Legal Assistance and the Protection of Suspects in a Post-Cadder World

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ABSTRACT

This thesis reviews the extent to which the introduction of a right to legal assistance (RLA) during detention has improved the protection of suspects following: (i) changes that have been made in the Criminal Procedure (Legal Assistance, Detention and Appeals) (Scotland) Act 2010 and (ii) changes proposed in legislation stemming from Lord Carloway's Review, namely the Criminal Justice (Scotland) Bill that is currently progressing through the Scottish Parliament. It will do this by identifying and then assessing the four main protections facilitated by the newly introduced RLA in the post-*Cadder* Scottish criminal justice system. The likely effect on a suspect following the implementation of the Criminal Justice (Scotland) Bill in conjunction with the limited safeguards which have been incorporated into the Bill as it stands at present, means that the enhanced protections intended to ensure increased fairness and justice for all suspects, may in fact largely nullify the intentions of both the *Cadder* ruling and Lord Carloway's recommendations, however well intentioned both were. This thesis concludes that with a lack of adequate safeguards in place, combined with high rates of waiver, an increase in the time a suspect can now be detained, and the removal of that cornerstone of criminal procedure, corroboration, all conspire to make a suspect less protected than he would have been prior to the introduction of the RLA in the 2010 Act.

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Declaration

I declare that this thesis is my own work, and has not been plagiarised. Where information or ideas are obtained from any source, this source is acknowledged in the footnotes.

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In memory of my father, Louis Capaldi; M.B.E.

List of Abbreviations

ACPOS	Association of Chief Police Officers in Scotland
COPFS	Crown Office and Prosecutor Fiscal Service
CJSB	Criminal Justice (Scotland) Bill, introduced 20 June 2013
CP(S)A 1995	Criminal Procedure (Scotland) Act 1995
ECHR	European Convention on Human Rights
ECtHR	European Court of Human Rights
NIJ	National Institute of Justice
PACE	Police and Criminal Evidence Act 1984
RLA	Right to legal assistance
RTS	Right to silence
SARF	Solicitor Access Recording Form
SCCRC	Scottish Criminal Cases Review Commission
2010 ACT	Criminal Procedure (Legal Assistance, Detention and Appeals) (Scotland) Act 2010

CHAPTER ONE

INTRODUCTION

1.1 Introduction to the thesis

The aim of this thesis is to assess the extent to which the introduction of a right to legal assistance (RLA) during detention has improved the protection of suspects in a number of key areas, namely the prevention of ill treatment, the prevention of emotional distress, understanding and enforcing the right to silence and the prevention of wrongful conviction.[1] In addressing this aim, I will argue that, despite the introduction of a RLA, suspects are not left better protected overall by the changes that have occurred post-*Cadder* in Scotland. In order to make this argument I will assess each of the areas of protection identified above individually, having regard to the changes that have been already made by way of the Criminal Procedure (Legal Assistance, Detention and Appeals) (Scotland) Act 2010 and also the proposed legislation currently going through the Scottish Parliament, that of the Criminal Justice (Scotland) Bill, introduced on 20 June 2013. I will conclude that although the RLA does offer some degree of additional protection in these areas, the fact that a significant proportion of suspects are likely to waive their RLA, combined with the increase in maximum detention times and the removal of the requirement for corroboration, means that the position that suspects are left in is far from improved.

One case more than any other was the catalyst for change within the Scottish criminal justice system, that of *Cadder v HM Advocate.*[2] Peter Cadder declined to have a solicitor notified of his detention and therefore received no legal assistance whilst in custody. During police examination Mr Cadder made various incriminating admissions. Following his conviction, he claimed that the Crown's reliance on the admissions made during his police examination at his subsequent trial, breached Article 6 of the ECHR.[3] Following an unsuccessful appeal at the High Court of Justiciary, Mr Cadder's case was

[1] As chapter 3 will explain, these are drawn from F Leverick "The right to legal assistance during detention", 2011 15(3) Edin. L.R. 361-375.

[2] [2010] UKSC 43, 2010 SLT 1125.

