006. The Commission is a national human rights institution (NHRI) and is accredited with 'A' status by the International Co-ordinating Committee of NHRIs at the United Nations. The Commission is the Chair of the European Network of NHRIs. The Commission has general functions, including promoting human rights in Scotland, in particular to encourage best practice; monitoring of law, policies and practice; conducting inquiries into the policies and practices of Scottish public authorities; intervening in civil proceedings and providing guidance, information and education.

INTRODUCTION

The Commission welcomes the opportunity to comment on the Criminal Justice (Scotland) Bill.

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*

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

In approaching its task, it is important that the Scottish Government recognises that the decision in *Cadder* did not provide a suspect with some added extra or 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 notion that some sort of "rebalancing exercise" requires to be carried out in the form of removal of other procedural safeguards, such as corroboration, is mistaken and the provisions abolishing corroboration without providing an adequate alternative safeguard are of considerable concern to the Commission.

It is essential that, so far as possible, Scots law does not repeat the experience of *Cadder*. The Criminal Justice (Scotland) Bill 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 Bill properly identifies the rights and duties at stake, as well as anticipating developing trends across the ECHR contracting states.

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, the Criminal Justice (Scotland) Bill must be compatible with Convention Rights. The following articles of ECHR are relevant to the provisions of the Bill:

- 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

PRINCIPLES

In line with the spirit of Article 5, the Carloway Review had at its core the presumption of liberty. While that presumption may be reflected in certain provisions of the Bill, the Commission believes that the Bill would be strengthened by making an express statement at the outset, to the effect that the presumption, albeit rebuttable, must be in favour of liberty. This would serve as the overarching principle in which light all provisions must be considered.

PART 1 ARREST & CUSTODY

Arrest without warrant (s.1 & 2)

In relation to section 1, the Commission recommends that the power of arrest without warrant apply only to offences punishable by imprisonment. This would more closely align with Article 5. Section 1(2) extends the power of arrest beyond imprisonable offences on the basis of “interests of justice”. While section 1(3) provides some assistance, it is not an exhaustive definition and therefore the provision is apt to give rise to uncertainty both for the police and for those suspected of non-imprisonable offences. The effect of arrest is to deprive a person of their liberty. Under section 14 of the Criminal Procedure (Scotland) Act 1995 (detention powers), this could only be done in relation to imprisonable offences. The Commission is not aware of any evidence of a need to alter the basis upon which a person can be deprived of their liberty. Non-imprisonable offences are at the lowest end of the scale of gravity. Further, taking a person into custody engages Article 8, as well as Article 5, ECHR. Under Article 8, the obligation is on the State to justify interference with the individual’s private life. Such interference must be proportionate. In respect of non-imprisonable offences, deprivation of liberty will be much harder to justify in Article 8 terms. In such circumstances, the judicial oversight of the warrant procedure provides a safeguard against potential breaches of Convention rights.

The Commission agrees with Lord Carloway’s view that certain key terms should be defined in statute. Such definitions would assist in clarifying the purposes and the limits of Article 5. In particular, the Commission would encourage a statutory definition of the reason for arrest and subsequent detention. The purposes for which persons can be taken into custody should be strictly defined - such as interview, search, or recovery of evidence that might otherwise be destroyed.

In addition, the Commission would encourage a statutory definition of who is a suspect. 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.

Information to be given on arrest and information to be given at police station (s.3 & 5)

The information to be provided in Sections 3 and 5 of the Bill does not provide sufficient information to fully protect the right to silence in Article 6 terms. The information contained in the common law caution includes the suspect being informed that anything he says will be taken down and might be used in evidence. This form of caution is fuller and more adequate in terms of providing the suspect with sufficient information to decide whether he wishes to waive his right to silence. While the terms of the common law caution may generally be used in practice, failing to include these in provisions enshrining a caution in statute increases the risk that a suspect will be told only this more limited information and thus not afforded their full Article 6 rights.

It is important to recognise that while the provisions of Part 1 envisage 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 Article 5 is found in *Gillan & Quinton v UK*⁴. 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 Article 5 was engaged (it disposed of the application by finding a violation of Article 8), the judgement suggests it would have concluded that there was a deprivation of liberty.

In *Ambrose v Harris*⁵, the Supreme Court held that, in the case of G who was detained under section 23 of the Misuse of Drugs Act, there was “significant curtailment of his freedom of action” and therefore Article 6 was engaged and he was entitled to legal assistance before questioning.

Thus it can be seen that if the effect of the measure (arrest or other measure) employed in reality deprives the suspect of liberty, and 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.

