# REFORMING SCOTS CRIMINAL LAW AND PRACTICE:
# THE CARLOWAY REPORT

## Scottish Government Consultation Paper

<table>
<thead>
<tr>
<th>Chapter</th>
<th>Contents</th>
<th>Page</th>
</tr>
</thead>
<tbody>
<tr>
<td>i</td>
<td>Foreword</td>
<td>2</td>
</tr>
<tr>
<td>ii</td>
<td>Responding to the consultation</td>
<td>3</td>
</tr>
<tr>
<td>1.</td>
<td>Introduction</td>
<td>5</td>
</tr>
<tr>
<td>2.</td>
<td>Arrest and detention</td>
<td>8</td>
</tr>
<tr>
<td>3.</td>
<td>Custody</td>
<td>12</td>
</tr>
<tr>
<td>4.</td>
<td>Liberation from police custody</td>
<td>16</td>
</tr>
<tr>
<td>5.</td>
<td>Legal advice</td>
<td>19</td>
</tr>
<tr>
<td>6.</td>
<td>Questioning</td>
<td>24</td>
</tr>
<tr>
<td>7.</td>
<td>Child suspects</td>
<td>28</td>
</tr>
<tr>
<td>8.</td>
<td>Vulnerable adult suspects</td>
<td>32</td>
</tr>
<tr>
<td>9.</td>
<td>Corroboration</td>
<td>36</td>
</tr>
<tr>
<td>10.</td>
<td>Other criminal evidence issues</td>
<td>43</td>
</tr>
<tr>
<td>11.</td>
<td>Appeal procedures</td>
<td>49</td>
</tr>
<tr>
<td>12.</td>
<td>Finality and certainty</td>
<td>53</td>
</tr>
</tbody>
</table>

Annex A: List of consultation questions 57
Annex B: Respondent Information Form and consultation questionnaire (attached separately)
FOREWORD BY THE CABINET SECRETARY FOR JUSTICE

The effective operation of our justice system is an important factor in maintaining public confidence in the rule of law.

In October 2010, a decision of the UK Supreme Court in the case of HMA v Cadder overturned decades of Scottish procedure regarding the questioning of detained subjects. The Supreme Court’s ruling, which overruled Scotland’s highest criminal appeal court, meant that Scots law was incompatible with the European Convention on Human Rights. I took immediate action in the form of the Criminal Procedure (Legal Assistance, Detention and Appeals) (Scotland) Bill to put our statutory law back on an ECHR-compliant footing.

As much as the decision in Cadder caused upheaval, it also provided the opportunity to re-evaluate our justice system in more detail. I therefore asked Lord Carloway to undertake his review of Scots law and practice, which reported on 17 November 2011. The Carloway Report is an extensive piece of work which I strongly believe provides a clear and coherent package of reforms to modernise the Scottish criminal justice system.

The changes proposed by Lord Carloway are far-reaching and radical. Some, such as the removal of the requirement for corroboration, are monumental and will overhaul many years of legal practice.

Lord Carloway spent a year consulting and carrying out extensive research before producing his report. This has been followed by informative debate on his recommendations in Parliament, both in the main chamber and in the Justice Committee. I would like to continue this debate as I look to take Lord Carloway’s recommendations forward.

Lord Carloway’s recommendations sit alongside a substantial programme of wider work to reform courts and procedures. These include Lord Gill’s recommendations for reform of the civil courts, Sheriff Principal Bowen’s proposals for Sheriff and Jury reform and ongoing work to improve the efficiency and effectiveness of the summary courts. All of these reforms are brought together within the Making Justice Work programme, which will ensure that they are implemented in a coherent way. Our work to implement Lord Carloway’s recommendations will form an integral part of that programme.

It is my intention to present a Bill to Parliament based upon the recommendations in the Carloway Report but which is also informed by your responses to this consultation.

I look forward to hearing your views as we address these historic recommendations.

Kenny MacAskill
Cabinet Secretary for Justice
RESPONDING TO THE CONSULTATION

The Government welcomes responses to this consultation document by 5 October 2012. Please send your response with the completed Respondent Information Form (see "Handling your response" below) to:

carrowayconsultation@scotland.gsi.gov.uk

or:

Iain Hockenhull
Criminal Justice & Parole Division
GW14 St Andrew's House
Edinburgh
EH1 3DG

If you have any queries, contact Iain Hockenhull on 0131 244 3317

We welcome responses to some or all of the questions. If you are only interested in parts of the consultation please indicate clearly in your response which questions or parts of the consultation paper you are responding to, as this will aid our analysis of the responses received.

This consultation, and all other Scottish Government consultation exercises, can be viewed online on the consultation web pages of the Scottish Government website at http://www.scotland.gov.uk/consultations.

The Scottish Government now has an email alert system for consultations (SEconsult: http://www.scotland.gov.uk/Consultations/seConsult). This system allows stakeholder individuals and organisations to register and receive a weekly email containing details of all new consultations (including web links). SEconsult complements, but in no way replaces SG distribution lists, and is designed to allow stakeholders to keep up to date with all SG consultation activity, and therefore be alerted at the earliest opportunity to those of most interest. We would encourage you to register.

Handling your response

We need to know how you wish your response to be handled and, in particular, whether you are happy for your response to be made public. Please complete and return the Respondent Information Form as this will ensure that we treat your response appropriately. If you ask for your response not to be published we will regard it as confidential, and we will treat it accordingly. A copy Respondent Information Form is available on the Scottish Government website alongside a Consultation Questionnaire designed to assist consultees in responding. The use of the questionnaire is entirely optional and responses on any relevant issue in any format are welcome.

All respondents should be aware that the Scottish Government is subject to the provisions of the Freedom of Information (Scotland) Act 2002 and will therefore
consider any request made to it for information relating to responses made to this consultation exercise.

**Next steps in the process**

Where respondents have given permission for their response to be made public and after we have checked that they contain no potentially defamatory material, responses will be made available to the public in the Scottish Government Library (see the attached Respondent Information Form). These will be made available to the public in the Scottish Government Library by 5 November 2012 and on the [Scottish Government consultation](#) web pages by 30 November 2012. You can make arrangements to view responses by contacting the SG Library on 0131 244 4552. Responses can be copied and sent to you, but a charge may be made for this service.

**What happens next?**

Following the closing date, all responses will be analysed and considered, with a view to bringing forward legislation. We aim to issue a report on this consultation process by the end of November 2012.

**Comments and complaints**

If you have any comments about how this consultation exercise has been conducted, please send them to:

Iain Hockenhull  
Criminal Justice and Parole Division  
GW14 St Andrew's House  
Edinburgh  
EH1 3DG  
Or e-mail: carlowayconsultation@scotland.gsi.gov.uk

Note: this consultation paper is a working document. Text may be modified as a result of responses to the consultation exercise, so should not be taken to reflect the final position.
1. INTRODUCTION

Lord Carloway’s Review

1.1 On 26 October 2010, Lord Carloway was asked to lead an independent review of law and practice following United Kingdom Supreme Court's decision in the case of Cadder v HMA and the subsequent passage of the Criminal Procedure (Legal Assistance, Detention and Appeals) (Scotland) Act 2010 (the “2010 Act”).

1.2 The terms of reference for the review, which were agreed between Lord Carloway and Kenny MacAskill, the Cabinet Secretary for Justice, were as follows:

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

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

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

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

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

1.3 Lord Carloway carried out his independent review with the support of a specialist team seconded from justice organisations. The review team operated independently of their parent organisations, answering only to Lord Carloway. Lord Carloway also made extensive use of an independent reference group made up of representatives from justice organisations, legal practitioners, the judiciary and academics.

1.4 The Review process consisted of a range of evidence gathering, research, analysis and consultation. The consultation process ran from 8 April 2011 until 3 June 2011 and received a total of 51 responses.
1.5 The Carloway Report was published on 17 November 2011. A copy of the Report and associated materials from the consultation process are available at the Review’s [website](#).

**The Carloway recommendations - summary**¹

*Under the changes recommended by Lord Carloway, the revised criminal justice system will start from a simplified, unitary system of arrest, on reasonable grounds for suspicion, and detention. An arrest will trigger a set of rights for the suspect securing access to a lawyer, with particular protections for child suspects and vulnerable adults, to ensure that any proceedings against the suspect constitute a fair trial. It will also entail a system in which a suspect being charged should be brought before the court within 36 hours of arrest. Alongside this the police will have greater powers to conduct a structured investigation, with the ability to liberate a suspect on condition they return for later questioning, with other unnecessary constraints on questioning removed, subject to the supervision of the courts. This will give the police time to pursue further investigations other evidence such as phone records or DNA evidence.*

*Similarly, there will be a less rule-bound approach to the evidence gathered. Judges and juries should assess the quality and relevancy of evidence, free of the current restrictive rules and principles, such as the general requirement for corroboration, that belong to an earlier age and, as research has indicated, may now operate as an impediment to justice. And if a judicial decision at first instance is to be challenged, there will be a single, streamlined and well-regulated appeal process to follow, rather than the various and archaic procedures currently in place. The Scottish Criminal Cases Review Commission will be reinforced as the final safeguard against miscarriages of justice.*

**The Government’s approach**

1.6 The Scottish Government has listened closely to the comment and discussion following the publication of the Carloway Report. This has taken the form of press coverage, a debate in Parliament, written correspondence received and [evidence sessions](#) held by the Justice Committee in November and December 2011.

1.7 Many of Lord Carloway’s recommendations have already been widely accepted, in principle at least, by most commentators. The main focus of debate has centred on the recommendation to remove the requirement of corroboration and links between that recommendation and wider aspects of Scots law.

1.8 The Government’s broad approach has been to accept Lord Carloway’s report as a substantial and authoritative piece of work. We have accepted the broad reasoning as set out in the Carloway Report. This consultation paper is therefore not attempt to revisit his review. It is designed to promote public discussion of his recommendations to assist us in translating the package of reforms he has proposed

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¹ Extracted from the [news release](#) accompanying publication of the Carloway Report. An [Executive Summary](#) is also available.
into legislation. Readers are encouraged to refer to the Carloway Report for further background and detail in relation to individual recommendations.

1.9 The logic of Lord Carloway’s recommendations is that they are self-standing and he does not recommend further review, except on some specific issues, most notably the treatment of vulnerable adults within the system. The Scottish Government does not intend to commission a further independent review of the law linked to the Carloway recommendations at this stage.

1.10 We intend to introduce a Bill to Parliament, at an early legislative opportunity, based around Lord Carloway’s recommendations, and taking into consideration the views provided through this consultation process.

The European Context

1.11 The Government is committed to fulfilling its international obligations and in particular to introduce legislation which complies with the terms of the European Convention on Human Rights (ECHR) and EU Law. The EU published a ‘roadmap’ on procedural rights in 2009 and a number of measures have followed. Directives have been agreed on Interpretation and Translation and the Right to Information. A draft directive on Access to a Lawyer, which is closely connected to the Carloway recommendations, is currently being negotiated. At the time of publication the UK Government has not opted in to that measure but the Scottish Government remains engaged with negotiations and we hope to reach a position where we and the UK as a whole can opt in at a later stage. The EU Commission are planning further draft directives in relation to vulnerable suspects and legal aid and a Green Paper has been published on pre-trial detention. We will continue to engage closely with these developments and our objective will be to ensure that the law in Scotland meets and exceeds common international standards.

Format of this consultation paper

1.12 There are 41 consultation questions in this paper. Each chapter sets out Lord Carloway’s recommendations, highlights debate on the topic, explains the Government’s view, and concludes with a question(s) on which we would welcome views. The consultation questions are then reproduced separately in Annex A.
2. ARREST AND DETENTION

2.1 The arrest and detention of suspects of crime is a core function of the police. Lord Carloway examined the manner in which suspects are currently taken into police custody and questioned on suspicion of having committed a criminal offence. Similar powers in other jurisdictions were also explored. Lord Carloway put forward recommendations for improvements to the current processes including the introduction of a new power of arrest on suspicion of having committed a crime. The Report proposes defining arrest and subsequent detention and the grounds by which police can exercise these powers. It sets out a coherent and easily understood process which is intended to meet the needs of police, judiciary and the suspect, whilst ensuring compliance with the ECHR.

Lord Carloway’s recommendations:

— a suspect, who is not detained or being questioned, should not have a distinct legal status with statutorily defined rights;

— section 14 detention should be abolished and the only general power to take a suspect into custody should be the power of arrest;

— arrest should be defined as meaning the restraining of the person and, when necessary, taking him/her to a police station;

— arrest should be distinguished from detention, which should be defined as the holding of a suspect in custody once he/she is at a police station and pending possible appearance in court;

— the ground for both arrest and subsequent detention should be defined in statute as reasonable suspicion that the person has committed a crime;

— legislation should make it clear that, although a person must be advised of the reason for his/her arrest and detention and of any charge against him, it is not necessary for an arrest or detention to be accompanied by a charge;

— the reason for arrest and subsequent detention should be stated to be to bring the person before the court, by way of continued investigation into the merits of the case and reporting to the procurator fiscal with a view to service of a summary complaint or a petition in accordance with current practice;

— statute should provide that a suspect should not be detained unless it is necessary and proportionate and in particular that the suspect: (a) is liable to escape; (b) will not appear at an appointed court diet; (c) is likely to commit further crimes; or (d) may destroy evidence, interfere with witnesses or otherwise obstruct the course of justice;
— it should be an express statutory requirement that, in determining whether a suspect’s detention or continued detention is necessary and proportionate, the nature (including level of seriousness) of the crime and the probable disposal if convicted must be taken into account. Only in exceptional circumstances should a person be detained where the charge does not involve an imprisonable offence;

— it should be made clear that the police have power to question a suspect and to carry out any other lawful investigative procedures notwithstanding the suspect’s arrest and detention, in the same way as they have at present with a person in section 14 detention;

— no court warrant ought to be required to arrest and detain for imprisonable offences on reasonable suspicion; and

— for non imprisonable offences, such a warrant should be a requirement unless the police officer is of the view that, were such a warrant to be obtained, the suspect:
  (a) would be likely to abscond; or
  (b) may destroy evidence, interfere with witnesses or otherwise with the course of justice pending any court appearance.