[3] At para 10.

heard by the UK Supreme Court, which ruled that the law in Scotland was incompatible with Article 6 of the ECHR in allowing a suspect to be detained and questioned by police without having access to legal advice.[4]

The Scottish Government moved fast, and passed the Criminal Procedure (Legal Assistance, Detention and Appeals) (Scotland) Act 2010 within 24 hours of the Supreme Court's ruling. It stated that this was done in order to ensure that, "Scottish practice accords with the standards of the European Convention on Human Rights and to ensure the effective functioning of the criminal justice system following the [Supreme Court's] judgement."[5] The Act introduced a right to a private consultation with a solicitor both before any questioning begins and at any other time during questioning.[6]

The *Cadder* judgement caused shock waves to reverberate throughout the Scottish legal system, beyond the immediacy of the ruling itself. The Crown Office and Procurator Fiscal Service (COPFS) said that, "At the time of the ruling in October 2010, [it] estimated that there were 3,471 cases where the issue of the admissibility of evidence from police interviews had been raised by the defence".[7] As an immediate result of the the Supreme Court's ruling in *Cadder,* the Crown did not proceed with a total of 867 prosecutions.[8] However, for the purposes of this thesis, the most important effect of the decision was that it started a chain reaction of events that led, via Lord Carloway's Review,[9] to a whole series of other changes including the proposal to remove the corroboration requirement[10] and an increase in the maximum time permitted for

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[4] At para 50 per Lord Hope; para 93 per Lord Rodger.

[5] Policy memorandum accompanying the 2010 Act, para 2.

[6] s.15A(7) of the Criminal Procedure (Scotland) Act 1995 as inserted by the 2010 Act.

[7] Crown Office and Procurator Fiscal Service, "Crown review of cases after *Cadder v HMA*" (news release), 9 Feb 2011, available at *www.copfs.gov/News/Releases/2011/02/Crown-review-cases-after-Cadder-V-HMA*.

[8] Ibid.

[9] *The Carloway Review: Report and Recommendations* (November 17, 2011) (*Carloway Report*) available at: http://www.scotland.gov.uk/Resource?Doc/925/0122808.pdf [Accessed September 20, 2013]

[10] Report para 7.2.55.

detention.[11] These changes are now contained in the Criminal Justice (Scotland) Bill, introduced on 20 June 2013.

Some legal academics and lawyers have argued that the introduction of a RLA was unnecessary in Scotland. Ferguson suggests that, "The unintended legacy of *Cadder* may be the dismantling of key protections for accused persons within the Scottish system of criminal procedure" and that the Supreme Court may have inadvertently begun a process of chain reaction ultimately leading to a suspect being less well protected, not more.[12] Others have argued that the RLA would lead to an increase in protection for suspects in a number of respects. For example, Leverick suggests that the RLA can help to enforce a suspect's right to silence and may have a role to play in preventing wrongful conviction.[13] I intend to assess these competing claims in the light of the changes that are now going to be made to the Scottish criminal justice system following Lord Carloway's review.

1.2 Terminology of the thesis

I have chosen to use the term "right to legal assistance" rather than "right to legal advice" because the presence of a solicitor during detention may do more than simply advise suspects - for example, the solicitor may also explain their rights, check the conditions of their detention or help them to enforce their rights while being interviewed by the police.

1.3 Defining the scope of the thesis

My thesis does have one important limitation which is that it has been necessary to submit it before knowing how the chain of events started by *Cadder* will end. The thesis takes account of legal developments up until the end of May 2014. At this point the Criminal Justice (Scotland) Bill is on hold pending the results of a review that will be

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[11] Report para 5.2.38.

[12] PR Ferguson, "Repercussions of the Cadder case: the ECHR's fair trial provisions and Scottish criminal procedure" [2011] Crim LR 743.

[13] Leverick, n 1 above, 361-375.

carried out by Lord Bonomy of additional safeguards that may be necessary following the removal of the corroboration requirement.[14] This may result in further developments, but my conclusion will address this point.

1.4 Outline of the thesis

The structure of the thesis will proceed as follows. First chapter one will set out the aims and objectives of the thesis. Chapter two will then detail the development of the RLA in Scotland noting its evolution and changes that have been proposed to the Scottish criminal justice system as a result of this right. Chapter three will attempt to assess whether or not suspects are left better protected by the changes in the law as a result of the *Cadder* judgement. It will do this by identifying what it is that we are trying to protect suspects from and assessing each protection in turn. Chapter four will examine the issue of waiver of the RLA and will re-assess the conclusions of chapter three in the light of this. Lastly, chapter five will reach an overall conclusion, namely that the introduction of a RLA has improved protections in a limited manner, but has lessened the overall protections a suspect enjoyed pre-*Cadder*, especially given that a significant proportion of suspects are likely to waive their RLA.

[14] See Scottish Government News Release, "Group to examine corroboration safeguards", 6 February 2014, available at http://news.scotland.gov.uk/News/Group-to-examine-corroboration-safeguards-8fe.aspx.

CHAPTER 2

THE DEVELOPMENT OF THE RIGHT TO LEGAL ASSISTANCE IN SCOTLAND

2.1 Introduction

This chapter charts the development of the right to legal assistance (RLA) in Scotland, noting the main developments relating to the right itself and also the other key changes that have been proposed to the justice system as a result of the introduction of this right. As such, it starts by examining the pre-*Cadder* position, the case of *Cadder* itself and the changes contained in the government's emergency legislation that was passed to address the *Cadder* decision. It then goes on to examine the relevant recommendations of the Carloway Review, which was set up in the wake of *Cadder*, and the relevant provisions of the Criminal Justice (Scotland) Bill. The aim in this chapter is primarily to describe and set out background material that will be analysed in chapters three and four.