In chapter 4 the Bill provides for legal assistance before interview for those in “police custody”. This appears to mean those arrested in terms of section 1 or by virtue of a warrant. The cases highlighted above demonstrate that there may be a number of mechanisms (other than arrest) which arguably deprive a person of their liberty and may trigger certain other rights (such as the right to legal assistance). The Bill does not make provision for legal assistance in such situations (discussed further below with regard to section 24). The Commission recommends that in order to avoid creating “grey areas”, suspects should be told of their right to legal assistance at the time of first caution (per Lord Carloway’s recommendation), whether questioning is to take place in a police station or not,. This should be facilitated even if the person is not being arrested, but is going to be questioned.

⁴ (2010) 50 EHRR 45

⁵ [2011] UKSC 43

Information to be given at police station (s.5)

The rights afforded by EU Directive 2012/13/EU are not clearly reflected by Section 5. Article 3 of the Directive requires that a suspect be provided with information about their rights either orally or in writing. Thereafter, Article 4, requires that suspects are provided promptly with a written Letter of Rights, which they must be allowed to retain while in custody. The Letter of Rights covers additional information to that which must be provided under Article 3. These are not alternative provisions; rather both the initial information and the Letter of Rights must be provided. Section 5(3) is unclear regarding this distinction. The provision should make clear that a suspect must be provided with both the initial information (verbally or in writing) as well as a written Letter of Rights.

Custody (s.7-13)

The Commission welcomes the abolition of the 24 hour detention period. The Commission's view is that the period for which a person can be held in custody should be 6 hours and any extension of time beyond 6 hours should be allowed only in exceptional circumstances and only for the purposes of facilitating Article 6 rights.

The Commission criticised the Criminal Procedure (Legal Assistance, Detention and Appeals) (Scotland) Act 2010 (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.

Taking someone into custody engages Article 8 of ECHR and as such has to be justified under Article 8(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. In fact, the evidence is to the contrary and the vast majority (83.5%) of people are able to be released from detention within 6 hours. The Commission therefore recommends that the Scottish Government restore 6 hours as the standard detention period. Extensions of time should be allowed only in exceptional circumstances where a lawyer cannot be provided within the normal period or for other Article 6 requirements (such as provision of an interpreter).

The doubling of detention times under the 2010 Act, it might be suggested, was not intended to allow sufficient time to provide legal assistance, but rather to give the police longer to carry out inquiries. The Commission would be concerned if investigations which could equally be carried out while a suspect is at liberty resulted in extensions of the detention period. That would, in our view, not be justified. 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 involved in longer detention periods may not be justified.

The length of time and the purposes for which a child can be taken into custody should be tightly controlled. The Scottish Government should consider whether it is

appropriate to keep a child in custody for investigations beyond 6 hours in any circumstances.

It is important that the state ensures that data are collected about all detentions across Scotland. This will assist in identifying any systemic issues which may arise, for example, failure 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 and accordingly the situation should be kept under review.

The test for continued detention in section 10 should be expanded to include consideration of the probable disposal if convicted which, as Lord Carloway pointed out, serves to emphasise that only in exceptional circumstances should a person be detained where the charge is for a non-imprisonable offence.

The Commission recommends that s.10(2)(a) should impose a test of whether the person's presence is "necessary" to enable the offence to be investigated, rather than "reasonably required". The application of a test of necessity better comports with both a presumption of liberty and the requirements for justifying any Article 8 interference.

Investigative liberation (s.14-17)

Such a measure potentially provides an opportunity for greater respect for Article 8 rights by ensuring that people are only in custody when the aspect of the investigation being carried out requires them to be there.

It is essential to respect the presumption of innocence and the presumption that suspects should not be in custody unless it is necessary. Accordingly, it is necessary that limits on the exercise of this power are clearly delineated.

The Commission agrees with Lord Carloway's recommendation that the police should be required to specify the nature of any enquiries which they intend to carry out under these provisions, unless doing so would compromise the investigation. In addition, as in the case of the general power of arrest, the purposes for which persons can be taken into custody should be strictly defined - such as interview, search, or recovery of evidence that might otherwise be destroyed. Any conditions imposed upon a suspect must be proportionate to the need to protect potential victims, witnesses and evidence.

Given that such suspects are not yet subject to court proceedings, there should be protections put in place to ensure that information about the suspect is not disclosed and Article 8 rights are respected. The Carloway review makes reference to this issue at para 5.3.12 in terms of the practical problems that such a suspect may face such as suspension from his/her job even though he/she is eventually cleared of all suspicion.

Any conditions need to be proportionate and respect Article 8 rights. Account should be taken, for example, of a suspect's work and family commitments. Consideration should also be given to the availability of the suspect's instructed solicitor to ensure consistency of representation if possible.