Background

2.2 The question in issue in the Cadder case was whether a person who had been detained by the police on suspicion of having committed an offence has the right of access to a lawyer prior to being interviewed. At that time, sections 14 and 15 of the Criminal Procedure (Scotland) Act 1995 (“the 1995 Act”) allowed a police constable to detain a suspect for up to 6 hours and put questions to him. The detainee was under no obligation to answer them and was informed of that at the outset. He was entitled to have a solicitor informed of his detention. But under the law he had no right of access to a solicitor during the six hours. The Supreme Court held in this case that Article 6 of the ECHR requires that a person who has been detained by the police has the right to have access to a solicitor prior to being interviewed unless in the particular circumstances of the case there are compelling reasons to restrict that right. The Report notes that in all but the most exceptional cases, evidence of an admission made by the suspect before he has been afforded that right will be inadmissible in any subsequent trial. The police must have “reasonable grounds to suspect” a person if they wish to detain him.

2.3 Emergency legislation in 2010 took swift and corrective action to address the judgment, in particular to provide a statutory right for suspects to have access to a solicitor and to extend the time afforded to police to perform their interviews and enquiries in light of this.

2.4 The legal challenges surrounding solicitor access and the subsequent Cadder ruling which prompted the emergency legislation led to questions being asked as to whether the current processes of detention and subsequent arrest are fit for purpose. Lord Carloway concludes that the distinction between arrest and detention has been
eroded to such an extent, including by the *Cadder* judgment, that there is little purpose in continuing with the two different states. The Report concludes that it would be simpler, and more clearly in tune with ECHR, to have a single period of custody (detention), once a suspect has been arrested on suspicion. Lord Carloway recommends that the powers currently conferred through section 14 are changed to a single power to arrest a person on the ground of ‘reasonable suspicion’. Arrest would be defined as the initial deprivation of liberty, i.e. the restraining of the person and taking them to the police station. The Report states that police questioning of a suspect (whilst detained) is permitted by ECHR provided that the intention is to bring the suspect before the court *if* the reasonable suspicion is confirmed.

2.5 Lord Carloway is clear that a suspect should be held in custody only where the suspect cannot reasonably be brought to court without detaining them. There will be cases where detention is needed to allow the police to properly investigate crimes and to ensure the suspect complies with the criminal process. In addition, the police would be required to consider the proportionality of holding a suspect in custody, taking account of the nature and seriousness of the crime and the probable disposal, if convicted.

**Response to recommendations**

2.6 During evidence sessions on the Carloway Review by the Scottish Parliament Justice Committee, there was limited discussion about the recommendations concerning arrest and detention. There was, however, widespread support for the clarity of the recommendations proposed on arrest and detention. ACPOS commented that the concept of arrest on reasonable suspicion, with an investigation continuing beyond that, was more straightforward and easily understood by the general public. They recognised that a judgment would have to be made in each case with regard to what constituted ‘reasonable suspicion’. It was noted that if the recommendations meant that the police could detain someone more than once and interview people after charge, then voluntary attendances might reduce.

**Scottish Government View**

2.7 The Government believes Lord Carloway’s recommendation for a move to a single period of police custody after arrest on reasonable suspicion introduces greater clarity to the arrest and detention process. We broadly accept the more detailed elements of his recommendations and are keen to hear views from consultees about practical issues that will need to be considered in putting them into effect.

**Question 1**

*What are your views on the move to a power of arrest on ‘reasonable suspicion’ of having committed a crime, replacing the common law and statutory rules on arrest and detention?*
**Question 2**

What are your views on Lord Carloway’s recommendations for the police no longer to be required to charge a suspect with a crime prior to reporting the case to the Procurator Fiscal? How is this best achieved in practice?

**Question 3**

Do you agree that a suspect in a criminal investigation, who has not been detained or arrested, does not require any statutory rights similar to those conferred had that person been arrested and detained?

**Question 4**

What are your views on the recommendation that a suspect should be detained only if it is necessary and proportionate having regard to the nature and seriousness of the crime and the probable disposal if convicted?
3. **CUSTODY**

3.1 In his Report, Lord Carloway highlighted that current law and practice has the potential to allow a person to be held, in certain circumstances, for a period of 4 and perhaps 5 days in police custody prior to appearance in court. He considers such lengthy periods unacceptable and recommends several changes to current arrangements for detention at a police station and subsequent appearance at court. Lord Carloway specifically assesses the maximum length of time a suspect should be detained before charge or released by the police, and the most appropriate way of reviewing a suspect’s status whilst detained in police custody. He also considers aspects of police charge, including timing at which the police should proffer a charge and the requirement for the police to issue a charge prior to reporting the case to the procurator fiscal.

**Lord Carloway’s recommendations:**

- section 17 of the Police (Scotland) Act 1967 should be amended so that the duty of the police is to ensure that persons arrested are not unnecessarily or disproportionately detained in custody;

- there should be a requirement that a person cannot be kept in police custody for more than twelve hours without being:

  (a) charged; or
  (b) advised that he/she is to be reported to the procurator fiscal with a view to him/her being charged with a specific offence;

- there should further be a requirement on the police to review any period of detention before charge at or about six hours after detention. Such a review should be carried out by an officer of at least the rank of inspector who has not been directly involved in the investigation;

- the time for appearance at court should be altered to the first court day after charge or notification of an intention to report to the procurator fiscal; both the common law and section 135(3) of the 1995 Act should be amended accordingly;

- it should be made explicit that there is no rule requiring the police to charge a suspect upon arrest, or once a sufficiency of evidence has been reached, and that, subject to compliance with the proposed regime in relation to arrest, detention and court appearance, the point at which the police proffer a charge or decide to report the suspect to the procurator fiscal is a matter for their discretion; and

- the period of time during which suspects are kept in custody should be kept under review by the COPFS. If it transpires under the new regime that suspects are being kept in custody without court appearance for more than thirty-six hours from the time of their arrest, measures (e.g. Saturday courts) should be introduced to
prevent that from occurring. Meantime consideration must be given to the reorganisation of the times of existing workloads in the procurator fiscal service and the courts.

Background

3.2 Suspects are detained using powers under the 1995 Act. Those provisions were amended by the 2010 Act which extended the period that police had to interview suspects from 6 hours to a period of 12 hours with potential for extension for a further 12 hours on the authority of a senior police officer (i.e. 24 hours in total). Lord Carloway considered practices in other jurisdictions and noted the low number of cases in which extensions to the existing 12 hour initial maximum have been required since the passing of the 2010 Act. He concluded that the detention period should be a maximum of 12 hours with no provision for extension. In reaching this conclusion, Lord Carloway highlights the need for care to be taken to ensure that, within reason and having regard to the suspect's Article 6 right, an investigation is not carried out in such a hurried manner that it infringes the suspect's Article 6 rights and/or ceases to be effective because of excessive time constraints. The Report makes other recommendations in relation to questioning including investigative liberation (see chapter 4 in this consultation paper) and further questioning with the permission of a sheriff (see chapter 6 in this consultation paper on questioning).

3.3 Lord Carloway recommends that the provisions of section 17 of the Police (Scotland) Act 1967 be amended to make clear that suspects arrested are not held unnecessarily or disproportionately in police cells. He also recommends introducing a requirement for a senior police officer to review a suspect's period in custody after a six hour period to ensure that the person is not being unnecessarily and disproportionately held in custody.

3.4 In considering the period between arrest and bringing the suspect to Court, the Report considered the legislative provisions in the Police (Scotland) Act 1967 and the 1995 Act. It also reflected upon Article 5 of the Convention which states that “everyone arrested or detained… shall be brought promptly before a judge or other officer authorised by law to exercise judicial power” and European Court of Human Rights (EChHR) case law which indicates, for the moment, that a period of up to four days detention is compliant with the ECHR and any longer period would normally be regarded as a violation of the right to liberty. Lord Carloway highlights some cases where suspects have spent over 4 days in police cells prior to being put before a Court. He suggests these are longer periods than ought to be regarded as acceptable in Scotland in human rights terms. Applying the rationale that the length of detention should not be affected by the day of the week upon which suspects are arrested, Lord Carloway proposes a maximum period of 36 hours from a suspect entering police custody under arrest to subsequent appearance at court. Lord Carloway has said that measures should be introduced to facilitate this change of practice to ensure that suspects are put before a competent Judicial Authority without delay. Looking ahead, he proposes that Saturday courts be introduced if suspects continue to be held for more than 36 hours.
3.5 Lord Carloway also recommends that the existing practice of police having formally to charge a suspect following their arrest and prior to the report to the procurator fiscal should not be an absolute requirement – rather, charging should be at the discretion of the police. They should be able to hold a person in custody for a court appearance and report the matter to the procurator fiscal. This option is envisaged to be helpful where the police are uncertain of what the exact charge should be or on whether there is sufficient evidence to merit that charge.

Response to recommendations

3.6 The recommendations made by Lord Carloway regarding custody and the maximum time that a suspect may be held in custody on suspicion have been widely welcomed. During the Justice Committee evidence session on 13 December, a member of the Committee proposed that consideration should be given to certain exceptions to the 12 hour maximum period recommended by Lord Carloway. That member suggested that a process of applying to a Sheriff for an extension could be considered in cases involving serious crime. ACPOS advised the Committee that whilst it understands the rationale behind the proposal to limit questioning to 12 hours it sees a difficulty for a small number of cases, and highlighted examples of cases which required an extension beyond 12 hours in the preceding year. ACPOS noted that the current provisions, under the 2010 Act, to allow an extension to the period of detention of a suspect from 12 to 24 hours have been operationally but only when the circumstances of the case dictated and where it was necessary and proportionate. Lord Carloway’s recommendation that people should be appearing at court within 36 hours of being detained is supported by ACPOS.

Scottish Government View

3.7 The Government accepts Lord Carloway’s view that suspects should not be unnecessarily or disproportionately held in police custody pending appearance at court and welcomes the recommendations to minimise those periods and improve the process. We believe that some pragmatism will be required about the timing of fully achieving the 36 hour target for bringing people before a court as this implies major operational changes in court sitting times and by extension major changes for COPFS and defence agents. We do not envisage every court sitting every day. If there is a need for courts to be open at weekends and/or bank holidays, then we anticipate that this will be on the basis of a regional arrangement or potentially even a national arrangement, making use of video link technology. We welcome suggestions for how best to give effect to the aim of bringing accused persons before a court as quickly as possible.

Question 5

Do you agree with Lord Carloway’s recommendation that the maximum time a suspect can be held in detention (prior to charge or report to the Procurator Fiscal) should be 12 hours? Please explain.
Question 6

What are your views on whether this 12 hour period could be extended in exceptional circumstances? How could this be regulated appropriately?

Question 7

What are your views on the need for the proposed 12 hour period of detention to be reviewed after 6 hours by a senior police officer?

Question 8

What do you consider the most effective way of ensuring that no person should be detained in custody beyond 36 hours before appearing before a Court, i.e. over the weekend period?

   o Are there any practical difficulties to be overcome in delivering a model that achieves this?

   o Bearing in mind the desire for suspects to be held for as short a period as possible, current ECHR case law which indicates a limit of 4 days, and affordability issues, do you consider there to be an alternative time period to the 36 hour recommendation before suspects appear before a Court?

Question 9

What are your views on the police having the ability to hold an accused for court and report a case to the procurator fiscal without first charging the suspect?
4. LIBERATION FROM POLICE CUSTODY

4.1 Lord Carloway has examined various models of arrest and subsequent processes which lead to a suspect’s first appearance at court, both within the UK and beyond. In keeping with the terms of the ECHR, he approaches this section of his Report with the presumption that a suspect is to be liberated from police custody, unless there is a necessary and proportionate reason for that person to be so detained until their appearance at Court. The Report looked at various stages when it may be appropriate for a suspect to be liberated from custody, for example when further enquiries or examinations are ongoing. Lord Carloway has proposed reforms which he considers support the general principle that persons suspected of an offence are not unnecessarily or disproportionately kept in custody, balancing that with the desire not to prejudice the effective investigation and prosecution of crime.

Lord Carloway’s recommendations:

— the police should be given express power to liberate a suspect from detention, pre charge/report, subject to any appropriate conditions for the purpose of carrying out further investigations. The police should not have to specify the nature of any enquiries, if that would compromise the investigation, but otherwise they should do so;

— the period of liberation on such conditions should be limited to a maximum of twenty-eight days. Where this is done, the period already spent in pre charge/report detention and any future period will be aggregated and must not exceed the twelve hour maximum;

— investigative liberation should only be granted on the basis that there remains reasonable cause to suspect the person of committing the particular offence;

— when it is granted, the police must provide a time and place for a return to the police station, when, of course, the rights of access to a lawyer would revive;

— the conditions for liberation may include special conditions, necessary for the proper conduct of the investigation, such as prohibiting the suspect from visiting a particular area, speaking to certain people and making himself/herself available for other legitimate purposes;

— the police should be given the power to liberate a suspect after charge or intimation of any intention to report the suspect to the procurator fiscal, on special conditions, including a curfew;

— where the police do not intend to recommend opposition to bail, the suspect should be released by them, either unconditionally or on an undertaking to appear at court on a specified future date. Where the police are uncertain whether or not to recommend bail they should seek the direction of the procurator fiscal;
— the procurator fiscal should have an express power to review police decisions on liberation and to liberate also on standard or special conditions;

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

— breach of conditions of liberation should be a criminal offence and breach of any condition of an undertaking should remain a criminal offence.

Background

4.2 Lord Carloway’s view is that liberation, subject to conditions, for a limited period whilst the police investigation is completed would seem a sensible alternative to prolonged detention in some cases. The Report highlights that modern investigations, particularly where serious criminality is involved, are often complex and involve, for example, technical examinations of telephones, computers, etc. These investigations often take considerable periods of time to complete and generally extend beyond the proposed 12 hour detention period. It may not be necessary or proportionate for a suspect to remain detained while investigations are completed.