2.2 Historical development from the 19th Century to the Criminal Procedure (Scotland) Act 1995

In the early 19th century, a crime would be investigated jointly by a sheriff of the jurisdiction in which it had taken place, alongside a local procurator fiscal whom the sheriff would appoint to provide assistance. As the police force was only emerging as a coherent body at this time, a sheriff relied upon a fiscal for investigative and examination purposes. Whilst the notion of such close ties between these particular arms of the criminal justice system might cause the modern jurist sleepless nights, this collaboration was normal practice.[1] It was only with the enactment of the Sheriff Courts and Legal Officers (Scotland) Act 1927,[2] that this connection was broken. The Act assigned the right of appointment of a procurator fiscal to the Lord Advocate. By the middle of the 19th century the sheriff had taken on a more judicial role ensuring the rights of the suspect were adhered to, leaving the interrogative role to the procurator

[1] *Cadder* at para 74 per Lord Rodger.

[2] S.1(2), Appointment of sheriff clerk and procurator fiscal.

fiscal. Macdonald describes this as being necessary for a sheriff, "...as it is his duty to protect him from any unfair or oppressive examination (the prisoner not being permitted legal advice)".[3]

The first sign that legal assistance at the pre-trial stage was becoming a formal privilege was the enactment of the Criminal Procedure (Scotland) Act 1887. This allowed a suspect the right to consult with, and have present during judicial questioning, a person of legal standing.[4] Section 17 states that a lawyer be informed of the suspect's detention for examination and that he "...be entitled to have a private interview with the person accused before he is examined on declaration, and to be present at such examination". The following year this right was subsequently strengthened by case law. In *Goodall,*[5] Lord McLaren held that where the charge was serious, (the instant case being a charge of murder against an illiterate woman), the magistrate should inform the accused of his RLA. In this case, because this had not been done, a declaration made by the suspect was rejected as inadmissible. By means of a pre-judicial examination audience between the suspect and his "law agent", the suspect now had for the first time access to a protective mechanism enshrined in law that, if utilised, would provide him with legal advice and assistance.

The birth of what we have come to know as the modern Police Force was continuing apace. With the advent of "burgh" police forces,[6] later developing into a police force with a county structure,[7] increasingly it was the police who began to take the lead role in investigating any alleged crime. Although police examination was now an integral part of the judicial examination process, the question of legal assistance raised its head once again. If the police questioned a suspect independently, he would not be afforded the legal protection of a consultation with his law agent. However, if taken to court, he would be provided with the full protection of a consultation with his lawyer before questioning alongside the right to have his lawyer present during the judicial

[3] Macdonald, A Practical Treatise on the Criminal Law of Scotland (first edition,1867), p290.

[4] Described in s.17 of the Criminal Procedure (Scotland) Act 1887 as a 'law agent'.

[5] *HM Advocate v Goodall* (1882) 2 White 1.

[6] Under the Burgh Police (Scotland) Act 1833.

[7] Police (Scotland) Act 1857.

examination itself. In reality it became practice that after arrest and charge, the suspect could only be questioned further under judicial examination. If the accused voluntarily gave a statement to the police upon arrest, this was, however, deemed to be acceptable. The fact that the suspect had not benefited from the shield of protection afforded by court judicial examination was not considered relevant.[8] However, following the Criminal Evidence Act 1898, which afforded the accused the right to give testimony during his trial,[9] and the Summary Procedure (Scotland) Act 1908, which gave the accused the right to emit a declaration,[10] judicial examination was on the wane.[11] Subsequently, as judicial examination was being used less, the police appetite to question a suspect upon arrest correspondingly diminished.

The police soon found themselves in a legal no-mans land. Could they question a suspect before arrest, in the hope of eliciting from him enough evidence to warrant a charge? The first obstacle to overcome was the fact that there did not exist any legal basis for a suspect to be detained by the police prior to arrest. Unfortunately for the suspects concerned, the lack of a right to legal advice meant that most were not aware of this.[12] Cases exist that show that suspects proceeded to provide voluntary statements which were deemed admissible.[13] In *Chalmers v HM Advocate,*[14] Lord Justice General Cooper made clear the shortcomings in such evidence when considering the issue of what is a fairly obtained statement:[15]

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[8] *Cadder* at paras 80-81 per Lord Rodger.

[9] S.2, Evidence of Person Charged.

[10] S.77(1).