It is not clear from the current proposals whether the suspect is expected to return to the police station at a specified time, albeit this could be included in any conditions imposed. The proposals allow for broad discretion on the part of the constable who can impose “any condition” considered necessary and proportionate. In order to ensure that this provision meets Article 8 requirements, consideration should be given to defining in statute the standard conditions for investigative liberation. These standard conditions should be based on the minimum restriction necessary for the legitimate purpose being pursued. Any extra conditions should only be necessary to secure compliance with standard conditions. It may therefore be useful to specify the requirement to return to the police station at a specified time within these conditions, in circumstances where there is to be a charge or intimation that the matter is being reported to the procurator fiscal. The specified time would provide a clear point in time when investigative liberation ceases. This condition may not, however, be necessary in all circumstances and it is essential that the imposition of such a condition is considered in light of the presumption of liberty and respect for Article 8 rights.

While limited by an overall time period of up to 28 days, the provisions permit a person to be arrested repeatedly in respect of the same offence. Repeated arrest represents an interference with Article 5 and Article 8 rights. There is a risk of harassment if no further boundaries on the use of this power are put in place. The addition of principles emphasising the presumption of liberty (as discussed above at p.2) would be of particular assistance in relation to powers such as this.

Person to be brought before court (s. 18)

Anyone who is arrested or detained has the right to prompt access to judicial proceedings. In determining the meaning of ‘promptly’, regard must have been given to the circumstances of the case but some cases have shown that somewhere around four days may be considered the maximum period of detention before being brought before Court.⁶ The issue arising over bank holidays, where a person can be detained until the next sitting day up to five days later, risks reaching the threshold of being unacceptable under Article 5, a matter clearly identified by Lord Carloway. Section 18 does not, however, address this issue. While Lord Carloway recommended that the maximum period a person should be thirty six hours, the requirement set out by Section 18 makes no headway in ensuring that this time limit is met. The Commission believes that a time limit which meets the requirements of Article 5 should be introduced. If a time limit is not introduced, the Commission considers it essential that Lord Carloway’s recommendation that the period of time during which suspects are kept in custody for court should be kept under review by the COPFS be followed through and the issue of a statutory time limit revisited if necessary

Liberation by police (s.19)

While section 41 stipulates a general duty for the police not to detain persons unnecessarily, the relevant factors relating to those who have been officially accused

⁶ Brogan & Others v UK Application no. 11209/84, Tas v Turkey (2001) 33 EHRR 15 at para 86

but have not yet appeared in court are not outlined. In order to strengthen protection of the presumption of liberty, this provision should outline appropriate factors for consideration by a constable when considering whether or not to release an accused from custody. Those factors should echo those under section 10; whether the person (if liberated) would be likely to interfere with witnesses or evidence or otherwise obstruct the course of justice, the nature and seriousness of the offence and the probable disposal if convicted (as discussed above). They should also include the factors identified by Lord Carloway, namely whether the accused is liable to escape, will not appear at an appointed court diet or is likely to commit further crimes. Specification of these factors in statute will assist in ensuring that any interference with Article 8 rights is necessary and proportionate.

Release on undertaking (s.20)

The Commission has some concerns regarding the availability of a condition of curfew in the terms of a release on an undertaking. This change in practice has implications for both Article 5 and Article 8. A curfew represents a restriction on the accused's Article 8 rights. In addition, there is a risk that a curfew could lead to a de facto deprivation of liberty if used disproportionately. The Commission would suggest that a number of steps could be taken to mitigate these risks.

Firstly, confirming the overarching principle of the presumption of liberty in the Act, as suggested above, would serve to highlight the need to keep this under consideration in decisions such as these.

Secondly, this provision raises similar concerns as those in relation to the conditions attached to investigative liberation, as discussed above. Accordingly, consideration should again be given to defining standard conditions based on the minimum restriction necessary, with extra conditions, such as curfew, only available if necessary to secure compliance with standard conditions.

Finally, the dissemination of guidance as to the operation of this discretion would be beneficial, in order to highlight to constables the appropriate considerations to be taken into account. The existing guidelines from the Lord Advocate regarding conditions which can be attached to post-charge liberation should be expanded to include guidance on the use of curfews and the implications for deprivation of liberty.

Review of undertaking (s.22)

Given that the conditions of liberation constitute an interference with Article 8 rights, the Commission recommends that a time limit be introduced within which a review by the Sheriff must be carried out. The Commission would suggest that a hearing take place within 24 hours.

Information to be given before interview (s.23)

The Commission welcomes the requirement for the information to be given on arrest, set out in Section 3. However, the Commission is of the opinion that the suspect and his solicitor should be informed prior to interview of the content of the "reasonable grounds for suspicion". Article 6(3)(a) requires that the suspect be informed of the

nature of the allegation against him. Article 6(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. However, a requirement to disclose the content of the grounds for suspicion would allow the suspect and his lawyer to make an informed decision as to how to proceed.