4.3 Lord Carloway recommends a period of investigative liberation when the police could liberate the suspect from custody while the police carry out further investigations into the suspected crime. This process would allow the police to require the suspect to re-attend at the police station for interview once the police investigations or examinations are complete. Any subsequent interviews must take place within a period of 28 days from the initial arrest and the total amount of time spent in police custody must not exceed the 12 hour maximum. Lord Carloway further recommends providing police with powers to set certain conditions on such liberation, similar to bail conditions, such as a requirement for the suspect to attend for further investigation procedures or to refrain from certain actions such as approaching witnesses etc. It is recommended that such conditions should be able to be reviewed by the procurator fiscal and a suspect should be provided the right for any conditions to be amended and/or terminated through summary application to a Sheriff. Lord Carloway notes that it will often be reasonable for the police to inform the suspect of their plans to carry out further investigations, but there will also be cases where that would compromise the investigation.

4.4 Consideration is given to how long investigative liberation should be in place for and the system currently in operation in England and Wales is looked at. The Report considers that the longer the liberation periods, the greater the potential detrimental impact to the suspect, especially if they are ultimately cleared of all
suspicion. It is therefore recommended that the period of investigative liberation on conditions should be limited to 28 days.

4.5 On the basis of the general principle that suspects are not unnecessarily or disproportionately kept in custody, Lord Carloway recommends that the police should have powers to liberate a suspect after charge (or intimation of intention to report the suspect to the procurator fiscal), on special conditions, such as a curfew.

Response to recommendations

4.6 During Parliamentary Justice Committee evidence sessions relating to the Report, there was support for the recommendations regarding the concept of investigative liberation. ACPOS commented that it provided the advantage of continuing with investigations whilst at the same time, ensuring that suspects are kept in custody for shorter periods of time. ACPOS also expressed the view that there may be situations where the maximum period of investigative liberation being set at 28 days may not be sufficient and that in proportionate and justifiable situations there may be a case for extending that period.

Scottish Government View

4.7 It is crucial that police are provided with the flexibility to manage their investigations, balancing the needs of the enquiry and public safety against the fundamental rights of the individual suspected of a crime. The Government therefore welcomes Lord Carloway’s recommendations to give the police greater powers to liberate suspects from custody for a set period to allow police enquiries to continue in appropriate cases.

Question 10

Do you agree with Lord Carloway’s recommendations that the police should be able to liberate a suspect from custody on conditions, referred to as investigative liberation? What are the practical issues with this and what comments do you have about conditions and safeguards?

Question 11

Lord Carloway suggests that a limit of 28 days be set on the period that the police can liberate a suspect on investigative liberation. Do you think that 28 days is sufficient in all cases? Please explain.

Question 12

Are there practical issues with the police advising the suspect of a time and place for a return to the police station, at the point investigative bail is granted?
5. LEGAL ADVICE

5.1 Providing a suspect with a right of access to a lawyer prior to police questioning lies at the core of the Cadder judgment. In this section, Lord Carloway reviews the operation of the right of access to a lawyer introduced by the 2010 Act and considers how best to ensure that the right is provided in a way that is sufficiently ‘practical and effective’ as emphasised in the Salduz judgment. This means identifying more precisely when the right arises, how it is communicated to the suspect, how it is provided and the circumstances in which it can be waived. Lord Carloway recognises that jurisprudence in this area is still developing, partly due to the knock-on effects of Cadder. Chapters 7 and 8 of this consultation paper address children and vulnerable adult suspects.

Lord Carloway’s recommendations:

— there is no need to require the police to secure access by a suspect to a lawyer outwith a police station and no legislation is required in that regard;

— part of the standard caution prior to the interviewing of suspects outwith a police station should include the information that he/she has a right of access to a solicitor if he/she wishes;

— the provisions of the 1995 Act (s 15A(3)) introduced by the 2010 Act, which entitle a suspect to have access to a solicitor (a) before any questioning at a police station and (b) during questioning, require to be amended to provide that such access is available, regardless of questioning, as soon as practicable after (under the recommended regime) the detention of the arrested suspect at the police station;

— a “letter of rights” should be drafted without delay. Every arrested and detained suspect should be provided with a copy of that letter unless there are particular reasons not to do so;

— it should continue to be the case that access to a lawyer means only to an enrolled solicitor;

— the legislation should be amended to make it clear that, although it is the police officer’s obligation to ensure that “intimation” of arrest, detention and request for assistance is made, it need not be made specifically by a police officer or to a solicitor in person. It should allow for forms of contact other than by telephone;

— the right of access to a lawyer does not extend to the provision of assistance from a solicitor of the suspect’s choice and no alteration to the legislation is required in this regard. Where the suspect requests access to a named solicitor, however, in accordance with current practice, efforts should be made to secure the attendance of
that lawyer within a reasonable time. No legislation is required in this area;

— in exceptional circumstances, the police must be able to delay all, or any part of, the person’s right of access to a lawyer or to withhold all, or any part of, that right. But there should not be any statutory definition of what is meant by “exceptional circumstances”;

— there is no need to set out in legislation what the role of the solicitor may be. The University Law Schools and the Law Society should be encouraged to formulate guidance for solicitors in advising clients in a police station. Understanding the role of the solicitor in that regard should be part of COPFS and police training;

— subject to what is determined to be reasonable remuneration in legal aid cases, it is for the suspect to decide whether the advice from a lawyer should be provided in person, or by other means such as by telephone or internet video link and whether he/she requires a solicitor to be present during any interview; and

— legislation should expressly provide that adults who are not vulnerable may waive the right of access to a lawyer. It should state that waiver must be express and recorded. The right cannot be waived unless and until the person has been fully informed of the right.

Background

5.2 The exact point at which access to a lawyer is triggered is a key consideration and an issue on which the Salduz and Cadder judgments do not provide exhaustive, definitive guidance. In the scenario of police detention, Lord Carloway recommends that the legislation should be amended to permit access to a lawyer for all suspects, even if no questioning is to take place. This approach allows the suspect to instruct immediate steps to demonstrate their innocence and secure their freedom. In reaching this conclusion he draws on the ECtHR (Second Chamber) judgment in Dayanan which appeared to go further than Cadder ruling that legal assistance should be available as soon as the suspect is deprived of his freedom, and the original published proposal for a draft EU Directive on Right of Access to a Lawyer in Criminal Proceedings currently being negotiated by the EU Institutions (see 1. 11 in this consultation paper).

5.3 Where questioning takes place outwith a police station, the suspect is technically at liberty, and Lord Carloway does not consider it necessary to require the police to secure them access to a lawyer. However, to minimise the risk of this approach to Article 6 fairness, it is recommended that the standard caution given to a suspect outwith a police station refers to their right to access a lawyer if they wish. In the event that the suspect elects to access a lawyer but fails to do so within a reasonable time, they will need to accompany the police to the police station on a
voluntary basis, or be arrested and taken to a police station, so that the legal advice can be made available prior to interview. Similarly, reflecting the Ambrose judgment in the UK Supreme Court, if a suspect has their liberty significantly curtailed whilst being questioned outwith a police station (for example, by being handcuffed) they must be afforded the right of access to a lawyer prior to questioning, if the answers are to be used as evidence. This will also require the suspect to attend the police station so that legal advice can be provided.

5.4 Lord Carloway examines the way the police currently arrange solicitor access for suspects and considers this to be a sensible and practical approach. He also accepts that the police must be able to delay a suspect’s right of access to a lawyer in ‘exceptional circumstances’ and that there is no need for that expression to be defined in statute. Subject to legal aid considerations, it is recommended that suspects should decide the way they receive advice from a lawyer (in telephone, in person etc.) and whether the solicitor should be present during any interview. It is recommended that advice should continue to be given only by enrolled solicitors.

5.5 There is no doubt that waiving the right to a lawyer is compliant with the ECHR, however for the waiver to be effective, certain conditions must be met. The waiver must be unequivocal, it must not go against any important public interest, safeguards must be in place and the suspect must understand the right and appreciate that they are waiving it. Lord Carloway recommends that the right cannot be waived unless and until the person has been fully informed of the right. He also emphasises that, given the admissibility of statements made during questioning now depends in part on how the right of access to a lawyer is delivered, it is important that the circumstances under which a waiver is exercised are carefully regulated. He recommends that legislation must set out that the waiver must be express and recorded.

Response to recommendations

5.6 There was general agreement around Lord Carloway’s recommendations on legal advice in both the Justice Committee evidence sessions and the debate in Parliament. Where there was discussion, it focussed around the point of access, waiver and the introduction of a letter of rights. There was also considerable debate about the rights of child and vulnerable adult suspects to waive their right of access to a lawyer - chapters 7 and 8 deal with this area of the discussion.

5.7 Committee members and JUSTICE supported Lord Carloway’s recommendation that the reasons for a suspect waiving their right of access to a lawyer should be recorded in order to demonstrate that the suspect had been made aware of, and understood, their rights. ACPOS felt that, through changes to ACPOS guidance, the police are already allowing suspects to make a more informed decision about their rights without going to the extent of recording reasons.

5.8 There were some concerns about the lack of clarity around the stage in the process at which a suspect has a right of access to a lawyer. JUSTICE was particularly concerned about the position of individuals who are identified as suspects but who are not detained or taken into custody. As Lord Carloway notes,
however, interviews outwith a police station are subject to the Article 6 requirement for fairness and this will constrain police practice.

5.9 ACPOS assessed in their response to the Review consultation that 80% of persons coming into police custody as an arrested person are not interviewed.

5.10 Whilst little mention was made of Lord Carloway’s recommendation that a letter of rights be introduced as soon as possible, those who did, including ACPOS, believed it to be a sensible suggestion. They did however warn that potential barriers to comprehension, such as poor literacy levels and non-English speakers, must be taken into consideration for it to prove a useful tool.

International obligations

5.11 There are two instruments from the EU Roadmap on procedural rights which have a direct impact on this aspect of criminal procedure and that Lord Carloway has used to inform his proposals. The Directive on the Right to Information in Criminal Proceedings has at its centre the provision of a letter of rights to suspects. A proposed Directive on the Right of Access to a Lawyer in Criminal Proceedings was published in June 2011 and negotiations are ongoing. It is worth noting that Lord Carloway’s recommendation on the timing at which the right of access to a lawyer is triggered was based partly on the June 2011 version of this Directive, which proposed that access be granted “from the outset of deprivation of liberty...” As a result of negotiations the most recent published draft text (April 2012) proposes that access to a lawyer shall take effect “as soon as practicably possible from the outset of deprivation of liberty...” The UK has not opted in to this Directive: a decision supported by the Scottish Government. However, both Governments continue to engage and contribute to negotiations with the hope that the final version of the Directive will be suitable to adopt.

Scottish Government View

5.12 The Government agrees with the thrust of Lord Carloway’s recommendations on the issue of legal advice for suspects. We are considering the implications of the proposals on the extent and timing of the right of legal advice and taking account of the developments in the draft Directive. The Government recognise that a change to provide for access to legal advice for persons not being questioned potentially implies a significant extension in the scale and scope of legal advice that will need to be provided. This, in turn, could have significant implications for legal aid in a time of reduced budgets, if such advice is to be publicly funded. We are also considering introducing a letter of rights for suspects in the course of 2012, on a non-statutory basis.

Question 13

What are your views on the recommendation for access to a lawyer to begin as soon as practicable after the detention of the arrested suspect, regardless of questioning?

- What do you see as the purpose of access to a lawyer when questioning is not anticipated?
What do you consider to be the best way of providing legal advice for suspects as soon as practicable after detention, whilst ensuring it is effective, practical and affordable?

**Question 14**

Do you foresee any difficulties with the recommendation that the standard caution prior to the interviewing of suspects outwith a police station includes information that they have a right to access a solicitor if they wish? If so, please explain what these are.

**Question 15**

Lord Carloway recommends that it is for the accused to decide on the way legal advice is provided (by telephone, in person etc.) and whether their solicitor is present during a police interview. Do you agree with this approach? If not, please give reasons.

- Are there any additional considerations for the form of legal advice when questioning is not anticipated?

**Question 16**

It is recommended that the right to waive access to legal advice, and the expression and recording of this, should be set out in legislation – do you agree? If not, please give reasons.

- Lord Carloway also recommends that this right can only be waived once a person is fully informed of the right – what are your views on this?

**Question 17**

Do you agree with Lord Carloway’s recommendation that the practice of only enrolled solicitors giving advice to suspects should continue? If you disagree, please set out an alternative approach.
6. **QUESTIONING**

6.1 Lord Carloway’s consideration of police questioning, and the broader issue of the use of statements given during questions as part of the trial evidence, takes account of recent decisions of the ECtHR, *Salduz* (Grand Chamber) and *Dayanan* (Second Chamber), and the UK Supreme Court decision in *Ambrose*. His principal focus has been to assess the extent to which the police questioning of a suspect can be consistent with the right to a fair trial under the ECHR. Lord Carloway does not propose any changes to the questioning of witnesses, but does suggest changes to the interviewing of suspects and accused persons.

**Lord Carloway’s recommendations:**

- there is no need for statutory provision on the purpose of questioning;

- the prohibition on police questioning after charge should be abolished and there should be a process whereby the police, where they feel there is good reason to question a suspect after he/she has been charged or reported to the procurator fiscal, can apply to a sheriff for permission to do so prior to a first appearance at court. In particular such an application:
  
  (a) must state the grounds for allowing questioning post charge; and
  (b) can be made, and responded to, remotely by electronic means;

- the Crown should also be entitled to make such an application to the court in the course of a prosecution, at the first appearance before the custody court; or at any time prior to the trial diet;

- in all such cases, the Court should have the discretion to place whatever conditions, constraints or limits on such further questioning it sees fit;

- legislation should provide that courts have a general power to exclude evidence, including statements made by suspects to the police during the course of an interview or otherwise if the admission of that evidence would result in the trial being rendered unfair in terms of Article 6, including unfair by reason of an infringement of a suspect’s right to silence or his/her privilege against self incrimination. Consideration should be given to the abolition of all other rules for the exclusion of relevant evidence in criminal cases;

- the common law rules of fairness concerning the admissibility of statements by suspects should be abolished in favour of the more general Article 6 test;

- there is no need for statutory provision on pre-interview briefing of suspects; and
the procedures of Judicial Examination and the emission of declarations should cease by, inter alia, repeal of the relevant provisions of the 1995 Act.

