

SPICe Briefing

Criminal Procedure: Responses to Cadder v HM Advocate

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On 26 October 2010, the UK Supreme Court issued its judgement in the case of *Cadder v HM Advocate*. It held that certain elements of Scots law governing police powers to detain and question suspects failed to respect the right to a fair trial under Article 6 of the European Convention on Human Rights. The court ruling has led to important changes to law and practice, an independent review and much debate.

Legal changes in response to the *Cadder* case include those made by the Criminal Procedure (Legal Assistance, Detention and Appeals) (Scotland) Act 2010. The relevant Bill was introduced on 27 October 2010 and, following an agreement of the whole Parliament to treat the Bill as an Emergency Bill, was passed on the same day. It received Royal Assent on 29 October 2010, with the Act coming into force the following day. Reforms introduced by the Act include a right of access to legal advice for suspects being questioned by the police and the extension of the period during which the police can detain suspects.

This briefing considers the background to the *Cadder* case, the implications of the ruling and the response of the Scottish Government and others.



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EXECUTIVE SUMMARY

- Prior to the Criminal Procedure (Legal Assistance, Detention and Appeals) (Scotland) Act 2010 (the 2010 Act), a person suspected of a crime in Scotland could generally be detained and questioned by the police for a period of up to six hours prior to arrest and/or release. The suspect did not, during that period, have the right to receive legal advice from a lawyer
- In November 2008, the European Court of Human Rights held, in the case of *Salduz v Turkey*, that a lack of access to legal assistance while the suspect was in police detention had disclosed a systemic violation of the European Convention on Human Rights (ECHR). The case concerned a minor who had been taken into custody by police officers and was subsequently interrogated by them in the absence of a lawyer. While in custody he made a number of admissions which he later sought to retract, stating that they had been obtained under duress. His case before the European Court of Human Rights relied on Article 6 of the ECHR – the right to a fair trial
- In June and July 2010, the Lord Advocate issued first [interim guidelines](#) and then [revised guidelines](#) for the police on access to solicitors by suspects. The guidelines were issued pending the judgement of the UK Supreme Court, in the case of *Cadder v HM Advocate*, on the implications of the *Salduz* case for Scotland. Although the guidelines were not intended to pre-empt the decision of the court, they were issued in order to protect prosecutions pending the court's decision
- On 26 October 2010, the UK Supreme Court, in the case of *Cadder v HM Advocate*, ruled unanimously that the law in Scotland was incompatible with Article 6 of the ECHR in allowing a suspect to be detained and questioned by the police without having access to legal advice
- The Criminal Procedure (Legal Assistance, Detention and Appeals) (Scotland) Act 2010 came into force on 30 October 2010. The relevant Bill, introduced by the Scottish Government under emergency legislation procedure, was passed following parliamentary scrutiny on 27 October 2010. The 2010 Act:
 - provides a statutory right to legal advice for suspects being questioned by the police
 - extends the six hour period during which a suspect can be detained for questioning by the police
 - provides a mechanism that can be used (if necessary) to ensure that adequate legal aid arrangements are available for detained suspects
 - reinforces the principles of certainty and finality set out in the Supreme Court's decision in *Cadder*

THE CADDER CASE

POLICE DETENTION OF SUSPECTS

Prior to the Criminal Procedure (Legal Assistance, Detention and Appeals) (Scotland) Act 2010 (the 2010 Act),¹ a person suspected of a crime in Scotland could be detained and questioned by the police for a period of up to six hours prior to arrest and/or release. The introduction of this detention period was recommended by the Thomson Committee in its 1975 report on Criminal Procedure in Scotland (Scottish Home and Health Department 1975). The review of criminal procedure undertaken by the committee led to legal changes in the Criminal Justice (Scotland) Act 1980. Relevant provisions on detention were subsequently re-enacted in the Criminal Procedure (Scotland) Act 1995 (the 1995 Act).