Right to have a solicitor present (s.24)

While the jurisprudence of the ECtHR is not yet clear on whether/when the right to legal assistance arises for those not in police custody⁷, as discussed above⁸, there are situations where measures other than arrest deprive the suspect of his liberty. The jurisprudence of the ECtHR appears to be moving towards recognising a right to legal assistance in situations where there is “significant curtailment of [his] freedom of action”⁹.

In order to pre-empt the likely development of this right by the ECtHR, 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 Article 5, could trigger Article 6(3)(c). Similarly a 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 Article 6(3)(c).

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 most obvious grey area is where the police have grounds to arrest 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 arrested. This implied measure of compulsion or coercion or curtailment of freedom of action has been recognised by the legislature, as it is in the Bill (which proposes the same measure). There would seem little logical difference between the voluntary attendee being questioned at the police station, and the suspect questioned elsewhere whom the police could arrest but choose not to do so.

⁷ as discussed in SHRC’s Response to the Carloway Review Consultation at <http://www.scottishhumanrights.com/publications/consultationresponses/article/carlowayresponsejune2011>

⁸ See above at pages 3 & 4

⁹ *Zaichenko v Russia* App. No. 39660/02, Judgement 18 February 2010 at para 48

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.¹⁰ A similar practice exists in New Zealand.¹¹ 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 Article 6 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 arrested. The Commission is of the opinion that any suspect, whatever his location, who is to be questioned under caution should be afforded the right to legal assistance, be advised of that right at the time he is first cautioned, and be 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).

Statutory protection should be in place to ensure all suspects are treated fairly. It is important to recognise that in assessing whether a trial is fair, regard must be had to the entirety of the proceedings including the questioning of the suspect before trial.

This is particularly relevant in relation to access to legal advice and representation. The Commission notes and commends the dissenting opinion of Lord Kerr in *Ambrose* which sets out that the "features of a fair trial lead inexorably to the conclusion that where an aspect of the proceedings which may be crucial to their outcome is taking place, effective defence by a lawyer is indispensable. When one recognises, as Strasbourg jurisprudence has recognised for quite some time, that the entirety of the trial includes that which has gone before the actual proceedings in court, if what has gone before is going to have a determinative influence on the result of the proceedings, it becomes easy to understand why a lawyer is required at the earlier stage."

¹⁰ *R v Orbanski, R v Elias* [2005] 2 SCR 3, 2005 SCC 37, para 6, judgement of majority delivered by Charron, J.

¹¹ s 23(1)(b) New Zealand Bill of Rights Act 1990; *MOT v Noort, Police v Curran* [1992] 3 NZLR 260

It is important to bear in mind that the purpose of legal assistance is not only to protect the right against self-incrimination but also to provide a check on conditions of detention and any potential vulnerability of the suspect.

In addition, the requirement set down by *Salduz* is that a suspect must be provided with access to a lawyer from the time of the first interview unless there are compelling reasons, in light of the particular circumstances of the case, to restrict that right (emphasis added)¹². Any restriction on that right must not result in prejudice to the right to a fair trial, which even a justified restriction can do. The Commission is concerned that the level of discretion allowed to a constable by section 24(4) is too great and may not, therefore, meet the necessary standard. In order to assist in assessing whether “exceptional circumstances” exist that would constitute sufficiently compelling reasons to restrict the right, it would be beneficial for exceptional circumstances to be more precisely defined. Further the Commission recommends that the approval of an inspector or higher be required for such a restriction. It is essential that the police record the reasons for their decision, to ensure that they are valid.

Consent to interview without solicitor (s.25)

The Commission welcomes the requirement for the police to record the reasons for a suspect’s waiver of the right to legal assistance. This will enable proper scrutiny as to whether the waiver is valid – meaning whether 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.

It is essential that the reasons for waiver are recorded but there are also strong arguments in favour of requiring a full record of the entire discussion around waiver.

There are, however, 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.¹³ 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.¹⁴ Any statutory provision on the waiver of rights must take into account such differing vulnerabilities.

In order for a waiver to be knowing, intelligent and unequivocal, a suspect must be fully informed of the right, and the consequences of waiving it. A suspect should therefore receive the necessary advice to enable him/her to be “fully informed”. Such advice could be given in a variety of ways, such as by way of the information to be provided in terms of sections 3 and 5. At present, there would seem to be no means

¹² para 55

¹³ *Pishchalnikov v Russia* App. No. 7025/04, Judgement 24 September 2009

¹⁴ *Salman v Turkey* App. No. 35292/05, Judgement 5 April 2011

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 provision of legal assistance to children has been held by ECtHR to be of fundamental importance.¹⁵ 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 Article 6 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.*”¹⁶ 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.