Background

6.2 Lord Carloway assessed the purposes of police questioning as providing the suspect with an opportunity to set out his or her account of events including a defence; and for the police to investigate reported crimes. He considered these were implicit from the ECHR so that there is no need to define the purpose of questioning in legislation.

6.3 He does however question the tenet of Scots Law whereby a suspect cannot continue to be questioned after charge. Lord Carloway looked at this issue across different jurisdictions and found that the distinct status assumed by an accused person after police charge in Scotland is less evident in other jurisdictions, particularly in continental Europe. He also found that the New South Wales variant of the 'distinct status' model does allow for a person to be re-interviewed in particular circumstances. Lord Carloway concludes that in a human rights based system, there is no particular reason why there should be an absolute prohibition on post-charge questioning, provided that the suspect's rights continue to be adequately and effectively protected. On this basis, he recommends that questioning after charge is permitted, subject to the approval of the Court. In considering Article 5 rights to liberty, Lord Carloway believes that post-charge questioning (with Court approval) is preferable to the police extending the 12 hour questioning period. He recommends that it should be possible for the Court approval process to be by electronic means i.e. by means of an electronic application and approval, rather than requiring a hearing in court.

6.4 Provided that the safeguards of legal advice and police caution are in place, permitting questioning after charge, or beyond the 12 hour detention period, offers benefits both for the investigation of crime and to the accused, who in some cases may be exonerated in response to new evidence. Situations which might justify questioning after charge include where it is not possible to question the suspect due to the influence of drink, because of a psychotic episode or where new evidence comes to light. In the last case, the example given by Lord Carloway in his report is where detailed technical reports on the use of a mobile phone or computer take some weeks to obtain. Lord Carloway is clear that care must be taken to ensure that an accused person is not repeatedly or unnecessarily questioned, particularly for summary level cases.

6.5 Lord Carloway challenges the belief that the admission of statements elicited by questions asked by the police or prosecutor after charge infringes the right to a fair trial – and refers us back to the ECHR which does not prohibit this. He notes that applying common law rules, or Article 6 rights (the ECHR approach), are different tests. Lord Carloway argues that it is preferable to have a single test and that this test should be applicable to all evidence. He argues that the ECHR approach fits squarely with the general theme of his report – to secure compliance
with the ECHR - and that this approach would allow the courts to focus on what evidence is relevant, rather than testing this on the basis of traditional ‘rules of evidence’ terms.

6.6 In line with his recommendations on police and Crown questioning after charge, Lord Carloway also recommends that the statutory procedure of judicial examination should be repealed. His reasoning is that it is seldom used and will serve no purpose in view of his other recommendations.

Response to recommendations

6.7 There has been relatively little discussion of Lord Carloway’s recommendations on police questioning since the publication of the report. There was comment during the Justice Committee’s evidence session on 13 December that very little evidence on or criticism of the recommendations on police questioning had been received. However, support for these recommendations on police questioning was expressed by ACPOS and Professor Peter Duff of Aberdeen University.

6.8 It is worth noting that ACPOS, the Association of Scottish Police Superintendents (ASPS), and the Scottish Police Federation (SPF) in responding to Lord Carloway’s public consultation\(^2\), all supported the introduction of post-charge police questioning. ASPS noted that post-charge questioning could be “of great benefit to the investigation without unduly affecting the rights of the individual”. SPF noted that without post-charge questioning there was the “risk of an incomplete picture of facts and may indeed by unfair to the suspect as it could result in them not having a full opportunity to explain facts or circumstances that could assist them.”

6.9 JUSTICE gave written evidence to the Committee stating that it welcomed the proposal “that statements made to the police that are obtained in breach of Article 6 ECHR should not be admitted in evidence and that this principle should be put in statutory form.”

International obligations

6.10 The EU Roadmap for strengthening procedural rights of suspects in criminal proceedings includes the introduction of a directive on Right of Access to a Lawyer in Criminal Proceedings. This is relevant to police questioning (see chapter 5 in this consultation paper).

Scottish Government view

6.11 The Government agrees with Lord Carloway’s recommendations outlined in this chapter including the suggestion that questioning after charge should be able to take place if permission is granted by a Sheriff or the court hearing the case.

\(^2\) Responses to Lord Carloway’s consultation may be viewed at: http://www.scotland.gov.uk/Resource/Doc/925/0120161.doc
Question 18

Do you agree that the police should be allowed to question a suspect after charge (subject to the permission of the court and any conditions they apply), as outlined in the recommendations? Please explain.

Question 19

Do you agree that the procedure of Judicial Examination should be removed, whilst introducing provisions to allow the Crown to apply to the court to question a suspect after charge, as outlined in the recommendations? Please explain.

Question 20

Do you agree that the present common law rules of fairness concerning the admissibility of statements by suspects should be abolished in favour of the more general Article 6 test, as outlined in the recommendations? Please explain.
7. CHILD SUSPECTS

7.1 The Report looks in some detail at what particular provision should be made in relation to child suspects to ensure they understand their right of access to a lawyer. Lord Carloway considers the age at which suspects ought to be seen as children and what special treatment and protection ought to be accorded to child suspects. This chapter should be read in conjunction with chapter 5 of this paper.

Lord Carloway’s recommendations:

— for the purposes of arrest, detention and questioning, a child should be defined as anyone under the age of 18 years. This means that the current provisions concerning notification to a parent, carer or other responsible person and these persons having access to a child suspect should be extended to all persons under 18 years of age;

— there should be a general statutory provision that, in taking any decision regarding the arrest, detention, interview and charging of a child, whether by the police or the procurator fiscal, the best interests of the child shall be a primary consideration;

— all children should have the right of access to a parent, carer or responsible person if detained and, in any event, in advance of and during any interview, provided that access can be achieved within a reasonable time. The police should be able to delay or suspend that right in exceptional circumstances;

— the general role of the parent, carer or responsible person should be defined in statute as consisting of the provision of any moral support and parental care and guidance to the child and to promote the child’s understanding of any communications between him/her, the police and his/her solicitor;

— where the child suspect is under 16, he/she must be provided with access to a lawyer, and neither he/she, nor a parent, carer or responsible person can waive that right;

— where the child is under 16, he/she must be provided with access to a parent, carer or responsible person, and he/she cannot waive that right;

— where the child is 16 or 17 years old he/she may waive his/her right of access to a lawyer but only with the agreement of a parent, carer or responsible person; and

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

7.2 The Report sets out at length the current legislation, guidance and practice with regard to the arrest and detention of young people. Lord Carloway notes that in many cases the preferred option is to deal with much offending by young people through informal measures, where such a response is appropriate:

“Where informal measures are the likely outcome of events, there is little concern about the commonly adopted practice of the police speaking to a child in the presence of his/her parents or other carers in the presumed relative comfort of his/her own home or at school. The issue of the admissibility of a statement made by the child in such circumstances is not going to arise, because no prosecution or other legal process is to follow.”

7.3 The Report concludes that children should only be arrested and detained where there is no reasonable alternative and in taking that decision, the police should be required to apply, as a primary consideration, the best interests of the child, in line with Article 3.1 of the UN Convention on the Rights of the Child.

7.4 The Report recognises that current practice is to treat children as those persons under 16, or persons aged 16 and 17 where they are subject to a supervision requirement. Lord Carloway’s view is that a number of domestic and international instruments suggest that all under 18s ought to be accorded the same measure of protection but recognises that “[over 16s] ought to be able, with appropriate assistance, to express fully coherent, informed views; that is to say to exercise their right to participate effectively in the proceedings”. In considering how rights to parental support and legal advice ought to be extended, Carloway therefore makes a number of suggestions concerning waiver of the rights to access parental support and/or legal advice by children of different ages.

7.5 Lord Carloway recommends that child suspects should have express statutory rights of access to a parent, carer or responsible person broadly similar to, and running in parallel with, those in relation to the right of access to a lawyer. He defines the general function of the parent, carer or responsible person as to provide any necessary moral support, parental guidance and to aid communication between the child and police, and any solicitor.

Response to recommendations

7.6 To date there has been little direct response to the Report’s specific recommendations on child suspects. In carrying out his Report and developing his recommendations, Lord Carloway spoke to the Scottish Government, ACPOS, the Scotland’s Commissioner for Children and Young People (SCCYP) and Scottish Children’s Reporters Administration (SCRA). At the Justice Committee evidence session on 13 December 2011, Lord Carloway’s approach to child suspects was discussed. ACPOS and the Law Society expressed direct support for the recommendation that under 16s not be allowed to waive their right to legal advice.

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3 Carloway Report, para 6.3.6
4 Carloway Report, para 6.3.31
ACPOS expressed the view that they, SCRA and SCCYP all support Carloway’s efforts not to overly formalise dealings between the police and young people.

**Scottish Government View**

7.7 The Scottish Government acknowledges the value to children and young people involved in offending behaviour of keeping them out of formal processes. Ideally, we would like to see such approaches, which do not engage the need to provide legal advice, used wherever possible and appropriate. At the same time, ensuring a high standard of protection is offered to children where they do enter formal processes is essential.

7.8 As the Report recognises, balancing rights to parental support, legal advice and self-determination in a way that allows for practicable procedure will present challenges. For that reason, there are a number of questions on which views are sought around the best way of achieving the stated objectives. Extending the definition of a child to all those under 18 for the purposes of arrest, detention and questioning has significant implications and we need to consider the knock on effects of such a change. In other areas, views about how implementation would work in practice might suggest a different balance between legislation and support and guidance.

7.9 In particular, Carloway suggests that legislation should direct a parent to provide moral support, care and guidance, including aiding understanding of the communications between a child and his/her solicitor. Section 1 of the *Children (Scotland) Act 1995* states that the “parent has in relation to his child the responsibility—

- to safeguard and promote the child’s health, development and welfare;
- to provide, in a manner appropriate to the stage of development of the child—
  - direction (for those aged up to 16)
  - guidance (for those aged up to 18)"

7.10 It would be useful to have the views of interested stakeholders in discussing how these responsibilities might best be effected during detention and questioning and how they might best be set out formally in legislation or otherwise.

**Question 21**

*Do you agree with Lord Carloway’s recommendation that, for the purposes of arrest, detention and questioning, a child should be defined as anyone under the age of 18 years? Please explain why.*

**Question 22**

*Do you agree that there should be a general statutory provision that, in taking any decision regarding the arrest, detention, interview and charging of a child, the best interests of the child shall be a primary consideration?*
o How would such a provision work in practice?

**Question 23**

Do you agree with the terms of the Report that the general role of the parent, carer or responsible person should be to provide any moral support and parental care and guidance to the child and to promote the child’s understanding of any communications between the child, the police and the solicitor?

o Should the responsibilities of a parent, carer or responsible person be provided for in statute or achieved through guidance and the possible provision of support or in some other way?

**Question 24**

Do you have comments on the recommendation for children aged 16 or 17 years to be able to waive their right of access to a lawyer only with the agreement of a parent, carer or responsible person?

**Question 25**

Do you have comments on the recommendation for children aged 16 or 17 years to be able to waive their right of access to a parent, carer or responsible person, but that in such cases they must be provided with access to a lawyer?

**Question 26**

What are your views on the recommendation that children under 16 should not be able to waive their rights to legal advice?
8. VULNERABLE ADULT SUSPECTS

8.1 The Report is concerned with adult suspects who have permanent or semi-permanent vulnerabilities which affect their fitness to be interviewed when arrested and detained as a suspect by the police. Lord Carloway suggests that such suspects may require the presence of an ‘appropriate adult’ during the police interview and similar protections to those for child suspects. Ensuring that any vulnerable suspect is promptly identified, understands their rights and is able to make informed decisions based on that understanding is at the heart of the topic. This is in line with ensuring that a vulnerable suspect’s rights to a fair trial (including that of legal representation) under Article 6 of the ECHR are recognised and applied from the point of arrest and detention. This chapter should be read in conjunction with chapter 5 of this paper.

Lord Carloway’s recommendations:

— there should be a statutory definition of a “vulnerable suspect”. This should be, in broad terms, a person who, in the view of the police officer authorising the suspect’s detention, is not able to understand fully the significance of what is said to him/her, of questions posed or of his/her replies because of an apparent (a) mental illness; (b) personality disorder; or (c) learning disability;

— statute should define the role of an appropriate adult as being to assist in ensuring that effective communication takes place between the suspect, the police and the suspect’s solicitor (if any) and that the suspect is not disadvantaged, relative to the non-vulnerable suspect, in the detention and interview processes by reason of his/her vulnerability;

— statute should provide that a vulnerable suspect must be provided with the services of an appropriate adult as soon as practicable after detention and prior to any questioning. He/she should only be able to waive his/her right of access to a lawyer if the appropriate adult also agrees to this; and

— statute should define, at least in broad terms, the qualifications, professional or otherwise, necessary for a person to be an appropriate adult. The Review has not had sufficient material upon which to form a view on this subject, and the Government should carry out further research in that regard.

Background

8.2 Lord Carloway noted that there is currently no statutory definition of a vulnerable suspect. He has examined the current legal definitions of vulnerable witnesses in section 271 of the *Criminal Procedure (Scotland) Act 1995* and adults at risk in section 3 of the *Adult Support and Protection (Scotland) Act 2007*. 
8.3 The Report highlights that the identification of vulnerable suspects requires judgment by the investigating and custody officers, but there are few statutory rules on the identification or treatment of vulnerable suspects at that stage of the police investigation. Furthermore, vulnerability may only become apparent to the suspect's lawyer during a private consultation and the lawyer, in line with the Dayanan ECtHR judgment, will be required to bring this to the attention of the relevant police officer with a view to the officer contacting an Appropriate Adult.