Section 14 of the 1995 Act allows the police to detain and question a person suspected of committing an offence punishable by imprisonment. Prior to the 2010 Act, section 14 provided that the police could detain a person in such circumstances for up to six hours. That detention must be terminated earlier where any of the following occur:

- (a) the person is arrested;
- (b) the person is detained in pursuance of any other enactment; or
- (c) there are no longer grounds for detaining the person under section 14

Also prior to the 2010 Act, the police were not required to offer access to a solicitor to persons detained under section 14 of the 1995 Act, although detainees were entitled to have the fact of their detention intimated to a lawyer (and one other person).

In June 2010, the Lord Advocate issued [interim guidelines](#) on access to a solicitor by suspects. [Revised guidelines](#) were published in July 2010 and issued to the police in Scotland pending the judgement of the UK Supreme Court in the case of *Cadder v HM Advocate*. Although the guidelines were not intended to pre-empt the decision of the court, they were issued in order to protect prosecutions pending the court's decision.

The Lord Advocate's guidelines provided, amongst other things, that where a police senior investigating officer determines that the interview of a detained suspect is necessary the suspect must be offered access to a solicitor for private consultation, in person, in advance of the interview. Suspects should also be asked at this stage whether they wish to have a consultation by telephone in the event that a solicitor is unable to attend at the police station.

It may be noted that, since 1984, those held in police custody in England and Wales have had the right to consult with a lawyer at any time. This is provided for under section 58(1) of the Police and Criminal Evidence Act 1984 (PACE). The position in other common law jurisdictions is similar. In Canada and New Zealand, anyone arrested or detained has the right to instruct a lawyer without delay. In Australia (with the exception of one territory), suspects have the right to communicate with a lawyer before being questioned by the police. In the United States of America, suspects have had the right to legal counsel during police questioning since the 1966 ruling of the US Supreme Court in *Miranda v Arizona*.²

¹ The 2010 Act is considered later in this briefing.

² Sarah Smith, Scottish Human Rights Law Group; the Journal Online; The Law Society of Scotland, 16 August 2010.

BACKGROUND TO THE CADDER CASE

In 2009, Peter Cadder was convicted of two assaults and a breach of the peace at Glasgow Sheriff Court. His conviction relied, in part, on confession evidence given in a police interview which was conducted without a lawyer being present. He appealed his case to the High Court of Justiciary arguing that his human rights, in relation to the right to a fair trial, had been breached. His appeal was, in part, based on the fact that answers he provided during an interview with police were obtained without access to a lawyer. The arguments put forward in the appeal were based on the decision of the European Court of Human Rights in *Salduz v Turkey* (2008).

Ruling of the European Court of Human Rights in *Salduz v Turkey*

Salduz v Turkey concerned a minor who had been taken into custody by police officers and was subsequently interrogated by them in the absence of a lawyer. While in custody he made a number of admissions in a statement given to the police. When brought before the public prosecutor, and subsequently the investigating judge, the suspect sought to retract his statement, saying that it had been obtained under duress. His case before the European Court of Human Rights relied on Article 6 of the European Convention on Human Rights (ECHR) which provides as follows:

"Article 6: Right to a Fair Trial

1. In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law. Judgement shall be pronounced publicly but the press and public may be excluded from all or part of the trial in the interest of morals, public order or national security in a democratic society, where the interests of juveniles or the protection of the private life of the parties so require, or the extent strictly necessary in the opinion of the court in special circumstances where publicity would prejudice the interests of justice.
2. Everyone charged with a criminal offence shall be presumed innocent until proved guilty according to law.
3. Everyone charged with a criminal offence has the following minimum rights:
 - (a) to be informed promptly, in a language which he understands and in detail, of the nature and cause of the accusation against him;
 - (b) to have adequate time and the facilities for the preparation of his defence;
 - (c) to defend himself in person or through legal assistance of his own choosing or, if he has not sufficient means to pay for legal assistance, to be given it free when the interests of justice so require;
 - (d) to examine or have examined witnesses against him and to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him;
 - (e) to have the free assistance of an interpreter if he cannot understand or speak the language used in court.