The Commission is of the view that children should always have legal representation, with no option to waive that right and welcomes the provisions of the Bill regarding under 16s. If children aged 16 and 17 are able to waive their right of access to a lawyer then it must only be allowed when it is a fully informed decision. The Commission considers that this would only be possible after obtaining legal advice, rather than the advice of a relevant person.

The role of the parent, carer or responsible person should not be to advise on whether to waive the right of access to a lawyer. The role of the parent should be clearly defined as providing support for the child to understand and cope with the pressure of the situation. It should not be confused with the role of the legal representative. Parents/carers/responsible persons are not legally qualified, and may be as inexperienced in police investigations as the child and should not be put in the position of having to guide the child through their rights and the legalities of questioning.

Questioning of persons “officially accused” (s.27-29)

There are no rules under ECHR that an accused person cannot be questioned beyond a particular point in proceedings, provided his rights under Article 6 are met. This reflects the fact that there are very different legal systems which exist among the Convention states, including inquisitorial systems.

¹⁵ *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

¹⁶ *Panovits v Cyprus* App. No. 4268/04 Judgement 11 December 2008 [emphasis added]

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 Article 6, 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 deciding whether or not questioning following official accusation 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 officially accused person 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 and necessity of allowing questioning after someone is officially accused. There is a danger that it may, in certain circumstances, fall foul of Article 6.

If there is to be any form of questioning after a person is officially accused it must be accompanied by relevant protections including the right to legal assistance, to proper disclosure and that no adverse inference be drawn.

Child suspects (s.31 & 32)

There are a series of international instruments in relation to children in the criminal justice system that must be considered, including the UNCRC, 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 Commission notes that the age of criminal responsibility has important implications regarding how early a child can come into contact with the justice system. In Scotland the age of criminal responsibility is 8, albeit that due to recent changes a child cannot be prosecuted for an offence committed when they were under the age of 12.

The Beijing Rules ask states to ensure that the age of criminal responsibility is not set too low and that emotional, mental and intellectual maturity are taken into account. The United Nations (UN) Committee on the Rights of the Child, in its authoritative interpretation of Article 40 of the CRC recommends that States:

“increase their lower minimum age of criminal responsibility to the age of 12 years as the absolute minimum age and to continue to increase it to a higher age level” .

The Committee reiterated this in relation to Scotland in its Concluding Observations on the United Kingdom. The Government should take the opportunity presented by this Bill to raise the age of criminal responsibility from 8.

It is important that the role and responsibilities of parents, carers and responsible persons is clearly set out. Part 1 of the Children (Scotland) Act 1995 sets parental responsibilities and rights, such as to direct and guide the child until age 16 and to guide until age 18. In the context of a child arrested, detained or questioned, it is important that there is clarity that the role is to support the child, not to make decisions on the child’s behalf or act as a legal representative.

Vulnerable persons (s.33 & 34)

There is a problem in providing a comprehensive definition of a vulnerable adult. The definition of “vulnerable persons” in the Bill considers vulnerability as being a consequence of mental disorder, however, vulnerability may exist for a variety of reasons. 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. The definition in the Bill covers only those who are vulnerable by way of mental disorder and as a consequence, there may be cases where the necessary support and advice to secure Article 6 rights is not provided.

Given that the Bill provides that it will be for police to identify vulnerability, it is important 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. Such training should take into account the developing case law on legal capacity which increasingly refers to the rights set out in the United Nations Convention on the Rights of Persons with Disabilities, particularly Article 12. The rights of personal autonomy under Article 8 ECHR must be respected and the Government should ensure that, in applying this provision, the right to legal capacity is respected.

Right to consultation with a solicitor (s.36)

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 Article 6(3)(c)

it is not necessarily enough simply to appoint a lawyer. The right must be effective. Given that the purposes behind the right to legal assistance extend beyond protecting the right not to incriminate oneself, it would appear self-evident that cases will arise where a telephone call is inadequate to protect the 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.

The terms of section 36 of the Bill are unclear as to who is to determine the appropriate means of consultation. The Commission would be concerned if this is a matter for the police rather than for the suspect and his legal advisor to determine.

Best interests of the child s.42

Scotland has a strong tradition in relation to the protection of the rights of the child. The Children (Scotland) Act 1995 provides that the welfare of the child concerned should be *the paramount* consideration when making decisions about them. This goes further than the minimum requirement set out in Article 3 of UNCRC of requiring the best interest of the child to be a *primary* consideration. The Commission's view is that section 42(2) should use the higher standard of "paramount".

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. The Commission recommends that this should be explicitly stated in the terms of Section 42.