8.4 The Report acknowledges that the measures required to safeguard the interests of a vulnerable suspect will vary from case to case and that there may sometimes be practical difficulties in ensuring prompt attendance. There may also be questions around whether those who do not fully understand their rights are capable of understanding the meaning of waiving a right. Lord Carloway recommends a statutory definition of a vulnerable suspect be enacted and that the term should be defined in a shorter and simpler way than that used in vulnerable witness legislation. The minimum requirement to support a vulnerable suspect would be the provision of an Appropriate Adult to enable suspects to understand their rights and to decide whether access to a lawyer should be waived.

Background to the current role of Appropriate Adults

8.5 At present, Appropriate Adults facilitate communication between the police and adults (persons aged 16 or over) who have any mental illness, personality disorder or learning disability. In practice this includes people with acquired brain injury, autistic spectrum disorder and dementia. The role of an Appropriate Adult is not currently defined in statute.

8.6 An Appropriate Adult is available to victims, witnesses, suspects and accused. Appropriate Adults are independent of the police and are not usually known to the person being interviewed. They are often social workers or health professionals (although they do not fulfil the Appropriate Adult role in that professional capacity). An Appropriate Adult can be present during every stage of the investigation, including searches, interviews, medical examinations, the taking of forensic samples (e.g. DNA), fingerprinting, photographing, and identification parades.

8.7 The Appropriate Adult facilitates communication between the police and the interviewee. The Appropriate Adult monitors the interview to ensure the person is not unduly distressed, understands at all times why they are being interviewed and is not disadvantaged by their disorder. The Appropriate Adult advises the interviewing officer of concerns and can prompt a suspension.

8.8 An Appropriate Adult does not: advise the person being interviewed whether or how to answer any questions; object to any questions being asked (except to facilitate communication between the police and the interviewee); tell the police if they think a particular line of questioning is unfair; offer support after interview; or help arrange ongoing referrals. As such, their role is quite distinct from that of a solicitor.
Response to recommendations

8.9 There was general agreement around Lord Carloway’s recommendations on legal advice in both the Justice Committee evidence sessions and the Parliamentary debate. In the Justice Committee session on 13 December there was considerable debate about the rights of child and vulnerable adult suspects to waive their right of access to a lawyer. An observation was made that “in order to waive their rights a person first needs to know and understand what these rights are and someone who is under age sixteen or who is vulnerable may not understand their rights”. Another commentator reflected that “we should be cautious about the recommendation that vulnerable adult suspects should be treated in the same way as 16 to 17 year olds” (i.e. be able to waive right to legal advice with agreement of Appropriate Adult). It was also noted “that vulnerable adults covers a wide range of people in difficult circumstances and with different levels of understanding and ability…”

International obligations

8.10 As part of the EU roadmap on procedural rights, the European Commission is currently formulating its policy on safeguards in criminal procedures for suspected or accused persons who are vulnerable. The proposal is due to be published later in 2012 when the initial scope of a draft Directive will be set out. However, the focus of Lord Carloway and the Commission is similar - to protect the rights of vulnerable suspects - and the Government anticipates that there will be areas of overlap and similarities in approach.

Scottish Government View

8.11 This Government is committed to supporting vulnerable people in the criminal justice system. We are already consulting on steps to improve support for vulnerable victims and witnesses, and Lord Carloway’s recommendations complete the picture with a focus on suspects.

8.12 The Government agrees, in principle, that:

- there should be a statutory definition of a “vulnerable suspect” with the broad definition proposed by Lord Carloway
- the role of an Appropriate Adult should be defined in statute
- statute should provide for timely access to the services of an Appropriate Adult where needed
- legislative provision should be made to define the qualifications necessary to become an Appropriate Adult and that further steps are required to decide what these qualifications should be.

8.13 The Government recognises that there are some concerns in relation to the proposal that Appropriate Adults need to agree to a vulnerable suspect waiving their rights to a lawyer, on the basis that goes further than the “communication facilitator” role they play at present.

8.13 The model of provision of Appropriate Adult services differs across the country, with a significant role for local authorities in a number of areas. Any change
to provision, status or qualifications of Appropriate Adults will therefore require a process of negotiation with those responsible for provision. We do not underestimate the challenges involved in this and it may be that a phased approach is required.

**Question 27**

*Do you agree with Lord Carloway’s recommendation that there should be a statutory definition of a “vulnerable suspect”?

- Do you agree with the definition proposed by Lord Carloway?
- If not, what do you think the definition should be?

**Question 28**

*Do you agree with Lord Carloway’s recommendation that the role of an Appropriate Adult should be defined in statute?

- Do you agree with the definition proposed by Lord Carloway?
- If not, what do you think the definition should be?

**Question 29**

*Do you agree with Lord Carloway’s recommendation that statute should provide that a vulnerable suspect must be provided with the services of an Appropriate Adult as soon as practicable after detention and prior to any questioning?

- If so, do you agree that the current role of an Appropriate Adult should be extended so that a vulnerable suspect can only waive their right of access to a lawyer if the Appropriate Adult also agrees to this?

**Question 30**

*Do you agree with Lord Carloway’s recommendation that statutory provision should be made to define the qualifications necessary to become an Appropriate Adult?

- If so, what steps do you think are required to decide what these qualifications should be?
9. CORROBORATION

9.1 The requirement for corroboration of evidence in criminal cases is an ancient and highly distinctive feature of Scots criminal law. Generally speaking, it is not used in other countries. The Carloway Report provides a description of the rule:

“there must first be at least one source of evidence (i.e. the testimony of one witness) that points to the guilt of the accused as the perpetrator of the crime. That evidence may be direct or circumstantial. Secondly, each "essential" or "crucial" fact, requiring to be proved, must be corroborated by other direct or circumstantial evidence (i.e. the testimony of at least one other witness).”

9.2 The requirement for corroboration does not therefore require every fact in a case to be proved by two witnesses: “Corroboration is about the number of witnesses available to prove facts. It is not about number of facts available to prove guilt.”

Examples of corroboration

- DNA: a forensic sample can be the only evidence required to identify a perpetrator, but there must be two ‘witnesses’ to: (a) the finding of the sample at the crime scene; (b) the obtaining of a sample from the accused; and (c) the comparison between those two samples.
- Eyewitnesses: if one witness states that he or she saw the accused commit a crime, this could be corroborated by testimony from another witness if it is sufficiently similar or consistent to confirm the testimony of the first witness. The evidence of the second eyewitness is needed to support that of the first witness and need not be directly incriminating on its own.
- Eyewitness/circumstantial: where one witness states that he or she saw the accused commit a crime, this could be corroborated by circumstantial evidence confirming or supporting the eyewitness’ evidence.
- Circumstantial: In some cases a combination of circumstantial evidence from two or more sources can provide corroboration.

9.3 Historically, the requirement for corroboration has been regarded as an important protection against an accused person being convicted unsafely on the basis of the evidence of a dishonest or mistaken witness.

Lord Carloway’s recommendations:

- the current requirement for corroboration in criminal cases be abolished; and

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5 Carloway Report, para 7.2.6
6 Carloway Review consultation paper, Chapter 3.1, para. 10.
— in solemn prosecutions where there is no corroboration of testimony, there should be no requirement on the judge to warn the jury of any dangers perceived purely as a consequence of the absence of such corroboration.

Background

9.4 Chapter 7 of Lord Carloway’s Report charts in detail the origins and development of Scots law in relation to corroboration. It notes that the rule has its origins in a different era: one that featured capital punishment, little or no scientific evidence and an unstable legal profession. It concludes that the rule has developed so that it no longer requires “two testimonies, each confirming guilt. It requires one such testimony and another witness speaking to facts which make the truth or accuracy of the first witness’s evidence more likely.”

9.5 The Report finds no evidence to support the argument that the requirement for corroboration protects against unsafe convictions. It suggests that instead of focusing on the quality of evidence, the requirement simply assesses the quantity of evidence. The Report concludes that the requirement for corroboration could itself lead to miscarriages of justice, by making it too difficult to prosecute certain offences, for example those typically committed in private (such as rape). Research conducted for the Carloway Report examined 458 serious criminal cases that did not make it to trial in the year 2010. The cases were discontinued after an initial court appearance. The research found that 268 of those cases (58.5%) would have had a ‘reasonable prospect of conviction’ (the assessment used by prosecutors in England and Wales) had there been no corroboration test. The Carloway Report also contains research focused on sexual offences where there was insufficient evidence to allow proceedings on petition (an earlier stage). This research examined 141 sexual offence cases dropped in the period July to December 2010. It concluded that 95 (67%) of those cases would have had a reasonable prospect of conviction without the requirement for corroboration. The implication is that around 450 additional serious cases would have been prosecuted in court, although it is important to note that in cases which went to trial ultimately a jury would have decided whether to convict. There is therefore no guarantee that the number of convictions would increase to the same extent.

9.6 The Report concludes:

“…the requirement of corroboration should be entirely abolished for all categories of crime. It is an archaic rule that has no place in a modern legal system where judges and juries should be free to consider all relevant evidence and to answer the single question of whether they are satisfied beyond reasonable doubt that the accused person committed the offence libelled.”

9.7 Lord Carloway reaches a further recommendation to build upon the abolition of the requirement for corroboration. This seeks to guard against a possible practice

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8 Carloway Report, para 7.2.13
9 Carloway Report, para 7.2.55
that could potentially arise as a result of abolition. It could occur in situations where a trial judge might feel obliged to issue a special warning to the jury about the dangers of convicting on the basis of uncorroborated evidence. Although the Report acknowledges that a warning might in some cases be appropriate, it concludes that it should never be given automatically, either in all cases or in certain types of case. The trial judge should not feel compelled to issue a warning, but should instead be free to use his or her discretion depending upon the circumstances.

Response to recommendations

9.8 The recommendation on corroboration featured heavily in the Parliamentary debate on 1 December and in the Justice Committee’s three evidence sessions on the report. Those sessions were summarised by the Committee in a letter to the Cabinet of Secretary for Justice dated 26 January 2012.

9.9 The recommendation to remove the requirement for corroboration has attracted a broad range of comment. Some have been strongly opposed to removal, with a common objection being that corroboration provides a safeguard against unsafe convictions. On the other hand, a significant body of opinion has agreed that there is a case for abolition. As noted by the Justice Committee, there appears at the very least to be a clear consensus that the use of corroboration rules in Scots criminal law should be reassessed. Commentators have also made reference to the removal of the requirement for corroboration in civil cases by the Civil Evidence (Scotland) Act 1988.

9.10 Regardless of their standpoint on abolition, many commentators have called for further consideration of its impact on other aspects of criminal evidence and procedure. There have been some suggestions that abolition would increase the number of prosecutions overall. However, Lord Carloway commented to the Justice Committee on 29 November that he would not expect the total number of prosecutions to increase if the requirement for corroboration were to be abolished. He did though suggest that there might be an increase in conviction rate.

Sexual offences

9.11 A feature of sexual crime is that it is typically committed in private, where corroboration may be difficult to obtain. Removal of the requirement for corroboration should therefore permit a higher number of prosecutions. In considering sexual offences, the Faculty of Advocates cautioned that “the abolition of corroboration might lead to more rape prosecutions but not necessarily more convictions”. The Senators of the College of Justice also stressed this point in their

10 “Behind this disagreement, however, the Committee noted an underlying consensus: that the corroboration rule should not be seen as sacrosanct, and that it was legitimate to re-investigate from first principles whether it continues to serve a useful purpose in 21st century Scots criminal law. The Committee agrees. Lord Carloway is to be congratulated for having provoked a much-needed discussion on the purpose of corroboration.” Justice Committee letter to the Cabinet of Secretary for Justice, dated 26 January 2012.


12 Memorandum submitted by the Faculty of Advocates to the Justice Committee, available at: http://www.scottish.parliament.uk/parliamentarybusiness/CurrentCommittees/45421.aspx
submission in response to Lord Carloway’s consultation paper.\textsuperscript{13} However, Rape Crisis Scotland argued in favour of abolition in writing to the Justice Committee. This view was particularly influenced by experiences following the 2010 \textit{Cadder} decision. Rape Crisis Scotland contended that changes made as a result of \textit{Cadder} had resulted in a significant drop in the number of rape prosecutions.\textsuperscript{14}

9.12 Rape Crisis Scotland did also sound a note of caution, highlighting that other systems without a corroboration requirement, such as England and Wales, have a conviction rate for rape that is comparable to that in Scotland. It concluded that:

\textit{“Removing the requirement for corroboration does not mean there will be a flood of cases with very little evidence making it to court, or an unacceptable risk of miscarriages of justice. There will still be a test against which cases will be judged before they can proceed to court, but it will be one based on the quality of the evidence, not the quantity. Removing the requirement for corroboration should, however, enable the Crown to bring prosecutions in cases where there is a lack of corroboration but where they believe there is still enough evidence to give a reasonable chance of conviction.”}\textsuperscript{15}

\textbf{Juries and verdicts}

9.13 The concern most frequently cited in relation to corroboration has been the interaction with the jury system, which permits a decision on conviction or acquittal to be made by a simple majority (8 out of 15 jurors). Only the most serious cases require to be tried before a jury in Scotland, making up less than 5\% of all cases, with the remainder decided by a judge alone.