In November 2008, a unanimous decision of the European Court of Human Rights held that a lack of access to legal assistance while the suspect was in police detention disclosed a systemic violation of the ECHR. The [opinion of the court](#) states:

“In order for the right to a fair trial to remain sufficiently ‘practical and effective’ Article 6(1) requires that, as a rule, access to a lawyer should be provided as from the first

interrogation of a suspect by the police, unless it is demonstrated in the light of the particular circumstances of each case that there are compelling reasons to restrict this right. Even where compelling reasons may exceptionally justify denial of access to a lawyer, such restriction – whatever its justification – must not unduly prejudice the rights of the accused under Article 6. The rights of the defence will in principle be irretrievably prejudiced when incriminating statements made during police interrogation without access to a lawyer are used for conviction.” (European Court of Human Rights 2008, para 55)

Consideration by the High Court of Justiciary

The law on detention by the police in Scotland had previously been considered by the High Court of Justiciary (the most senior criminal court in Scotland) in [Paton v Ritchie 2000](#) and [Dickson v HM Advocate 2001](#). It was found, on both occasions, to be compliant with ECHR. The implications of the *Salduz* case for Scotland were most recently considered by the High Court in [McLean v HM Advocate 2009](#). The sheriff dealing with that case referred it to the High Court and asked whether the fact that legal representation was not available from the moment of entry into police custody constituted a violation of an accused person’s rights under Article 6 of the ECHR. The sheriff also asked, on the assumption that the prosecution sought to rely on the evidence of a police interview conducted without access to legal advice, whether the Lord Advocate would be acting incompatibly with the accused’s right to a fair trial under Article 6, and thus outwith her powers as constrained by section 57(2) of the Scotland Act 1998.³

In the *McLean* case, the High Court considered that *Salduz* was open to interpretation, and that the key factor in determining whether there was a violation of Article 6 was whether the prosecution’s reliance on a statement made by the accused in the absence of a lawyer would irretrievably prejudice the rights of the defence. In considering whether a trial had been conducted fairly, the court considered that the particular circumstances of the case must be examined as well as the guarantees put in place under the relevant jurisdiction to ensure a fair trial.

The High Court in *McLean* concluded, amongst other things, that there were sufficient safeguards in place in the Scottish legal system to ensure a fair trial for the accused in such a situation. For example, the court pointed out that any unfair treatment or coercion during a police interview would render incriminating answers inadmissible in evidence. In addition, even if an accused person made voluntary admissions in fair circumstances, he/she could not be convicted on that basis alone as Scots law requires there to be corroboration of evidence. (With regard to corroboration, the general position in relation to Scots criminal law is that the essential elements of a criminal offence must be proven by evidence from at least two separate sources.) The court’s main conclusions were:

- whether or not there had been a fair trial depended on the particular circumstances of the case, including what arrangements the jurisdiction in question had made for access to legal advice, seen against the guarantees which were otherwise in place in that jurisdiction to secure a fair trial

³ Section 57(2) of the Scotland Act 1998 prevents members of the Scottish Executive from acting incompatibly with relevant ECHR rights or Community law. The Lord Advocate is a member of the Scottish Executive by virtue of section 44(1)(c) of the 1998 Act. Her functions as head of the system of criminal prosecutions in Scotland are, accordingly, subject to the control in section 57(2). Thus, she and her officials have no power to act incompatibly with relevant ECHR rights or Community law when conducting prosecutions.

- the guarantees available under the Scottish system were sufficient to secure a fair trial for a person who, while detained, was interviewed by police officers without access to a lawyer and whose responses were relied on by the prosecution at trial
- the fact that legal representation was not available did not of itself constitute a violation of Article 6 of the ECHR
- the court was not obliged to directly apply *Salduz v Turkey*, where the European Court had not in that case carefully considered any features of the Scottish system of criminal procedure
- that even if *Salduz* amounted to the expounding of a principle that Article 6 required that access to a lawyer should be provided from the first interrogation of a suspect by the police, that principle could and should not be applied without qualification in Scotland; and, in particular, if other safeguards to secure a fair trial were in place, there was, notwithstanding that a lawyer was not so provided, no violation of Article 6

THE RULING IN CADDER

On 26 October 2010, the UK Supreme Court, in the case of *Cadder v HM Advocate*, ruled unanimously that the law in Scotland was incompatible with Article 6 of the ECHR in allowing a suspect to be detained and questioned by the police without having access to legal advice. In the court's [judgement](#), Lord Hope observed that:

“There is no doubt that the appeal court’s decision in *McLean* was entirely in line with, and fully supported by, previous authority. The question, however, is whether it can survive scrutiny in the light of what the Grand Chamber said in *Salduz v Turkey* (2008) 49 EHRR 421.” (UK Supreme Court 2010, para 29)

Lord Hope concluded that the decisions of the High Court of Justiciary in *Paton v Ritchie 2000*, *Dickson v HM Advocate 2001* and *HM Advocate v McLean 2010* (see above) were no longer good law in the light of the European Court of Human Rights’ ruling in *Salduz* and that they should be overruled. He stated that:

“I would allow the appeal on the ground that leading and relying on the evidence of the appellant’s interview by the police was a violation of his rights under article 6(3)(c) read in conjunction with article 6(1) of the Convention.” (UK Supreme Court 2010, para 63)

Concerns had been raised in anticipation of the Supreme Court’s judgement about the possibility of its decision applying retrospectively to completed prosecutions. However, having considered previous authorities, the court concluded that its decision would not permit the reopening of closed cases. Lord Hope stated:

“In the light of these authorities I would hold that convictions that have become final because they were not appealed timeously, and appeals that have been finally disposed of by the High Court of Justiciary, must be treated as incapable of being brought under review on the ground that there was a miscarriage of justice because the accused did not have access to a solicitor while he was detained prior to the police interview. The Scottish Criminal Cases Review Commission must make up its own mind, if it is asked to do so, as to whether it would be in the public interest for those cases to be referred to the High Court. It will be for the appeal court to decide what course it ought to take if a reference were to be made to it on those grounds by the Commission.” (UK Supreme Court 2010, paras 56 – 62)

At the time of the Supreme Court's ruling, the Crown Office and Procurator Fiscal Service (COPFS) estimated that there were 3,471 cases where the issue of the admissibility of evidence from police interviews had been raised by the defence. On 9 February 2011, the COPFS [announced](#) that it had completed an analysis of the impact of the *Cadder* case in the three months since the judgement. During this time a total of 867 cases, the majority of which were summary prosecutions, could not proceed or could not continue as a direct result of *Cadder*. Scott Pattison, Director of Operations at COPFS stated:

“Since the ruling in October, we have been reviewing the impact of the Supreme Court's judgment, prioritising the most serious crime. There has been extensive liaison between Procurators Fiscal and the police to thoroughly explore the impact of the *Cadder* decision on the available evidence and any potential lines of further enquiry. Each case was then carefully considered by Crown Counsel before any conclusion was reached that no further evidence was available, and the case required to be discontinued as a result of *Cadder*. In some solemn cases, we have decided to discontinue proceedings meantime - these cases are not closed and will be kept under review, so proceedings may be raised should additional evidence come to light in the future.” (Crown Office and Procurator Fiscal Service 2011)

THE 2010 ACT

INTRODUCTION

The Criminal Procedure (Legal Assistance, Detention and Appeals) (Scotland) Act 2010 (the 2010 Act) came into force on 30 October 2010. The relevant Bill, introduced by the Scottish Government under emergency legislation procedure, was passed following parliamentary scrutiny on 27 October 2010. The Policy Memorandum to the Bill stated that:

“The ruling of the UK Supreme Court in the case of *Cadder v Her Majesty's Advocate* on 26 October 2010 has significant implications for the investigation and prosecution of crime in Scotland. This Bill forms part of the Scottish Government's response to the decision. It is designed to ensure that Scottish practice accords with the standards of the European Convention on Human Rights (ECHR) and to ensure the effective functioning of the criminal justice system following the judgement.” (para 2)

The 2010 Act:

- provides a statutory right to legal advice for suspects being questioned by the police
- extends the six hour period during which a suspect can be detained for questioning by the police
- provides a mechanism that can be used (if necessary) to ensure that adequate legal aid arrangements are available for detained suspects
- reinforces the principles of certainty and finality set out in the Supreme Court's decision in *Cadder*