[11] In his Report, Lord Carloway subsequently recommended the abolition of judicial examination due to dis-use (see para 6.2.64). The Criminal Justice (Scotland) Bill reflects this recommendation (see s.63).

[12] *Cadder* at para 83 per Lord Rodger.

[13] *Hartley v HM Advocate* 1979 SLT 26.

[14] 1954 JC 66.

[15] At 75.

> "I recognise that in several cases distinctions have been properly drawn between "routine questioning", during exploratory police investigation of a crime, and the interrogation of prisoners, after arrest or in a prison awaiting trial. But when a person is brought by police officers in a police van to a police station, and, while there alone, is faced with police officers of high rank, I cannot think that the need for protection is any less than it would have been if he had been formally apprehended. The ordinary person is not to know that he could have refused to be taken to the police station or to answer any questions, and, even if he knew that, he would be unlikely to adopt such a course and it would probably avail him little if he did."

This position changed following a proposal from the Thomson Committee on Criminal Procedure in Scotland.[16] On the recommendation of the Thomson Committee, a six hour detention period was introduced whereby a suspect could be detained by the police for questioning without a mandatory right of access to a solicitor.[17] The prevailing mood of the Committee was one of concern that the suspect's rights may somehow interfere with the course of justice, "...creating a situation in which criminals can render the investigation of their crimes difficult or even impossible merely by standing on their rights".[18] This can be clearly seen in the following paragraph taken from the Thomson Committee's report:

> "Although a person who has been charged with an offence is entitled to an interview with a solicitor, we recommend that a solicitor should not be permitted to intervene in police investigations before charge. The purpose of the interrogation is to obtain from the suspect such information as he may possess regarding the offence, and this purpose might be defeated by the participation of his solicitor."[19] 8

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[16] Thomson Committee, Criminal Procedure in Scotland: Second Report (Cmnd.6218: October 1975).

[17] Criminal Justice (Scotland) Act 1980, Part 1, ss.2(2), 3(4).

[18] Para.2.03.

[19] Para.7.16.

Reflecting upon the Thomson Committee's recommendation in 2010, Lord Hope expressed his resignation that change was inevitable because of the legal seeds that were sown thirty years earlier. He stated, "...by preferring to go their own way, those who were promoting the legislation that gave effect to the Thomson Committee's recommendations were shutting their eyes to the way thinking elsewhere was developing", and that 'now, sadly, 30 years on, the Scottish criminal justice system must reap the consequences'.[20]

The consequences referred to by Lord Hope stemmed from a statutory procedure that allowed police in Scotland to detain and question a person suspected of a crime for a duration of up to six hours prior to arrest and/or release with no right to legal assistance during that time. This, as referred to above, was as a result of the Thomson Committee's recommendations. Thus the position pre-*Cadder* was that enacted by way of the Criminal Justice Scotland) Act 1980 and subsequently the Criminal Procedure (Scotland) Act 1995. Section 14(2) of the Criminal Procedure (Scotland) Act provided that a suspect could be detained for a maximum six hours. Section 15(1) provided that a detained suspect should be informed that he is entitled to have the fact of his detention intimated to a solicitor and one other person. However, in line with the Thomson Committee's recommendations, a detained suspect had no right of access to a solicitor aside from this. Little could the members of the Thomson Committee sitting in Edinburgh in 1975 imagine that their recommendations would have such far reaching and significant implications on the very nature of Scots criminal procedure.

2.3 The early Scottish cases challenging section 14

A number of Scottish cases pre-*Cadder* challenged the ECHR compatibility of section 14 of the Act. The first of these was *HM Advocate v Robb*.[21] Robb raised a devolution minute to argue that the use of a statement obtained from him when no legal representative was present to provide him with advice during his interview, despite his persistent demands for one at the time, would breach his right to a fair trial under Article

[20] *Cadder v HM Advocate* [2010] UKSC 43, per Lord Hope at para.51.

[21] 2000 J.C. 127.

6 of the Convention. Lord Penrose refused the minute stating that the matter of fairness must be considered in its entirety, something that would only become possible when the court was made aware of all evidence during the course of the trial.[22]

Later that year in *Paton v Ritchie*,[23] the issue arose again. Similar to the decision in *Robb,* Lords Cullen, Sutherland and Dawson held that the matter of fairness depended on the trial as a whole, and was not just to be determined on the basis of a lack of legal assistance. However, they went further than the decision in *Robb,* by making clear that Article 6 of the Convention did not create a universal right of access to legal advice before or during examination by police,[24] as existing safeguards are already in place.[25] These included the fact that in Scotland no adverse inference could be drawn from the fact that an accused person was silent when he was questioned by the police[26] and the fact that the absence of a caution informing the suspect of his or her right to silence is likely to put in doubt the admissibility of anything said in response to a police officer.[27]

The final significant challenge was in *Dickson v HM Advocate.*[28] Once again, it was claimed that the use of a transcript of an interview at trial would breach Article 6 because his solicitor had not been present despite repeated requests by Mr Dickson that he be present. Lords Cameron, Milligan, Hamilton, Macfadyen and Weir followed *Robb,* ruling that fairness should be determined in the context of the trial as a whole. They stated that the deficiency of a solicitor's presence during examination in this case should have no effect on the construction of the defence, especially given that the jury had been explicitly directed to cast aside any evidence produced during trial that had been obtained inequitably.[29] They also clearly expressed their view that there was no

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[22] At 132.