9.14 Scots criminal law is unusual in permitting a simple majority of jurors to convict or acquit. Most other Western systems that use juries rely upon unanimity or a qualified majority for a conviction. However, guilty verdicts in Scotland are reached on the basis that the key evidence has been corroborated. If the requirement for corroboration was to be removed and no further change made, it would become possible for 8 out of 15 jurors to convict an accused on the basis of uncorroborated evidence. Each justice system is different and direct comparisons of individual

\textsuperscript{13} Evidence of the Senators of the College of Justice to the Carloway Review (pages 381-382 of this paper): \url{http://www.scotland.gov.uk/Resource/Doc/925/0120161.doc}
\textsuperscript{14} Rape Crisis Scotland written submission to Justice Committee, para 1.2: “Prior to Cadder, the police were often reliant on admissions from the accused to help them build a case (for example, prior to Cadder, men accused of rape would often admit to intercourse but claim that it was consensual). Since Cadder, defence lawyers seem to be routinely advising their clients to make no comment at all during police interviews, which is seriously hampering police efforts to put cases together and appears to be making prosecutions in rape cases even more difficult than they were previously”. [The Scottish Government’s criminal proceedings bulletin shows a fall in the number of people prosecuted for rape or attempted rape between 09-10 and 10-11 (covering the first few months after Cadder), although this did continue a downward trend and recorded crime fell over the same period. A number of other changes were made in the same period: the creation of National Serious Crime Unit within COPFS in June 09 and the \textit{Sexual Offences (Scotland) Act 2009}, which changed the definition of rape.]
\textsuperscript{15} Rape Crisis Scotland written submission to Justice Committee, para 2.3
features can be misleading. Nevertheless, some have questioned whether such a system would retain adequate safeguards against wrongful conviction.\textsuperscript{16}

9.15 Lord Carloway’s terms of reference did not extend to consideration of the majority necessary for a conviction by a jury. However the Review did conclude that it did not regard an alteration as “either necessary or desirable.”\textsuperscript{17} Nevertheless, Lord Carloway did make the following remark in evidence to the Justice Committee:

“If Parliament wishes to examine the majority verdicts and the not proven verdict, it is of course free to do so. I am not saying that it should not be changed; I am just saying that we did not think that it was directly connected.”\textsuperscript{18}

9.16 Lord Carloway went on to highlight that in other jury systems a failure to arrive at a verdict does not result in an acquittal. For example in England and Wales, a minimum of 10 out of 12 jurors is required to convict or acquit, but if a jury is unable to reach a decision, the accused is not acquitted. Instead, a decision has to be made about a retrial. Scotland does not operate retrials in this way and there are no ‘hung juries’: the agreement of 8 jurors is required for a conviction, otherwise the accused is acquitted.

9.17 There are two acquittal verdicts possible under Scots law: not proven and not guilty. A not proven verdict has the same status in law as a verdict of not guilty. Some commentators have suggested that removal of the corroboration requirement would impact upon use of the ‘not proven’ verdict. The use of two different acquittal verdicts is a distinctive feature of Scots law and not typical of other systems. One justification offered for the not proven verdict is that it can be applied where a jury considers that an accused may be guilty but does not accept that there is adequate corroboration.\textsuperscript{19} As a result some might argue that removal of the requirement for corroboration would render the not proven verdict unnecessary. There is also an argument that has been advanced that, without the requirement for corroboration, the distinction between not proven and not guilty would become much harder to appreciate, running the risk of confusing jurors as to its use. These are largely technical legal arguments and little is known about how juries view the not proven verdict and whether they see it in these terms. The alternative view is that the not proven verdict provides additional protection over other systems in a context where there is no requirement for corroboration by offering the jury a verdict which accepts there is evidence against the accused but not enough to convict.

9.18 In 1994 the then Scottish Office consulted on the 3 verdict system, juries of 15 people and simple majority verdicts. Taking account of the differing views

\textsuperscript{16} See for example the evidence of the Scottish Law Commission to the Carloway Review (page 200 of this paper): \url{http://www.scotland.gov.uk/Resource/Doc/925/0120161.doc}

\textsuperscript{17} Carloway Report, para 1.0.20

\textsuperscript{18} Lord Carloway’s evidence to the Justice Committee on 29 November 2011, cols. 543-544

\textsuperscript{19} Thomson Committee on Criminal Procedure in Scotland, Second Report, October 1975, Cmd 6218, para 51.05. The Committee recommended retaining the three verdicts, reducing the number of jurors to 12 with 7 required for a majority.
expressed and the relevant features of the jury system, the Scottish Office decided to retain all three elements.20

9.19 In 2008 the Scottish Government consulted on the size of juries and simple majority verdicts – The Modern Scottish Jury in Criminal Trials. The Scottish Government having considered responses brought forward legislation in respect of juries but decided not to alter the size of juries or simple majority verdicts at that time.

9.20 The Carloway Report’s supplementary recommendation on corroboration, designed to ensure that there should be no requirement on a judge to warn the jury of any dangers perceived to arise purely as a consequence of the absence of corroboration, has attracted little public comment.

Related developments

9.21 The Scottish Law Commission’s Report on Similar Fact Evidence and the Moorov doctrine was published on 23 May 2012. The Carloway Report discusses the relationship between Moorov and corroboration from para. 7.2.19.

9.22 The SLC’s recommendation in relation to the use of previous convictions has the potential to increase the range of evidence available to the court in certain circumstances. For example, it may permit evidence to be led that shows a propensity by the accused towards a committing certain type of offence or that identifies certain patterns of past behaviour that may be relevant to the current case. The Government will carefully consider the interaction of the SLC’s recommendations with the Carloway Report.

Scottish Government View

9.23 The Scottish Government agrees that the requirement for corroboration in criminal cases should be abolished. The rationale for the rule stems from another age, its usage has become confused and it can bar prosecutions that would in another legal system seem entirely appropriate.

9.24 Abolition is not expected to result in a substantial number of cases based upon uncorroborated evidence. As outlined by Lord Carloway, change is not being propounded in order to favour the prosecution of crime. Police and prosecutors will continue to seek the best evidence that can practically be made available in every criminal case. Judges and juries will be highly unlikely to convict on the basis of meagre evidence. The focus is upon modernising and remodelling the justice system. It is difficult to dispute Lord Carloway’s assertion that criminal cases should be decided upon the basis of the overall quality of the evidence, without being distorted by the application of an outdated and overly technical set of rules.

9.25 The Government is not minded to revisit Lord Carloway’s recommendation on removal of the requirement for corroboration or to remit this question to a further review. The focus of the Government is now upon deciding how to best achieve

20 Firm and Fair, the Scottish Office, June 1994, Cm 2600
abolition and what, if any, additional measures require to be taken as a consequence. It is on that basis that the Government invites the views of those responding to this paper.

9.26 The question then becomes one of whether the wider system of protections in Scots law is sufficient to prevent miscarriages of justice in the absence of a requirement for corroboration. While we have listened carefully to the range of commentators who have advocated a need to change jury majorities and the like, we are persuaded by Lord Carloway’s logic that this is not necessary at the current time. The protections for suspected and accused persons in Scotland following implementation of the Carloway reforms will continue to be substantial – access to legal advice, the right to silence, extensive rights of disclosure, the need for cases to be proved beyond reasonable doubt, the three verdict system and rights of appeal. In this context, we do not believe that the removal of the requirement of corroboration will result in a fundamental unbalancing of the system. Fundamentally, like Lord Carloway, we trust judges and juries to make judgments based on the quality of evidence before them.

9.27 While several contrary arguments have been advanced, to date limited hard evidence has been put forward in support of the potential risks that have been identified. This consultation provides the opportunity for those commentators and interests to provide any evidence that they consider makes these potential concerns real and significant rather than just theoretical.

**Question 31**

*Lord Carloway concludes that the requirement for corroboration has no place in a modern legal system and should be abolished. Setting aside any question about whether this would require other changes to be made, do you agree with that conclusion?*

**Question 32**

*If the requirement for corroboration is removed, do you think additional changes should be made to the criminal justice system?*

- If you think additional changes should be made, what specific changes would you suggest and why? For example, if altering the size of jury majority required or verdicts what would a new system require or include?

- What evidence do you have to support your position?
10. OTHER CRIMINAL EVIDENCE ISSUES

10.1 In addition to corroboration, the Carloway Report assesses three other aspects of the law of evidence. Each of these areas is concerned with the evidence put before a court in a criminal case: the sufficiency of the evidence; the use of statements made by an accused to the police; and the use of adverse inferences from exercise of the right to silence. Only in relation to statements does the Report recommend a change to the law.

Lord Carloway’s recommendations:

— the test for sufficiency of evidence at trial and on appeal should remain as it is now, other than that, as already recommended, the requirement for corroboration should no longer apply;

— the distinction between incriminatory, exculpatory and mixed statements should be clarified so that, so far as statements made to the police or other officials in the course of an investigation are concerned, no distinction is drawn between them in terms of admissibility. All statements made by accused persons to such persons in that context should be admissible in evidence for all generally competent purposes, including proof of fact, in the case against that accused except where the content of a statement would otherwise be objectionable;

— further consideration should, in due course, be given to whether this rule should be applied to all pre trial statements by accused persons; and

— no change is made to the current law of evidence that prevents inferences being drawn at trial from an accused’s failure to answer questions during the police investigation.

Background

Sufficiency of evidence

10.2 Questions of sufficiency arise when a trial judge has to assess whether there is enough prosecution evidence for a case to be allowed to proceed. This can occur when the prosecution has led all of its evidence at the trial and the judge is asked to consider whether, in its totality, there is sufficient evidence for the case to be put to a jury for a verdict. If the trial judge decides that there is not sufficient evidence then he or she may direct that there is ‘no case to answer’ and acquit the accused without the case being put to a jury. At present, this most frequently occurs where the judge decides that a crucial aspect is not corroborated. In recommending that no change to the law on sufficiency be made, the Report comments:

“If the requirement for corroboration were to be abolished, there is no need for any further change to the existing law on sufficiency of evidence at the trial stage. The issue for the trial judge would be the same as it is at present,
except that there would be no need for corroboration. The trial judge should not be permitted to sustain a "no case to answer" submission or a submission made at the conclusion of all the evidence on the basis that he/she does not consider it "reasonable" for the jury to return a verdict of guilt because of the quality of the testimony adduced. It should be enough, therefore, that there has been some testimony that (i) the crime charged has been committed; and (ii) the accused was the perpetrator."²¹

10.3 In considering the question of assessing the sufficiency of evidence at a trial, it should be borne in mind that the prosecutor must always decide that a prosecution would be in the public interest for the case to make it to court.

**Statements to the police**

10.4 Statements given by an accused person to the police can provide an important source of evidence. Lord Carloway identifies that these statements are typically considered to come within three different categories and analyses the law in relation to their use:
- incriminatory statements: contain material that points towards the guilt of the accused;
- exculpatory statements: contain material that could exonerate the suspect; and
- mixed statements: contain material capable of being both incriminatory and exculpatory.

10.5 Lord Carloway notes that incriminatory statements made to the police are generally speaking admissible before a court, provided they conform to certain rules such as that in *Cadder* and the general requirements of spontaneity and fairness.²² However, the law is much more confused in relation to exculpatory and mixed statements. The use of these statements is more restricted, mainly due to a concern that their use could be manipulated. For example, it might permit a statement by an accused outlining their defence to be heard in court without adequate opportunity for it to be challenged. In contrast to an accused person directly giving evidence in court, there would not be an opportunity for cross-examination by the prosecution.

10.6 The Report concludes that the current system of treating incriminatory, exculpatory and mixed statements differently is confusing and highly complex. It is also out of line with the guiding principle adopted elsewhere in the Report that fairly obtained evidence should be freely assessed rather than constrained by overly restrictive rules. The Report recommends that the distinction between the three categories be removed, allowing for all types of statement to the police (or other public officials with a similar investigative role, e.g. customs officers) in the course of an investigation to be admissible (subject to the rules and protections referred to in the previous paragraph). This would mean that "it would be for a judge or jury to assess the credibility and reliability of statements in all the circumstances in which they came to be made."²³

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²¹ Carloway Report, para 7.3.19
²² Carloway Report, para 7.4.2
²³ See paras. 7.4.18-19 of the Carloway Report
10.7 The Report does discuss the possibility of going further and allowing all statements made by accused persons (i.e. not just statements to the police) to be admissible as evidence. However, it notes the concern that such an approach could “result in the creation of carefully prepared statements being read over to credible third parties for reiteration in court, thus presenting an account incapable of being tested by cross-examination or courtroom impression.” The same section of the Report highlights that this danger could potentially arise if a suspect prepared a statement in advance of a police interview. However, the Report concludes that a judge or jury “ought to be trusted to be able to assess such a statement for what it is worth, without requiring a formal direction on its value or the weight to be attached to separate elements of it.”

10.8 As a result, the first recommendation on this issue is confined to allowing statements made by accused persons to the police as evidence. The second recommendation proposes that further consideration be given to the concept of allowing the judge or jury to assess the credibility and reliability of all statements by accused persons. This could potentially take the form of a review of the wider law of hearsay. The law on hearsay provides rules to determine whether statements not made in court can be used as evidence. It provides an important check against gossip or unsubstantiated remarks being led in court and in general seeks to ensure that the evidence brought to court is the best available. For example, if the accused is alleged to have confessed to his or her friend, then that friend would be expected to give evidence directly in court. It would not be permissible for a third party to give evidence about what the friend had been told, unless there were special circumstances (for example if the friend had subsequently died).

Adverse inference

10.9 Suspects in criminal proceedings have a fundamental right to remain silent in the face of police questioning. This is an absolute right in Scotland, subject only to the need to answer certain questions seeking basic facts such as name and address. Unlike England and Wales, Scottish courts do not permit an adverse inference to be drawn from the silence of an accused person when questioned by the police.

10.10 Adverse inferences were introduced into the law of England and Wales in 1994. They operate where an accused seeks to rely on a particular point at trial that they did not mention to the police during questioning. Subject to a number of checks and balances, the law can permit the court to draw an adverse inference from a failure to mention the point at the time of questioning. The Carloway Report concludes that a similar system of adverse inference should not be adopted in Scotland. This is on the basis that it would lead to unduly complex rules that would be of little practical benefit. It would also not fit well with the presumption of innocence or the right against self incrimination.

10.11 It should be noted that this assessment of adverse inference is made in the context of silence during police questioning. If an accused person chooses to remain silent at the trial, the apparent absence of a reasonable explanation can legitimately be considered by a judge or jury in determining guilt.