A number of MSPs expressed concern during the passage of the relevant Bill, given the importance of the issues raised by the Supreme Court's judgement, that the Scottish Government sought to have parliamentary scrutiny carried out under the emergency bill procedure. They questioned whether the Lord Advocate's guidelines (which had been in place since June 2010) would not provide sufficient safeguards while fuller consultation and scrutiny of the legislative proposals was undertaken. The Cabinet Secretary for Justice argued that

although the guidelines were being followed, the Government was duty bound to take the approach it had:

“We are in a situation in which 1,000 or so people are detained every week. Without new legislation, there is the danger that matters could be struck down and that we could be left in a position in which we have no right of detention, so I believe that it is essential.”
(Scottish Parliament 2010, col 29554)

The use of the emergency bill procedure was also one of the issues which gave rise to comment by a number of people outwith the Parliament (considered later in this briefing).

KEY ISSUES

This section outlines some of the key provisions of the Criminal Procedure (Legal Assistance, Detention and Appeals) (Scotland) Act 2010. It includes consideration of relevant parliamentary scrutiny.

Access to a Solicitor

As outlined above, the 2010 Act provides a statutory right to legal advice for suspects detained by the police for questioning. Although the introduction of the Lord Advocate’s guidelines had resulted in access to a solicitor being made available to suspects in practice, the Scottish Government accepted that there should be a specific statutory right.

The relevant Bill, as introduced, provided that a constable could delay a suspect’s right to speak to a lawyer so far as it is necessary in the interest of the investigation, the prevention of crime, or the apprehension of offenders. Robert Brown MSP lodged an amendment at stage 2 which sought to delete this provision, arguing that it removed the right of automatic access to a solicitor which the decision in *Cadder* had centred on. The Cabinet Secretary for Justice argued that the provision replicated a test which was already contained in the Criminal Procedure (Scotland) Act 1995 (the 1995 Act), that it would only be exercised in compelling cases and that it was ECHR compliant (Scottish Parliament 2010 col 29612-29614). After a division the amendment was disagreed to. Robert Brown subsequently lodged an amendment at stage 3 which sought to make explicit that any delay in providing access to a solicitor could only take place in exceptional circumstances. This amendment was agreed to without division and is reflected in the 2010 Act.

Detention Periods

The 2010 Act extends the six hour period during which a suspect can be detained for questioning by the police to twelve hours, with the possibility of a further extension to 24 hours in certain circumstances.

In justifying this change the Scottish Government stated that, with the introduction of a system under which suspects are entitled to have access to a solicitor during detention, six hours was no longer considered to be an adequate maximum detention period by either the police (the Scottish Police Services Authority and the Association of Chief Police Officers in Scotland) or prosecution. In response to the Law Society’s view that any extension should not feature in the current legislation, but rather that relevant options for change should be considered by the Expert Review established to consider long term reform of the criminal justice system (see below), the Government argued that quicker action was required. It agreed that the Expert

Review should consider the detention period, but indicated that it was unlikely that any reforms emanating from that review could become law before late 2011 or 2012.

In relation to the possibility of a further extension to 24 hours, the 2010 Act allows this where a senior police officer affirms that such an extension is required because of the specific circumstances of a case. It can only be granted by an officer of the rank of at least inspector who has not been involved in the investigation.

Robert Brown MSP lodged a number of amendments on this issue during stage 2 scrutiny of the relevant Bill. Amongst other things, they sought to: (a) retain a six hour period of detention with the possibility of extension up to 12 hours by an officer of the rank of inspector or above where exceptional circumstances exist; and (b) allow for further extension to the detention period up to 24 hours on application to a sheriff. Following debate, these amendments were either disagreed to, not moved or withdrawn and are, therefore, not reflected in the 2010 Act.

Criminal Advice and Assistance (Legal Aid)

Section 2 of the 2010 Act amends the Legal Aid (Scotland) Act 1986 (the 1986 Act) – inserting a new section allowing advice and assistance to be made available without reference to the financial limits under section 8 of that legislation. The circumstances under which such advice and assistance would be available will be prescribed in regulations by Scottish Ministers. This had not happened at the time of writing this briefing.