[23] 2000 J.C. 271.

[24] At 275.

[25] At 275-276

[26] *Robertson v Maxwel*l 1951 J.C. 11. This is still the case – see the discussion in chapter three.

[27] *Paton v Ritchie*, at 275.

[28] 2001 J.C. 203.

[29] At para 24.

requirement for a solicitor to be present during a police interview under the Convention or Scots law.[30]

The Thomson Committee's advice opposing solicitors being permitted access to a suspect in detention and the unsuccessful challenges to s.14 in *Robb*, *Paton v Ritchie* and *Dickson*, effectively closed down what little debate there was surrounding a suspect's rights at this important time for three decades.[31] However, on the 29th May 2001, the scene was being set for a legal case in Turkey that would ultimately have a revolutionary effect upon Scots criminal procedure.

2.4 The Salduz decision

The case in question was *Salduz v Turkey.*[32] The facts of the case have been described in detail elsewhere,[33] but effectively concerned the complaint of a young Turkish man that the failure to provide him with access to legal assistance while he was detained in custody violated his rights under Articles 5 and 6 of the ECHR.

The Grand Chamber in *Salduz* delivered what was a clear and unequivocal verdict. In a unanimous decision,[34] it held that suspects should be afforded the right to legal representation, "...as a rule, unless it was demonstrated in the light of the particular circumstances of each case that there were compelling reasons to restrict this right".[35] The leading judgement continued:[36]

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[30] At 217.

[31] The cases attracted no notable academic criticism at the time.

[32] (2009) 49 EHRR 19.

[33] See e.g. C Shead, "The decision in Salduz" 2009 SCL 680; A Ashworth, "Salduz v Turkey" [2010] Crim LR 419.

[34] Although the ruling was a unanimous one, there were two separate judgements in the case. Judge Bratza issued a judgement in which he agreed with the general principle but suggested that the timing at which the right arises be earlier. This is of no significance for the purposes of this thesis.

[35] Para 55.

[36] Ibid.

> "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 a conviction".

Salduz was not the only relevant ECtHR judgement issued prior to *Cadder* in which the court expressed its view that suspects must be offered legal assistance prior to charge. Indeed, in his speech in *Cadder,* Lord Hope lists several cases in which the court had made similar pronouncements.[37] However, it was the catalyst that effectively exposed the difference between member states in Europe. It brought into sharp contrast the fact that legal assistance as a right was still not available in Scotland to suspects detained for police questioning. This left the seemingly solid and well established practice of criminal justice procedure in Scotland exposed to accusations of injustice and there was speculation that changes would need to be made to Scottish criminal procedure as a result.

2.5 HM Advocate v McLean

Although the *Salduz* ruling seemed crystal clear in both its message and intent, the High Court of Justiciary showed that they were not ready to follow the ECtHR just yet. The first Scottish case to arise post-*Salduz* was *HM Advocate v McLean.*[38] In *McLean,* following the lodging of a devolution minute, the suspect argued that Article 6 would be breached should a police interview he gave without his solicitor present be led in evidence. The court (a Full Bench convened specifically for the possibility that earlier cases such as *Dickson* would have to be overruled) disagreed.

This time a wholesale judicial justification was laid out for the fairness of Scots law as it then stood, delivered by Lord Justice General Hamilton. The High Court of Justiciary demonstrated its intention to steadfastly adhere to the belief that the protections

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[37] He notes e.g. *Yildiz v Turkey* (App no 4661/02)) ECHR 3rd February 2009; *Amutgan v Turkey* (App no 5138/04) ECHR 3rd February 2009; *Plonka v Poland* (App no 20310/02) ECHR 31st March 2009; *Pishchalnikov v Russia* (App no 7025/04) ECHR 24th September 2009; *Dayanan v Turkey* (App no 7377/03) ECHR 13th October 2009; *Tunç v Turkey* (App no 20400/03) ECHR 21st February 2008.