Abolition of requirement for constable to charge (s.51)

The process of charge under Scots law serves a useful function in terms of informing an individual of the reasons why they are being held and taken to court as required by Article 5(2) and Article 6(3)(a) of the European Convention on Human Rights (ECHR). It can also help towards providing the individual with adequate time and facilities to prepare their defence as guaranteed under Article 6(3)(b), which includes such things as the preservation of evidence.

Under the current system, the process of charge marks a clear point in the proceedings when a decision must be made about whether it is necessary and proportionate to continue to hold a person in custody. It also clearly marks the point when a suspect's status changes so that suspects are aware they can no longer be subjected to unauthorised questioning or certain other evidence gathering procedures against their will. Thus it serves a useful purpose in protecting the right against self-incrimination. Under the proposals, any further questioning or gathering of evidence from the suspect (accused) will be subject to independent scrutiny by the courts.

Section 51 means that the benefits described above may not be retained. Under the proposals, a person may be charged by a constable or they may be informed that a report is to be submitted to the procurator fiscal. This dual route provides less clarity as to the point at which the suspect's status changes and has the potential to create "grey areas". The requirement for police charge provides clarity for the suspect, the police and the courts as to the suspect's status, allowing clear triggers for Article 6 rights to be identified by all parties.

PART 2 CORROBORATION & STATEMENTS

Corroboration (s.57-61)

In its response to the Scottish Government's earlier consultation on Reforming Scots Criminal Law and Practice, the Commission expressed its view that corroboration acts to safeguard the quality of evidence.¹⁷ It is a means by which the reliability and credibility of evidence can be tested by the fact finder. It 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.

It is the Commission's view that if corroboration is abolished and insufficient additional safeguards are introduced, there is a danger that Scots law will have inadequate measures in place to allow for effective challenge to the quality of evidence. The Commission's concern is therefore that the risk of violation of Article 6 may be increased¹⁸.

The Commission emphasises that, in light of the Government's unnecessarily hasty response to the *Cadder* judgement, sufficient time needs to be taken to properly address the concerns of a wide range of stakeholders in order to ensure that the additional safeguards are fit for purpose and are sustainable. Failure to do so poses the risk of further adverse judgements, miscarriages of justice, disruption of the administration of justice and reduction of public confidence. To this end it is therefore necessary to fully understand the objective and consequent potential development of

¹⁷ See SHRC's response to Scottish Government Consultation on Reforming Scots Criminal Law & Practice 2012 at <http://www.scottishhumanrights.com/research/library/article/criminallaw2012>

¹⁸ See SHRC's detailed response to Scottish Government Consultation on Reforming Scots Criminal Law and Practice: Additional Safeguards Following the Removal of the Requirement for Corroboration, March 2013, at <http://www.scottishhumanrights.com/publications/consultationresponses/article/corroborationmarch2013>

the interpretation of Article 6 so as to determine how to replace corroboration with adequate additional safeguards and so not, although unintentionally, create difficulties due to taking a more minimalist compliant approach.

In deciding whether there has been a violation of Article 6, the European Court of Human Rights (ECtHR) considers whether the proceedings as a whole were fair. It is possible to identify certain key features of a fair trial. Of particular relevance to the present context are the need for proceedings which are adversarial in character, and the need for fair rules of evidence.¹⁹

Generally the ECtHR leaves the regulation of rules of evidence and procedure to the national systems. However, in considering whether the trial as a whole is fair, the ECtHR may require to consider broader issues relating to evidence and procedure, including the basis on which evidence has been obtained, the use to which evidence may be put, and the extent to which evidence may be relied upon.²⁰

In determining whether a trial is fair, ECtHR has regard to whether the rights of the defence have been respected. In particular, 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, whether an accused has the opportunity to challenge the authenticity of evidence and oppose its use, and with the quality of evidence relied upon for conviction. The ECtHR has confirmed that the stronger the evidence is, the less requirement for supporting evidence. By way of corollary, the weaker the evidence, the more important the requirement for supporting evidence.²¹

The ECtHR recognises the existence of corroborating evidence as a procedural safeguard of a fair trial. There are many examples of cases in which the availability (or not) of corroborating evidence has played a role in determining whether a trial has been fair. Where there is a risk of evidence being unreliable, the need for supporting evidence (in other words, corroboration) is greater in order to secure a fair trial.²²

Corroboration performs a “quality control” function, whether it exists as a legal requirement for sufficiency in every case, or because it exists as a matter of fact in a particular case. Where there is a source of evidence being relied upon for conviction which attracts concern about its quality (whether in terms of how it was obtained, its authenticity, its reliability or its accuracy), corroboration provides a means by which one can assess whether basing a conviction wholly or partly upon such evidence is unfair. It is a very practical tool which assists in the assessment of reliability of evidence.