The Scottish Government's stated intention is that the above change should ensure that the financial eligibility requirements do not unduly restrict the availability of solicitors needed to facilitate the new right of access to legal advice for suspects. It highlighted a number of possible problems if such a change is not made:

- the Law Society of Scotland had pointed to some evidence of solicitors struggling, since the introduction of the Lord Advocate's guidelines in 2010, to verify clients' financial eligibility before police interviews. The problem was a practical one, since most people who have been arrested do not have documents in their possession which would allow a solicitor to be reasonably satisfied that they were eligible to receive advice and assistance
- the financial eligibility requirements also presented a problem for publicly employed solicitors in the Public Defence Solicitors' Office (PDSO) since they are prevented by statute from assisting those who are financially ineligible to receive advice and assistance

The Scottish Government pointed out that if changes were not made to the operation of the financial eligibility requirements, some solicitors in private practice may be unwilling to carry out such work, whilst those from the PDSO would not be allowed to advise clients who are financially ineligible to receive advice and assistance. The Government's planned use of a regulation-making power to implement necessary changes is intended to allow a degree of flexibility in defining the circumstances in which advice and assistance is to be made available without reference to the financial limits, following consultation with the Scottish Legal Aid Board, the Law Society of Scotland and others.

The provisions on advice and assistance were not the subject of much debate during the passage of the Bill. However, Bill Butler MSP noted that:

“The provision of an enabling power to allow for the adjustment of legal aid eligibility rules for legal advice and assistance, which will allow new arrangements to be designed for the

provision of legal advice at police stations, is an aspect of the bill that seems both necessary and rational and is worthy of support". (Scottish Parliament 2010, col 29569)

Time Limits for Appeals

The Policy Memorandum to the Bill points out that the Supreme Court's decision in *Cadder* has been framed to protect finality and certainty in most completed cases. It also limits the possibility of appeals on the grounds that the suspect was detained and questioned without having had access to legal advice. The Supreme Court's judgement indicated that:

"convictions that have become final because they were not appealed timeously, and appeals that have been finally disposed of by the High Court of Justiciary, must be treated as incapable of being brought under review on the ground that there was a miscarriage of justice because the accused did not have access to a solicitor while he was detained prior to the police interview. The Scottish Criminal Cases Review Commission must make up its own mind, if it is asked to do so, as to whether it would be in the public interest for those cases to be referred to the High Court. It will be for the appeal court to decide what course it ought to take if a reference were to be made to it on those grounds by the Commission." (UK Supreme Court 2010, para 62)

Following the Supreme Court's decision in *Cadder*, the Scottish Government took the view that, as a general principle, concluded criminal cases should not be re-examined solely because the law had subsequently changed. The Policy Memorandum stated:

"For cases which have not been finally concluded, the 1995 Act makes provision for time limits in which appeals against conviction must be made. For example, in solemn cases appellants must note an intention to appeal against conviction within 2 weeks of the decision and specify grounds of appeal within a further 8 weeks. However, courts have discretion to waive these time limits in certain circumstances. There is currently no test in the 1995 Act for the allowing of such 'out of time' appeals and there is no developed jurisprudence of the court which makes apparent when such extensions will be granted or refused." (para 36)

The 2010 Act makes provision in relation to statutory appeal rights under the 1995 Act so that late appeals would require the appellant to give reasons as to why they failed to comply with time limits and the proposed grounds of appeal. The application must be intimated by the applicant to the Crown Agent, and the prosecutor may, within seven days of receiving intimation of the application, request a hearing and be given an opportunity to be heard upon the application (or to make representations in writing). This provision is made for both solemn and summary cases.

The Act also introduces time limits for the taking of appeals by bills of advocation and bills of suspension. It provides a three week period for such appeals which may be extended by the High Court on application by either party, explaining why the applicant failed to comply with the time limit and setting out the proposed grounds of appeal or review. A party must lodge the bill of suspension or bill of advocation within three weeks of the date of conviction, acquittal or, as the case may be, other decision to which the bill relates. The Policy Memorandum pointed out that this limit was required because such appeals are not currently subject to time limits, and could have potentially allowed some settled historical convictions to be appealed.