[38] [2009] HCJAC 97. For a more substantial discussion of the case, see F. Leverick, "The right to legal advice during detention: *HM Advocate v McLean*" (2010) 14 Edin LR 300.

available under Scottish procedure were in-line with Article 6 and robust enough, even following the Grand Chamber's unequivocal ruling in *Salduz.* Their Lordships affirmed that not only should the fairness of a trial be assessed according to the specific circumstances of the case and treatment of the accused,[39] but that Article 6 of the Convention is not violated by the absence of a solicitor pre-charge as there are other measures in place to secure the trial's fairness.[40] Their Lordships listed these in detail and they included: the fact that prior to an accused being questioned, he must be cautioned that he need not answer any questions; the fact that interviews with suspects are routinely tape recorded; the fact that no adverse inferences can be drawn from a suspect's failure to answer questions; the existence of the requirement for corroboration; and the inadmissibility of incriminating answers made as a result of coercion.[41] Lastly, their Lordships argued that section 2(1)(a) of the Human Rights Act 1998 directs that while ECtHR judgements must be considered, they are not binding.[42] It advocated that even if it was the clear decision and outcome of the Grand Chamber's ruling that any statement given by a suspect be inadmissible unless access to legal assistance, it:[43]

> "...cannot and should not be applied without qualification in this jurisdiction. In particular, if other safeguards to secure a fair trial of the kind which we have described are in place, there is, notwithstanding that a lawyer is not so provided, no violation, in our view, of Article 6".

2.6 Cadder v HM Advocate

On Tuesday 26th October 2010, the UK Supreme Court delivered a body blow to Scottish Criminal law and jurisprudence when it issued its judgement in the case of *Cadder v HM Advocate.*[44] As with *Salduz*, the precise facts of the case need not concern

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[39] Para 27.

[40] Para 25.

[41] Paras 24-26.

[42] Further discussion of this aspect of the ruling lies outwith the scope of this thesis, but see Leverick "The right to legal assistance during detention", Edin. L.R. 2011, 15(3), 361-375.

[43] Para 31.

[44] [2010] UKSC 43. The case is critically discussed in a special issue of the Edin LR: see the various articles in issue 15(2).

us here. Essentially, Mr Cadder declined to have a solicitor notified of his detention[45] and, following a period of police examination, made various deleterious admissions. He was convicted and subsequently claimed that the Crown's reliance on these admissions at trial breached Article 6 of the ECHR.[46] The claim was refused by the High Court but was ultimately determined by the UK Supreme Court, under the procedure governing devolution issue appeals.[47]

The seven Justices of the Supreme Court were united in agreement that the law in Scotland was incompatible with Article 6 of the ECHR, in allowing a suspect to be detained and questioned by police without having access to legal advice. In effect, the Supreme Court ruled that given the decision by the European Court in *Salduz,* the judgement delivered in *McLean* was no longer good law. In justifying its conclusions, The Supreme Court held that although the decision taken by the High Court of Justiciary in *McLean* was completely in keeping with previous domestic authority, post *Salduz,* it could not survive. The ECtHR ruling in *Salduz* requires that a detainee must be offered access to a lawyer at the point of detention, unless significant reasons exist to the contrary to restrict this right. Lord Rodger observed:

> "The procedure under sections 14 and 15 of the 1995 Act is therefore, in this respect, the very converse of what the Grand Chamber holds is required by article 6(1) and (3)(c) of the Convention...Moreover, the Grand Chamber long since declared that the right to silence and the right not to incriminate oneself, are generally recognised international standards which lie at the heart of the notion of a fair procedure under article 6...A right of access to a lawyer, which is implied in order to protect a right at the heart of a fair procedure under article 6, must itself lie near that heart. For this reason, in my view there is not the remotest chance that the European Court would find that, because of the other protections that Scots law provides for the accused persons, it is compatible with article 6(1) and (3)(c) for the Scottish system to omit this safeguard...and

[45] At para 5.

[46] At para 10.

[47] The precise procedural mechanism by which he did so was complicated and discussion lies outwith the scope of the thesis: see the discussion in F. Leverick, "The Supreme Court strikes back" (2011) 15 Edin LR 287.

> for suspects to be routinely questioned without having the right to consult a lawyer first. On this matter Strasbourg has spoken: the courts in this country have no real option but to apply the law which it has laid down."[48]

As a consequence of *Salduz* and *Cadder*, then, ss.14 and 15 of the 1995 Act now found themselves diametrically opposed to Article 6 of the ECHR.