There are certain types of evidence which give rise to concerns about reliability and accuracy and which otherwise disadvantage the rights of the defence. These include dock identification, evidence admitted under section 259 of the Criminal Procedure (Scotland) Act 1995, evidence of anonymous witnesses or undercover

¹⁹ The other features are the principle of legal certainty, and the issuing of a fair and reasoned judgment. Reed & Murdoch: Human Rights Law in Scotland, 3rd ed., pp 598-638

²⁰ *Gafgen v Germany* (22978/05)(Grand Chamber 1/6/12), para.162-163

²¹ *Gafgen*, para.164 *et seq.*

²² For example, *Allan v United Kingdom* (App. No. 48539/99), para.43

police officers, and unlawfully obtained evidence. In relation to dock identification, corroboration has been considered an important protection (in combination with other safeguards) against a violation of Article 6.²³ For other types of evidence, corroboration may not always provide a sufficient safeguard.²⁴ If the legal requirement for corroboration is abolished, there need to be sufficient other potential safeguards in place to ensure that the fairness of the trial is not compromised. Otherwise, whether or not a trial is fair may be determined by whether there happened to be corroborative evidence – that is, determined by a matter of fact rather than because of legal safeguards. The Commission is concerned that the consequences of abolition and the alternative safeguards needed in cases involving particularly problematic types of evidence have not been adequately taken account of.

In considering what other measures the ECtHR recognises as performing a “quality control” function, it is notable that the court has recognised exclusionary rules of evidence as providing such a safeguard.

In *Khan v United Kingdom*,²⁵ the applicant alleged a violation of Article 6 because his conviction was based on evidence which had been obtained in violation of Article 8. It had been the only real evidence against the applicant. The ECtHR held that there was no violation of Article 6. The reason for doing so was that the applicant had the opportunity to challenge the authenticity and use of the evidence, and could have availed himself of the exclusionary rule under section 78 of the Police and Criminal Evidence Act 1984. That section provides:

(1) In any proceedings the court may refuse to allow evidence on which the prosecution propose to rely to be given if it appears to the court that, having regard to all the circumstances, including the circumstances in which the evidence was obtained, the admission of the evidence would have such an adverse effect on the fairness of proceedings that the court ought not to admit it.

Scots law has no equivalent of section 78 of PACE. The Scots common law rule allowing unfairly obtained evidence to be excluded is arguably a much stricter test and confers a far narrower discretion on a trial judge.

The ECtHR identified several other “strong procedural safeguards” in addition to corroboration, in the context of the use of hearsay evidence. In *Al-Khawaja and Tahery v United Kingdom*,²⁶ the ECtHR had to consider the fairness of trials in which hearsay evidence was admitted and formed the basis of conviction. Strong procedural safeguards are necessary in this context because of 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 accuracy and reliability of the evidence).

The safeguards highlighted by the Court included²⁷:

²³ *Holland v HMA* 2005 1 SC(PC) 3, para.57

²⁴ for example, *N v HMA* 2003 JC 140, para.26, per LJC

²⁵ App. No. 35394/97

²⁶ Applications nos. 26766/05 and 22228/06, Grand Chamber judgment 15 December 2011, para.147

²⁷ *Ibid* at paras.148-151

- 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 right of the defence to lead evidence challenging the credibility and reliability of the statement, which would have been inadmissible if the maker of the statement was giving evidence in the usual way. There is no equivalent safeguard in the Scottish legislation.
- 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 ECtHR has recently confirmed that whatever the procedural safeguards may be, they must provide a real chance of effectively challenging the reliability of decisive evidence.²⁸ 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.²⁹ The Justice Clerk went on to commend the legislative safeguards in the equivalent English legislation as “prudent”.³⁰

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 it³¹ or if it has already been admitted, it should stop the proceedings. It appears to

²⁸ *Papadakis v The Former Yugoslav Republic of Macedonia*, App. No. 50254/07

²⁹ 2003 JC 140, para.22

³⁰ *Ibid* at para.27

³¹ per Lord Gill, *ibid* at paras. 35-36.

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.

Allowing a jury to consider convicting an accused on the basis of very poor evidence, or evidence where the ability of the defence to challenge it has been significantly restricted, jeopardises a fair trial.

The requirement to ensure a fair trial is a matter of law. It is therefore an obligation that rests with the judge. The Commission disagrees with Lord Carloway's view that all cases ought to be left to juries. Juries are masters of fact. The question of whether a verdict based on poor evidence is compatible with Article 6 in any given case is a legal question. The judge has to ensure the fairness of proceedings and protect the accused's Article 6 rights.

Given the State's positive duty under Article 6 to put in place a domestic system that meets the requirements of a fair trial, there must be adequate measures in place to allow the judge to give effect to his duty to prevent an unfair trial.