Scottish Criminal Cases Review Commission

Section 7 of the 2010 Act seeks to address the possibility of the Scottish Criminal Cases Review Commission receiving applications on the basis that legal access was, prior to the 2010 Act, denied to a suspect during detention.⁴ It provides that the Commission must have regard to finality and certainty in making referrals to the High Court. It also provides that the court may reject a reference from the Commission if it considers that it would not be in the interests of justice for any appeal arising from the reference to proceed. Finality and certainty in criminal proceedings is identified as a specific factor for the High Court to consider in making this assessment.

During the passage of the Bill, Christine Grahame MSP had expressed concern that the role of the Commission would be substantially changed by the above provisions and lodged an amendment at stage 2 to remove the relevant section of the Bill:

“The current position is that if, after consideration, the SCCRC thinks that there might have been a miscarriage of justice, it will make a referral to the High Court if an appeal is in the interests of justice—full stop. Section 7(3)(b) will insert a further test, which can override the current criteria. The test is: ‘the need for finality and certainty in the determination of criminal proceedings’. Therefore, the interests of justice can be outweighed by the need for finality and certainty. Finality for whom? Certainty for whom? In whose interest? Further to that substantial change to the SCCRC’s remit, section 7(4) will introduce for the High Court the power to reject a referral if it is not in the interests of justice, having regard to ‘the need for finality and certainty’— that phrase again. The current position is that when the SCCRC makes a referral to the High Court, the court must accept it—it has no discretion in the matter. The approach in section 7(4) is a substantial change. The court of appeal will be able to reject the referral, even if the case has met the test in section 7(3)(b).” (Scottish Parliament 2010, col 29639)

The Cabinet Secretary for Justice stated:

“To reassure Christine Grahame, I point out that the interests of justice cannot be overridden by the additional test. It is not meant to be an either/or; the bill introduces an additional and parallel test. We are saying to the SCCRC that, as well as looking at the interests of justice, it should also bear in mind the requirements for finality and certainty. On the question of judges, I can also assure her that the judge who considers a referral from the SCCRC will always be different from the original trial judge. She can have no doubts about that.” (Scottish Parliament 2010, col 29642)

Following a division the amendment was disagreed to and is not, therefore, reflected in the 2010 Act.

THE INDEPENDENT REVIEW OF LAW AND PRACTICE

On [18 November 2010](#), the Cabinet Secretary for Justice confirmed that an independent review of Scottish law and practice, announced in the wake of the UK Supreme Court’s decision in *Cadder*, was underway. The review, which is being led by Lord Carloway, a senior High Court judge, will consider a range of aspects of Scottish criminal law and practice. The remit of the review (entitled Access to Legal Advice in Police Detention: Consequences for Law and Practice) is:

⁴ The Commission’s role is to review and investigate cases where it is alleged that a miscarriage of justice may have occurred in relation to conviction, sentence or both.

- (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 requirement for 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 2010 Act may need further consideration, and the extent to which the provisions of the 2010 Act may need amendment or replacement
- (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

The review is expected to be completed in 2011, in time for legislation to be considered during 2011/12. Commenting on the review in an article in the [Scotsman Newspaper](#) (2010), Lord Carloway stated:

“We have to go back and look at the principles the Thomson Committee considered and see where they are relevant now. Should we have a separate process called detention at all? Should there be something separate from arrest? And whatever the status we recommend, what rights do we need to give the police to question a suspect and what protections have to be put in place for the person detained? We have to determine the minimum requirements set out by the European Court in *Salduz* and then consider how the balance should be constructed within the expectations of our society in Scotland.

Is corroboration in the melting pot? Yes. It is in my terms of reference and will therefore form a significant part of the review. Every sophisticated system of criminal law works on a system of checks and balances. Are the protections we have relied on previously appropriate now in a system which has had additional safeguards introduced into it following the Supreme Court judgment. Corroboration has been a cornerstone of the Scottish system for a long time - and a matter of considerable pride - in assessing sufficiency of evidence. I'm not aware of any other country in Europe that has such a strict concept of corroboration as we have had. If we conclude the concept should be adjusted we will have to set out a new test for sufficiency of evidence.”

OTHER RESPONSES TO THE CADDER CASE AND THE 2010 ACT

The *Cadder Case* and the 2010 Act (including the fact that the relevant Bill was passed under emergency legislation procedure) have elicited comments from a number of sources. A selection of these are summarised below.