2.7 The emergency legislation

The government's response to *Cadder* was swift. Less than 24 hours after the Justices of the Supreme Court had delivered their ruling, Scotland had passed the Criminal Procedure (Legal Assistance, Detention and Appeals) (Scotland) Act 2010. This hurriedly enacted Bill came into force on 30th October 2010 under emergency legislation procedure.[49]

The Scottish Cabinet Secretary for Justice, Kenny MacAskill, stated that the principal function of the 2010 Act was to "...bring statute into line with the Supreme Court judgement [in *Cadder*]".[50] The Act introduced a right to a private consultation with a solicitor both before any questioning begins and at any other time during questioning.[51] It permits the suspect to have intimation sent to a solicitor for this purpose, and states that he must be informed that he has these rights.[52] "Consultation" means "consultation by such methods as may be appropriate in the circumstances, for example by telephone".[53] In exceptional circumstances, the police may delay the exercise of the right to consult with a solicitor so far as it is necessary in the interest of the investigation, the prevention of crime or the apprehension of offenders.[54] The maximum

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[48] Cadder, at para 93.

[49] Standing Orders of the Scottish Parliament, 4th edn (2011) Chapter 9, Public Bill Procedures, rule 9.21.

[50] Scottish Parliament, Official Report col 29673 (27 October 2010).

[51] s.15A(7) of the Criminal Procedure (Scotland) Act 1995 as inserted by the 2010 Act.

[52] s.15A(2) & (6).

[53] s.15A(5).

[54] s.15A(8).

time for which a suspect may be detained was extended from six to twelve hours.[55] A further extension of twelve hours could then be authorised by a "custody review officer," of the rank of inspector or above and unconnected with the investigation, if he is satisfied that this is necessary to secure, obtain or preserve evidence, whether by questioning or otherwise, that the offence is an indictable one and that the investigation is being conducted diligently and expeditiously.[56]

Some of the Act's measures attracted considerable debate during its passage. Due in part to this, the Cabinet Secretary for Justice, Kenny MacAskill MSP, asked the Lord President, Lord Hamilton, to nominate a senior High Court judge to lead an independent review of Scottish criminal law and practice in the light of the Supreme Court's decision in *Cadder*. On the 26th October Lord Hamilton selected Lord Carloway, now Lord Justice Clerk, to head the review, which began in November of 2010. Lord Carloway was supported by a full-time Review team and assisted by a Reference Group which was made up of leading practitioners and academics.

2.8 The Carloway Review and subsequent developments

Lord Carloway reported in November 2011.[57] He described his review as an opportunity for Scotland's criminal justice system to "...re-cast and modernise aspects of the system so [that it] provides a comprehensive, effective and fair criminal justice system for the foreseeable future".[58] His terms of reference were:

> (i) To review the law and practice of questioning suspects in a criminal investigation in Scotland in light of the recent decisions by the UK Supreme Court and the ECtHR, and with reference to law and practice in other jurisdictions; (ii) To consider the implications of the recent decisions, in particular the legal advice prior to and during police questioning, and other

[55] s.14(1).

[56] s.14(2).

[57] *The Carloway Review: Report and Recommendations* (November 17, 2011) (*Carloway Report*) available at: http://www.scotland.gov.uk/Resource?Doc/925/0122808.pdf [Accessed September 20, 2013]

[58] Report para 4.0.1.

> developments in the operation of detention of suspects since it was introduced in Scotland in 1980 on the effective investigation and prosecution of crime; (iii) To consider the criminal law of evidence, insofar as there are implications arising from (ii) above, in particular the requirement for corroboration and the suspect's right to silence; (iv) 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 Act may need amendment or replacement; (v) 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.[59]

As such, he made 76 recommendations in total across the areas of arrest, detention and custody; police questioning and the provision of legal advice; rules of evidence, including corroboration; and the reduction of delays in appeals, and the role of the Scottish Criminal Cases Review Commission. Those relevant to the thesis will be noted shortly. Some, as we shall see, are extremely radical, most notably his recommendation that the requirement for corroboration in criminal cases be abolished.

Lord Carloway's report was followed in July 2012 by a consultation paper, in which the Scottish Government set out proposals based on Lord Carloway's recommendations.[60] The Carloway review has been criticized procedurally on the basis that it is inappropriate for radical changes to be made to Scottish criminal procedure on the recommendation of a single individual.[61] While an assessment of this criticism lies beyond the scope of this thesis it is worth noting that the Scottish Government's consultation paper made it obvious that it intended to adopt Lord Carloway's

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[59] *ibid* para 1.0.7.

[60] Scottish Government, *Reforming Scots Criminal Law and Practice: The Carloway Report* (2012). For comment on the consultation paper, see P Ferguson and F Raitt, "A clear and coherent package of reforms? The Scottish Government consultation paper on the Carloway report" [2012] Crim LR 909.