24 Carloway Report, para 7.4.15
Response to recommendations

Sufficiency of evidence

10.12 The recommendation on sufficiency has not attracted substantial public comment. It is though in line with the collective consultation response to the Carloway Review by Scotland’s most senior judges. That response commented that:

“…we would not be in favour of trial judges having power to take some cases away from the jury on the basis that there is a sufficiency of evidence but that a judgment is made on quality. Such a system usurps the function of the jury.”25

10.13 Professor Fiona Raitt in evidence to the Justice Committee commented that removal of the requirement for corroboration could be accompanied by a renewed focus upon sufficiency of evidence at trial. She suggested that:

“…prosecutors would have to assess both whether a prosecution would be in the public interest and also whether “there was sufficient evidence to ensure that there was a reasonable prospect of conviction. Moreover, juries, or judges in summary cases, would still require sufficient evidence in order to be satisfied beyond reasonable doubt—a very high standard—before they could return a guilty verdict.”26

Statements to the police

10.14 There has been little public discussion in relation to these recommendations. In response to Lord Carloway’s consultation the Senators of the College of Justice suggested that the entire question of mixed and exculpatory statements should be reviewed as a part of a wider assessment of the law on hearsay. The Law Society of Scotland in its response27 indicated that the existing system should continue. Following its evidence sessions, the Justice Committee suggested that any changes should be part of a further examination of the laws of evidence if the requirement for corroboration were to be removed. In his evidence to the Justice Committee, Lord Carloway suggested that a wider review of the law on hearsay might at some point be referred to the Scottish Law Commission for consideration.

Adverse inferences

10.15 Representatives from ACPOS, in evidence to the Justice Committee on 13 December 2011, argued in favour of permitting an adverse inference to be drawn from silence. This was on the basis that a suspect’s silence could have a crucial bearing on the credibility of their subsequent defence. However, the majority of legal

26 Evidence to the Justice Committee on 13 December 2011, col. 628 of the Official Report
professional commentators were not in favour. Some argued that changing the law would risk challenge under the ECHR. At the same Committee session, Professor Peter Duff suggested that adverse inferences were in fact rarely deployed in England and Wales because they were viewed as making an appeal against conviction inevitable. \(^{28}\)

**Any related developments**

**Sufficiency of evidence**

10.16 Consultees considering the issue of sufficiency may wish to refer to the Scottish Law Commission’s 2008 *Report on Crown Appeals* (Scot Law Com No 212). The SLC recommended in that Report (recommendations 1 and 2(a)(iv)) factoring of a “no reasonable jury” test into the deliberation of a court on sufficiency of evidence. This proposal was not adopted by the legislation that in 2010 implemented the rest of this SLC Report. This was because the Government concluded\(^ {29}\) at that time that it was unclear whether the proposal would have a significant positive impact and that it also had the potential to disrupt court time. That consideration was of course made in the context of the requirement for corroboration remaining a central feature of the trial process.

**Statements to the police**

10.17 The Scottish Law Commission considered aspects of the law of hearsay in criminal cases in a Report in 1995.\(^ {30}\) The rules on hearsay in civil cases were abolished by the *Civil Evidence (Scotland) Act 1988*.

**Scottish Government View**

**Sufficiency of evidence**

10.18 The Government is minded to accept Lord Carloway’s recommendation that no change would be required to the law on sufficiency of evidence as a result of the abolition of the requirement for corroboration. It would, however, welcome the views of consultees on this issue.

**Statements to the police**

10.19 The Carloway Report has provided a compelling case that the current system for processing mixed and exculpatory statements is highly complex and potentially confusing. The Scottish Government is attracted to the overarching argument that evidence should, wherever appropriate, be freely assessed by judges and juries rather than restricted by technically complex rules. This is in line with our wider approach of trusting judges and juries to assess the quality of evidence before them. The Government is in favour of Lord Carloway’s recommendations on

\(^{28}\) Evidence to the Justice Committee on 13 December 2011, col. 666 of the Official Report

\(^{29}\) See the Policy Memorandum for the Criminal Justice and Licensing (Scotland) Bill, paras. 283-286


47
statements and will consider further the question of a possible review of the wider law of hearsay.

Adverse inference

10.20 The Government agrees that no change should be made to the law to permit adverse inferences to be drawn from exercise of the right to silence. The experience in England and Wales suggests that adverse inferences are in practice highly complicated and hotly contested. They also greatly complicate the role of a lawyer in advising clients at the point of police questioning. The Government accepts the Report’s conclusion that the use of adverse inference should not be adopted.

Question 33

Do you agree that the test for sufficiency of evidence at trial and on appeal should remain as it is now? If not what do you believe should change?

Question 34

Do you agree the rules distinguishing treatment of incriminatory, exculpatory and mixed statements should simplified allowing the courts to assess them more freely? If you do not agree, should any other change be made regarding these statements?

Question 35

Currently no adverse inference can be taken from an accused person failing to answer police questions. Do you agree that this should not change?
11. APPEAL PROCEDURES

11.1 Lord Carloway’s examination of appeals took as its starting point the fact that, as part of the overall trial process, it is subject to the reasonable time requirement of Article 6 of the ECHR. In contrast with the process of bringing a person to trial, appeals have no strict time limits, and Lord Carloway recognised that in recent years there had been occasions when delays might be said to have tarnished the reputation of the Scottish legal system. He notes that the responsibility to manage timescales lies in practical terms with the court. His recommendations, in that context, seek to eliminate or reduce some sources of delay. Nevertheless, as he recognises, the most important safeguard against undue delays is “the ethical obligation of everyone in the legal profession engaged in appellate work to assist the court in ensuring that cases are progressed efficiently”.

Lord Carloway’s recommendations:

— the High Court should be provided with a statutory provision to impose sanctions, including that to dismiss an appeal or to order that particular steps should not be paid for out of public funds, to enforce time limits and its own procedural decisions;

— the 1995 Act should be amended to provide that:
  (i) where an applicant fails to lodge a Note of Appeal timeously, having lodged a Notice of Intention to Appeal, his/her appeal will be deemed to be abandoned;
  (ii) where an applicant seeks to lodge a Notice of Intention to Appeal late or seeks to have his/her abandoned appeal revived by lodging a Note of Appeal, having earlier failed to do so, the court may allow this but only if:
    (a) special cause is shown why a late Notice or Note should be allowed; and
    (b) the grounds of appeal are such as disclose that, were the appeal to be received late, the appeal would probably succeed on the grounds stated;
  (iii) discussions on whether to grant leave to appeal late shall all take place in chambers without the requirement of an oral hearing unless the Court otherwise directs; and
  (iv) the decision of the High Court refusing to allow a Notice of Intention to Appeal or a Note of Appeal to be received late is final.;

— where an application for leave to appeal late is granted, the Court must give a reason for that decision in a form capable of being communicated to any victim of the crime or next of kin of any deceased;

— the processes of Bill of Suspension and Bill of Advocation should be abolished. The provisions of sections 74 and 174 of the 1995 Act should be expanded to permit appeals from any pre trial decision of a court of first instance but only with leave of that court. Where the
decision has the effect of terminating a prosecution by acquitting the accused of a charge, or part of a charge, or otherwise the Crown should have the right of appeal without leave;

— section 176 of the 1995 Act should be amended to permit an applicant for a stated case based solely on the incompetency of a conviction to request the court to authorise that the appeal proceed by Note of Appeal rather than Stated Case. The court should be permitted to grant such authorisation. Other than in relation to the quorum of the Court, the appeal should proceed in the same way as a Note of Appeal against sentence;

— the same test for leave to appeal late as is suggested for solemn cases should be applied to summary cases. It ought also to be made clear that, in accordance with current practice, there is no appeal from the decision of a single High Court judge refusing leave to appeal late in a summary case;

— the High Court’s *nobile officium* should continue but there should be a statutory provision that applies the same finality to summary case appeal decisions that section 124 of the 1995 Act provides in relation to solemn cases; and

— further consideration by the court and the legal profession should be given to whether the practice of trial counsel not appearing in the appeal proceedings constitutes a problem and, if so, what steps should be taken to solve that problem.

**Background**

11.2 Quite apart from undermining the principles of finality and certainty, late appeals present substantial practical problems. The longer the interval from the original trial, the more difficult it will be for a trial judge to provide an accurate report, and the more likely that productions may have been returned, destroyed, or simply gone missing. Lord Carloway believes that in these circumstances measures to promote timeous appeals should be taken further. It is in this context that he recommends that appeals be deemed abandoned where the timetable is not adhered to, and other sanctions to give the High Court of Justiciary power to enforce its timescales.

11.3 Lord Carloway points out that there have been changes, in recent years, which have attempted to ensure that appeals are considered with what he calls ‘suitable vigour’. An example of a timescale set out in statute is the forty-two day period for submission of written case and argument in solemn appeals. He recognises that the *Criminal Justice & Licensing (Scotland) Act 2010* sought to support timescales for submission of Notices of Intention to Appeal by providing that where an application was made to allow such a notice late, not only must the
reasons for the appeal be given, but there should also be a statement as to why the
time limit had not been complied with.

11.4 Lord Carloway seeks to speed up summary appeals by recommending that
appeals on the basis of competence may be based on a Note of Appeal rather than
the less flexible stated case. The proposed abolition of Bills of Advocation and
Suspension in favour of general provisions permitting appeals from any pre-trial
decision, with leave, is also justified by the possibility that Bills may be used to delay
proceedings without being subject to the scrutiny of the court of first instance, or of a
judge of the High Court. Lord Carloway believes that a comprehensive code
governing appeals from summary courts would be available without recourse to
these Bills, which he describes as “archaic in form”.

11.5 In the same way, the nobile officium should not be used to circumvent a
decision concluding a properly conducted appeal procedure. However, just as the
proposal to abolish Bills of Suspension and Advocation takes account of the
existence of a comprehensive statutory code for appeals for the summary courts, so
Lord Carloway has decided against the abolition of petitions to the nobile officium
altogether: there may still be circumstances which are extraordinary and unforeseen,
and such petitions provide the only remedy available. The interests of finality and
certainty, and the Article 6 requirement to a ‘hearing within a reasonable time’ means
that appeals should be properly addressed; but safeguards remain to ensure that
Scots justice continues to meet the overall imperative of fairness.

Response to recommendations

11.6 There has been relatively little discussion of Lord Carloway’s
recommendations for the streamlining of appeals since the publication of his Report.
The issues were, however, canvassed in the consultation conducted by the Carloway
Review from 8 April to 3 June 2011. That consultation paper set out questions
concerning time limits, tests for allowing late appeals, and dismissing appeals where
they are not properly conducted, as well as proposing the abolition not only of Bills of
Suspension and Advocation, but also of petitions to the nobile officium.

11.7 Only about half of the respondents to the consultation addressed the
questions on the management of appeals. While there was support for managing
appeals in a more vigorous manner, several respondents pointed out that it would be
wrong to penalise an appellant for a failure on the part of his or her agents to conduct
an appeal with sufficient vigour. Of course, civil redress is available where the
services of a solicitor are clearly inadequate; but it is accepted this may not be
sufficient for the issues raised by criminal prosecutions. Nevertheless, it is difficult to
imagine that, in considering sanctions, any judge would not keep the genuine
interests of the appellant at the forefront of his or her mind. While Lord Carloway
listed some potential sanctions, we would be particularly interested in views on what
appropriate sanctions might be.

11.8 Concerns were also expressed that abolishing Bills of Suspension and
Advocation and petitions to the nobile officium might lead to difficulties should
unforeseen circumstances arise where the current statutory procedures were
insufficient. In the light of these concerns Lord Carloway noted the jurisdiction of the
SCCRC; however, he ultimately decided to retain the possibility of petitions to the nobile officium “to deal with circumstances which are truly extraordinary or unforeseen and where there is no other remedy available”.

Any related developments

11.9 The ECHR does not itself guarantee a right to an appeal. Article 2 of Protocol 7 does, in most instances; but the UK has not yet ratified it. However the ECtHR, in Lalmahomed v The Netherlands (22 February 2011) noted that the Kingdom of Netherlands also has not ratified Protocol 7, and consequently the ECHR did not impose on the state the obligation to provide the applicant with the opportunity to appeal. Even so, a contracted party which provides for the possibility of an appeal is required to ensure that persons amenable to the law shall enjoy before the appellate court the fundamental guarantees contained in Article 6. These include the right to a trial within a reasonable time. Again, Lord Carloway’s recommendations would be compatible with this approach.

Scottish Government View

11.10 The Scottish Government agrees in principle with Lord Carloway’s recommendations and believes they will contribute to ensuring appeals are heard in a more timely manner, improving flexibility, finality and certainty in appeal procedures.

Question 36

Do you agree that time limits in appeal cases should be enforced? What sanctions do you consider might be appropriate?

Question 37

Do the amendments Lord Carloway recommends to sections 74 and 174 of the 1995 Act, together with the retention of the nobile officium, cover all situations in which Bills of Advocation and Suspension might reasonably be used? If not, what other situations can you envisage?

Question 38

Do you have any comments on Lord Carloway’s other recommendations for appeals?
12. FINALITY AND CERTAINTY

12.1 Lord Carloway looked at the issues surrounding finality and certainty in criminal proceedings in the context of the changes made in the Criminal Procedure (Legal Assistance, Detention and Appeals) (Scotland) Act 2010 concerning Scottish Criminal Cases Review Commission (SCCRC) cases. These changes related to two specific matters. There was a change to how the SCCRC made decisions whether to refer cases to the High Court of Justiciary. There was also a change to the powers of the High Court had when receiving a referred case.

12.2 The 2010 Act expanded the “interests of justice” element of the test the SCCRC apply so that:

“In determining whether or not it is in the interests of justice that a reference should be made, the Commission must have regard to the need for finality and certainty in the determination of criminal proceedings”.

12.3 The 2010 Act also introduced a new power for the High Court to reject a reference from the SCCRC so that:

“Where the Commission has referred a case to the High Court… the High Court… may reject the reference if the Court considers that it is not in the interests of justice that any appeal arising from the reference should proceed.