Bill McVicar, Convener of the Law Society's Criminal Law Committee, commented:

“There is much to welcome in the Scottish Government's proposed legislation, particularly provision to ensure that suspects have a right of access to a solicitor when detained by the police. We also welcome the decision to end the means testing of legal aid for suspects in a police station, which will ensure universal access to legal advice at the earliest possible stage.

However, there appears to be little justification for the proposal to double, and in some cases quadruple, the length of time a suspect can be detained without charge. After all, the Lord Advocate's interim guidelines have been in place for four months and have worked well in the majority of cases. There are also serious concerns that facilities to hold suspects for such an extended period of time simply do not exist. There is a concern that any attempt to now increase the six hour detention period may well lead to suspects waiving their right to advice for fear of being held by the police for longer periods of time." (The Law Society of Scotland 2010)

Chief Constable David Strang, the lead on Criminal Justice for the Association of Chief Police Officers in Scotland (ACPOS), stated:

"ACPOS acknowledges the judgement which has been issued today by the Supreme Court will have significant implications for Scottish Policing. However ACPOS has been working closely with our criminal justice partners to prepare for the implications of the judgement. It recognises the importance of criminal justice demonstrating a fair balance between upholding the rights of both victims and suspects.

While the judgement will necessitate some changes to Police procedures, it will not impact on our core functions of protecting the public and maintaining public safety. In anticipation of this, the Lord Advocate issued interim guidelines to Chief Constables in June 2010. These arrangements will remain in place while the implications of the judgement are assessed. The Scottish Police Service is accustomed to adapting its practices to accommodate changes in the law and is sufficiently resilient to cope with the changes which will result from this judgement. There will be significant implications on police budgets and ACPOS will be discussing funding options with the Scottish Government." (Association of Chief Police Officers in Scotland 2010)

Commenting on the [BBC news website](#) on the day of the Supreme Court's judgement, Professor Alan Miller, Chair of the Scottish Human Rights Commission stated:

"This is no time for emergency legislation as there is no emergency. The floodgates have not been opened - this decision clearly does not apply to concluded cases. Rather, now it's time to get it right, and we have the time to get it right."

He went on to warn that the Government's timetable for emergency legislation was too short to allow a considered response':

"The proposed extension of the six hour time limit for detention on reasonable suspicion to 12 and then possibly 24 hours at the discretion of the police seems a disproportionate response to a decision which was based on the need to recognise the vulnerability of those questioned in police detention."

In November 2010, Jean Couper, Chair of the Scottish Criminal Cases Review Commission, commented:

"There is a general consensus, both within Scotland and internationally, that we should be proud that our legal system is one of the few globally that allows for the existence of a truly independent public body which operates, without any political or judicial interference, to vigorously and swiftly review and investigate allegations of miscarriages of justice and refer appropriate cases back to the High Court. Since its creation in 1999 the Commission has shown these qualities and repeatedly demonstrated that it will act in a responsible and balanced way, applying the statutory tests provided by Parliament. The high success rate of the comparatively small number of cases the Commission has referred to the appeal court is clear evidence of this. Whilst the court has and will continue to refuse some appeals based upon a referral by the Commission and on

occasion will comment upon our basis of referral, I have no evidence of any concern amongst the judiciary that the Commission is unable or unwilling to undertake its duties in a measured, considered and appropriate way. Section 7 of the new Act, and in particular the creation of a new section 194DA of the Criminal Procedure (Scotland) Act 1995, creates a fundamental change in the relationship between the court and the Commission.

The new legislative framework that gives authority to the High Court to reject a reference from the Commission at the outset risks undermining the role of the Commission as an independent arbiter of issues relating to alleged miscarriages of justice. The appropriate remedy for any aggrieved party, whether this be the applicant or the Crown, to challenge a decision made by the Commission, after it has considered the matter and reached a determination, is by way of judicial review. This, we feel, is the correct forum for the Commission's application of our statutory test to be considered and tested, and not by the High Court in terms of the new section 194DA(2)." (Scottish Criminal Cases Review Commission 2010)

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