The introduction of a power to allow a judge to withdraw a case from the jury if no reasonable jury could convict on the basis of the evidence before it, would be a good procedural safeguard. It is a safeguard that addresses the quality of evidence, which in the absence of corroboration, is particularly important. 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. The Commission would recommend such a power be introduced.

It should be noted, however, that the introduction of a "no reasonable jury" test would 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."³²

Again the Commission notes the importance which ECtHR attaches to a fact finder's ability to conduct a fair and proper assessment of the reliability of evidence. As has been stated, corroboration is a useful practical tool for that purpose.

³² *Al-Khawaja & Tahery v United Kingdom*, para.165

The Commission considers that the introduction of a “no reasonable jury” test should allow the judge to stop a case going to the jury where the conviction would be *partly* based on evidence that is of very poor quality. It should also allow the judge to apply the same qualitative assessment to a particular piece of evidence prior to it reaching the jury’s ears. In the absence of measures to allow judges to exclude individual pieces of evidence upon which no reasonable jury could rely for conviction, the potential strength of this safeguard is reduced. Such evidence ought not to be heard by the jury at all, hence the need for the power to exclude it. The Commission has recommended the introduction of a discretionary power for judges similar to that in section 78 of PACE. That, combined with the “no reasonable jury” test, would provide a better matrix of procedural safeguards.³³

While the Commission acknowledges that in the majority of cases it is likely that corroborative evidence will be led (and will act as a procedural safeguard), the system of criminal law needs to have measures in place to provide sufficient procedural safeguards for those cases in which there is no corroboration. Further in respect of types of evidence which give rise to concerns about reliability or which restrict the rights of the defence, it has already been noted by Scotland’s now most senior judge, that additional procedural safeguards (such as those in England) are “prudent”.³⁴

Exculpatory and mixed statements (s.62)

The Commission welcomes this provision. The content of a statement by an accused should be available as proof of the truth of its contents whether it is exculpatory, incriminatory or mixed, provided the statement has been lawfully and fairly obtained. The Commission notes that the provision could, perhaps, be more clearly expressed.

PART 3 SOLEMN PROCEDURE

Increase to jury majority required for conviction (s.70)

The ECtHR has not spoken directly on the question of simple jury majorities.

In *Pullar v United Kingdom*,³⁵ the majority did appear to consider that a jury comprised of 15 people was a procedural safeguard in the context of considering whether one of the jury’s number may not have been independent and impartial.³⁶ In the partly dissenting judgment, reference was made to the fact that there was a majority verdict to support the dissenting judge’s position that Mr Pullar was objectively justified in having doubts about the impartiality of the jury.³⁷

It is obvious that requiring a greater than simple majority for a guilty verdict provides a stronger procedural safeguard. However, the Commission does not consider that

³³ Albeit in Mr Tahery’s case, such a matrix was still insufficient to guarantee a fair trial because of the absence of corroboration.

³⁴ *N v HMA*, per Lord Gill

³⁵ App. No. 22399/93

³⁶ *ibid* at para.40-41

³⁷ See Partly Dissenting Joint Opinion of Judges Ryssdal and Makarczyk joined by Judges Spielmann and Lopes Rocha

this is an adequate safeguard to balance the abolition of the requirement for corroboration, as more fully described above. That is because jury majorities do not play any part in securing that only evidence of sufficient quality can form the basis for a conviction.

PART 5 APPEALS & SCCRC

References by SCCRC (s.82)

The Commission welcomes the approach that there will be no further statutory listing of the criteria included in the “interests of justice” test for SCCRC references. The Commission also recommends that s194C(2) of the 1995 Act be repealed. It is clear that SCCRC already took account of finality and certainty in applying the interests of justice test. The continued existence of the provision carries the danger that, in time, finality and certainty will be taken to have some greater weight than other considerations. While finality is important for the rule of law, it is able to be interfered with for good reasons.

The Commission welcomes the repeal of section 194DA. However, the Commission opposes the introduction of an additional hurdle in the determination of an appeal for those whose cases have been referred by the SCCRC. The proposal that the test should include “it is in the interests of justice that the appeal be allowed” constitutes such an additional hurdle. There is no reason in principle or in practice to distinguish between victims of miscarriages of justice simply based on the route by which their case happens to have arrived at the appeal court.

This constitutes a barrier to access to justice without apparent justification. The Commission accepts that it may be justified to impose a higher test in cases occasioned by a change in law, such as those arising from *Cadder*, however, this reasoning does not apply to the broader category of cases referred by the SCCRC. The court will only have occasion to apply the test set out in s. 194B in cases where it has found that a miscarriage of justice has occurred. In these circumstances, the justification for imposing a further hurdle in the determination of the appeal has not been made out.

Scottish Human Rights Commission
29 August 2013