In determining whether or not it is in the interests of justice that any appeal arising from the reference should proceed, the High Court must have regard to the need for finality and certainty in the determination of criminal proceedings”.

12.4 As Lord Carloway made clear in his Report\(^\text{31}\), there is no general requirement under the European Convention of Human Rights to have an arrangement analogous to the SCCRC. Only England & Wales and Norway have similar arrangements. Lord Carloway, however, highlights the crucial role played by the SCCRC in retaining public confidence in the criminal justice system.

Lord Carloway’s recommendations:

— section 194C(2) of the 1995 Act (as inserted by Section 7(3) of the 2010 Act) which introduces a requirement on the SCCRC to consider “finality and certainty” in considering a reference, should be retained. There should, however, be no further statutory listing of the criteria included in the “interests of justice” test for SCCRC references;

— section 194DA of the 1995 Act (as inserted by Section 7(4) of the 2010 Act) which provides a “gate-keeping role” for the Appeal Court in relation to references from the SCCRC should be repealed; and

\(^{31}\) Carloway Report, para 8.2.6 note 10
— when considering appeals following upon references from the SCCRC, the test for allowing an appeal should be that:
(a) there has been a miscarriage of justice; and
(b) it is in the interests of justice that the appeal be allowed.

Background

12.5 Paragraphs 8.2.1 to 8.2.25 of Lord Carloway’s Report discuss his recommendations in relation to finality and certainty. As well as considering the provisions of the 2010 Act, he also considered if there are any other ways in which finality and certainty, or the wider interests of justice, should be considered in the reference or appellate processes.

SCCRC and the ‘interests of justice’

12.6 Lord Carloway considers it is important that the statutory position should remain that the SCCRC should take the principles of finality and certainty into account when they apply the “interests of justice” test. He states that “…retention of the new wording (i.e. the 2010 Act wording) will ensure it continues to be an important factor recognising, if it were not obvious, that the possibility of a miscarriage of justice having occurred in the trial process does not, of itself, mean that it is in the interests of justice that the relative convictions be quashed. This applies in all cases where a miscarriage of justice is alleged and not just in change of law situations”.

12.7 Lord Carloway did not consider any other aspects of the “interests of justice” test should be listed in statutory form. He indicated he had confidence that the SCCRC will continue to take into account all other relevant matters when considering what is in the interests of justice and there is no need to provide a statutory list.

The High Court’s “gatekeeping” role

12.8 Lord Carloway considers the role of the High Court. He considered it is important that confidence in those that might seek to engage the SCCRC to investigate possible miscarriages of justice is not undermined, even indirectly, as that would hinder the operation of one of the important checks and balances in our criminal justice system. He indicated that “… if applicants were aware that, even if his/her case were to meet the criteria for a reference by the SCCRC, the Court could refuse to consider the reference for reasons other than whether there was a miscarriage of justice, this may well deter them from applying to the SCCRC in the first place. If applicants are deterred from applying to the SCCRC because of that perception, this has a strong potential for undermining the important role of the SCCRC within the criminal justice system”.

12.9 Lord Carloway notes that the "flood" of referred cases that had been feared following the Cadder judgment (fears of which prompted the introduction of the High

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32 Carloway Report, paras 8.2.13 to 8.2.18
33 Carloway Report, para 8.2.17
34 Carloway Report, paras 8.2.19 to 8.2.24
35 Carloway Report, para 8.2.20
Court’s gatekeeping role) did not materialise. He concludes that in all the circumstances, he considers it is inappropriate for the High Court to have a gatekeeping role in relation to SCCRC references because, “...the (negative) effect which such a role could have relative to the function committed by Parliament to the SCCRC” 36.

References to the High Court

12.10 Lord Carloway notes 37 that there are wider considerations in references than exist in an ordinary appeal process. In particular, an ordinary appeal process generally only reviews the proceedings in the trial court, though fresh evidence may have an impact. In contrast, by the time a reference is made, there may be other issues that the court would want to consider, including whether there has been a decision by the applicant not to appeal at all, or not to appeal on particular grounds.

12.11 In light of these wider considerations, he indicates that it may be appropriate for the High Court to be able to bring matters to a conclusion in a reference by considering, in whatever order it deems appropriate in a case, but after a final hearing, whether (a) there has been a miscarriage of justice in the trial process; and (b) it is also in the interests of justice that the appeal be allowed.

Response to recommendations

12.12 A range of views were offered during the consultation forming part of Lord Carloway’s review on proposals in this area. This was also the case during Parliamentary consideration. There was some concern expressed in these processes that although removing the High Court’s “gatekeeping” role was generally to be welcomed, the recommendation that would provide the High Court with an explicit power to consider whether it was in the interests of justice that the appeal be allowed would not represent a significant departure from the current position under the 2010 Act. There was also some questioning of why finality and certainty should be singled out as an explicit element of the interests of justice test.

Any related developments

12.13 The Criminal Cases (Punishment and Review) (Scotland) Bill was passed by the Scottish Parliament on 20 June 2012. The Bill provides a framework for the Scottish Criminal Cases Review Commission to decide whether it is appropriate to disclose information concerning cases it has referred to the High Court for appeal against conviction which have subsequently been abandoned or have fallen. The provisions are not directly relevant to the issues discussed in this chapter.

Scottish Government View

12.14 The Scottish Government agrees that Lord Carloway’s recommendations in this area represent clear recommendations which seek to move on from, and adapt in some areas, the provisions included in the 2010 Act.

36 Carloway Report, para 8.2.24
37 Carloway Report, para 8.2.25
**Question 39**

Do you agree that section 194C(2) of the 1995 Act should be retained and that there should be no further statutory listing of the criteria included in the “interests of justice” test for SCCRC references?

**Question 40**

What are your views on Lord Carloway’s recommendation that section 194DA of the 1995 Act should be repealed?

**Question 41**

Do you agree with the recommendations that, when considering appeals following upon references from the SCCRC, the test for allowing an appeal should be:

(a) there has been a miscarriage of justice; and
(b) it is in the interests of justice that the appeal be allowed.

If not, what do you think the criteria should be?
ANNEX A - LIST OF CONSULTATION QUESTIONS

ARREST AND DETENTION

Question 1

What are your views on the move to a power of arrest on ‘reasonable suspicion’ of having committed a crime, replacing the common law and statutory rules on arrest and detention?

Question 2

What are your views on Lord Carloway’s recommendations for the police no longer to be required to charge a suspect with a crime prior to reporting the case to the Procurator Fiscal? How is this best achieved in practice?

Question 3

Do you agree that a suspect in a criminal investigation, who has not been detained or arrested, does not require any statutory rights similar to those conferred had that person been arrested and detained?

Question 4

What are your views on the recommendation that a suspect should only be detained if it is necessary and proportionate having regard to the nature and seriousness of the crime and the probable disposal if convicted?

CUSTODY

Question 5

Do you agree with Lord Carloway’s recommendation that the maximum time a suspect can be held in detention (prior to charge or report to the Procurator Fiscal) should be 12 hours? Please explain.

Question 6

What are your views on whether this 12 hour period could be extended in exceptional circumstances? How could this be regulated appropriately?

Question 7

What are your views on the need for the proposed 12 hour period of detention to be reviewed after 6 hours by a senior police officer?
Question 8

What do you consider the most effective way of ensuring that no person should be detained in custody beyond 36 hours before appearing before a Court, i.e. over the weekend period?

- Are there any practical difficulties to be overcome in delivering a model that achieves this?
- Bearing in mind the desire for suspects to be held for as short a period as possible, current ECHR case law which indicates a limit of 4 days and affordability issues do you consider there to be an alternative time period to the 36 hour recommendation before suspects appear before a Court?

Question 9

What are your views on the police having the ability to hold an accused for court and report a case to the procurator fiscal without first charging the suspect?

Liberation from Police Custody

Question 10

Do you agree with Lord Carloway’s recommendations that the police should be able to liberate a suspect from custody on conditions, referred to as investigative liberation? What are the practical issues with this and what comments do you have about conditions and safeguards?

Question 11

Lord Carloway suggests that a limit of 28 days be set on the period that the police can liberate a suspect on investigative liberation. Do you think that 28 days is sufficient in all cases? Please explain.

Question 12

Are there practical issues with the police advising the suspect of a time and place for a return to the police station, at the point investigative bail is granted?

Legal Advice

Question 13

What are your views on the recommendation for access to a lawyer to begin as soon as practicable after the detention of the arrested suspect, regardless of questioning?

- What do you see as the purpose of access to a lawyer when questioning is not anticipated?
What do you consider to be the best way of providing legal advice for suspects as soon as practicable after detention, whilst ensuring it is effective, practical and affordable?

**Question 14**

Do you foresee any difficulties with the recommendation that the standard caution prior to the interviewing of suspects outwith a police station includes information that they have a right to access a solicitor if they wish? If so, please explain what these are.

**Question 15**

Lord Carloway recommends that it is for the accused to decide on the way legal advice is provided (by telephone, in person etc.) and whether their solicitor is present during a police interview. Do you agree with this approach? If not, please give reasons.

Are there any additional considerations for the form of legal advice when questioning is not anticipated?

**Question 16**

It is proposed that the right to waive access to legal advice, and the expression and recording of this, should be set out in legislation – do you agree? If not, please give reasons.

Lord Carloway also proposes that this right can only be waived once a person is fully informed of the right – what are your views on this?

**Question 17**

Do you agree with Lord Carloway’s recommendation that the practice of only enrolled solicitors giving advice to suspects should continue? If you disagree, please set out an alternative approach.

**QUESTIONING**

**Question 18**

Do you agree that the police should be allowed to question a suspect after charge (subject to the permission of the court and any conditions they apply), as outlined in the recommendations? Please explain.

**Question 19**

Do you agree that the procedure of Judicial Examination should be removed, whilst introducing provisions to allow the Crown to apply to the court to question a suspect after charge, as outlined in the recommendations? Please explain.
Question 20

Do you agree that the present common law rules of fairness concerning the admissibility of statements by suspects should be abolished in favour of the more general Article 6 test, as outlined in the recommendations? Please explain.

CHILD SUSPECTS

Question 21

Do you agree with Lord Carloway’s recommendation that, for the purposes of arrest, detention and questioning, a child should be defined as anyone under the age of 18 years? Please explain why.

Question 22

Do you agree that there should be a general statutory provision that, in taking any decision regarding the arrest, detention, interview and charging of a child, the best interests of the child shall be a primary consideration?

  o How would such a provision work in practice?

Question 23

Do you agree with the terms of the Report that the general role of the parent, carer or responsible person should be to provide any moral support and parental care and guidance to the child and to promote the child’s understanding of any communications between the child, the police and the solicitor?

  o Should the responsibilities of a parent, carer or responsible person be provided for in statute or achieved through guidance and the possible provision of support or in some other way?

Question 24

Do you have comments on the recommendation for children aged 16 or 17 years to be able to waive their right of access to a lawyer only with the agreement of a parent, carer or responsible person?

Question 25

Do you have comments on the recommendation for children aged 16 or 17 years to be able to waive their right of access to a parent, carer or responsible person, but that in such cases they must be provided with access to a lawyer?

Question 26

What are your views on the recommendation that children under 16 should not be able to waive their rights to legal advice?
VULNERABLE ADULT SUSPECTS

Question 27

Do you agree with Lord Carloway’s recommendation that there should be a statutory definition of a “vulnerable suspect”

- Do you agree with the definition proposed by Lord Carloway?
- If not, what do you think the definition should be?

Question 28

Do you agree with Lord Carloway’s recommendation that the role of an Appropriate Adult should be defined in statute?

- Do you agree with the definition proposed by Lord Carloway?
- If not, what do you think the definition should be?

Question 29

Do you agree with Lord Carloway’s recommendation that statute should provide that a vulnerable suspect must be provided with the services of an Appropriate Adult as soon as practicable after detention and prior to any questioning?

- If so, do you agree that the current role of an Appropriate Adult should be extended so that a vulnerable suspect can only waive their right of access to a lawyer if the appropriate adult also agrees to this?

Question 30

Do you agree with Lord Carloway’s recommendation that statutory provision should be made to define the qualifications necessary to become an Appropriate Adult?

- If so, what steps do you think are required to decide what these qualifications should be?

CORROBORATION

Question 31

Lord Carloway concludes that the requirement for corroboration has no place in a modern legal system and should be abolished. Setting aside any question about whether this would require other changes to be made, do you agree with that conclusion?
**Question 32**

If the requirement for corroboration is removed, do you think additional changes should be made to the criminal justice system?

- If you think additional changes should be made, what specific changes would you suggest and why? For example, if altering the size of jury majority required or verdicts what would a new system require or include?

- What evidence do you have to support your position?

**OTHER CRIMINAL EVIDENCE ISSUES**

**Question 33**

Do you agree that the test for sufficiency of evidence at trial and on appeal should remain as it is now? If not what do you believe should change?

**Question 34**

Do you agree the rules distinguishing treatment of incriminatory, exculpatory and mixed statements should be simplified allowing the courts to assess them more freely? If you do not agree, should any other change be made regarding these statements?

**Question 35**

Currently no adverse inference can be taken from an accused person failing to answer police questions. Do you agree that this should not change?

**APPEAL PROCEDURES**

**Question 36**

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Do the amendments Lord Carloway recommends to sections 74 and 174 of the 1995 Act, together with the retention of the nobile officium, cover all situations in which Bills of Advocation and Suspension might reasonably be used? If not, what other situations can you envisage?

**Question 38**

Do you have any comments on Lord Carloway’s other recommendations for appeals?
FINIALITY AND CERTAINTY

**Question 39**

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**Question 40**

What are your views on Lord Carloway’s recommendation that section 194DA of the 1995 Act should be repealed?

**Question 41**

Do you agree with the recommendations that, when considering appeals following upon references from the SCCRC, the test for allowing an appeal should be:

- (a) there has been a miscarriage of justice; and
- (b) it is in the interests of justice that the appeal be allowed.

- If not, what do you think the criteria should be?