[61] See J Chalmers and F Leverick, "Substantial and radical change: a new dawn for Scottish criminal procedure" (2012) 75 MLR 842 at 839-841.

recommendations as a package[62] and thus the matters that were open for consultation were very limited. The consultation was followed by a further consultation, this time specifically on safeguards that might be required if the requirement for corroboration was removed.[63] Finally, the Government put forward a draft Bill, the Criminal Justice (Scotland) Bill (CJSB), introduced on 20 June 2013, which enacted the vast majority of Lord Carloway's recommendations without amendment. Its only concession to the safeguards consultation was to propose that the majority of jurors required for a conviction in Scotland was increased from eight to ten.[64]

Stage 1 consideration of the Bill has been completed by the Justice Committee. This culminated with the debate of the Bill in Parliament.[65] During the stage 1 consideration, there was much criticism of the proposal to abolish the requirement for corroboration without putting alternative safeguards against wrongful conviction in place.[66] The Scottish Government initially pressed on with the Bill stating that it wished to pass the legislation, including the section abolishing the corroboration requirement, but with a clause providing that this would not be brought into force until appropriate safeguards against wrongful conviction had been identified. As such, stage 2 consideration of the Bill looked like it would commence and the Government announced that Lord Bonomy would undertake a review of appropriate safeguards (the Post Corroboration Safeguards Review).[67] However, close to the submission of this thesis, at the meeting of the

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[62] See the Consultation paper – both generally and specifically at para 9.26.

[63] Scottish Government, *Reforming Scots Criminal Law and Practice: Additional Safeguards Following the Removal of the Requirement for Corroboration* (2012), available at http://www.scotland.gov.uk/Publications/2012/12/4628.

[64] CJSB s.70(2).

[65] See Official Report, Meeting of the Parliament, 27 February 2014, available at: http://www.scottish.parliament.uk/parliamentarybusiness/28862.aspx?r=8968&mode=pdf.

[66] Members of the Justice Committee stated their criticism and concerns. See Justice Committee, 3rd Report, 2014 (Session 4) Stage 1 Report on the Criminal Justice (Scotland) Bill (6 Feb 2014) paras 243-258, available at:
http://www.scottish.parliament.uk/S4_JusticeCommittee/Reports/juR-14-03w.pdf
See also e.g. A Campsie, 'Not Proven: Judges Rebel Over Evidence Rule Plans' Herald Scotland (Glasgow 17 October 2012)
http://www.heraldscotland.com/news/home-news/not-proven-judges-rebel-over-evidence-rule-plans.19164611
accessed 21 January 2014.

[67] See Scottish Government News Release, "Group to examine corroboration safeguards", 6 February 2014, available at http://news.scotland.gov.uk/News/Group-to-examine-corroboration-safeguards-8fe.aspx

Scottish Parliament on 23 April 2014,[68] the Government announced that stage 2 consideration of the Bill would not proceed until the Safeguards Review had reported in April 2015.

The following (and final) section of this chapter examines the main recommendations of (a) Lord Carloway and (b) the CJSB in those areas that are relevant to the argument of my thesis, namely the timing of the RLA; the dimensions of the RLA; whether the RLA be refused; and whether the RLA can be waived.

2.9 The relevant legal developments

2.9.1 *The timing of the RLA*

The first relevant issue relates to the timing of the RLA. Before the 2010 Act, suspects could only be detained for a maximum period of six hours and had no right to receive legal assistance until they had actually been arrested. Only at this point could they request the right to a private meeting with a lawyer before they appeared at their first court appearance.[69] By way of the provisions introduced in the emergency legislation, a suspect now has the right to, "a private consultation with a solicitor" both before and at any time during questioning.[70] This did leave open the precise point at which the right arises. However, the *Carloway Review* recommended that the fact that a person is being asked questions by the police should be the trigger for the RLA to be activated. Furthermore, Lord Carloway considered that a suspect who was being interviewed by police outwith a police station was still technically "at liberty", and therefore there was "no need to require the police to secure access by a suspect to a lawyer".[71]Notwithstanding, he recommended that in order to be fully compliant with Article 6 following ECtHR case law,[72] and the European Directive on the Right to Legal

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[68] Official Report, Meeting of the Scottish Parliament 24 April 2014, available at http://www.scottish.parliament.uk/parliamentarybusiness/28862.aspx?r=9116&mode=pdf.

[69] s.17(2).

[70] Criminal Procedure (Sc) Act , s 15A(3), as inserted.

[71] Report para 6.1.18.

[72] See *Dayanan v Turkey* (app no 7377/03) 13 October 2009 at [31]-[32].

Assistance,[73] a suspect in this position ought to be informed as part of the police caution that he has a right of access to a solicitor. He therefore proposed that the provisions of the 1995 Act,[74] introduced by the 2010 Act, require to be amended to provide that such access is available, regardless of questioning, as soon as practicable after the detention of the arrested suspect at the police station.[75] This means the RLA would operate as soon as detention commences, rather than being dependent on questioning. The Scottish Government followed Lord Carloway's recommendation. Section 36 of the Bill provides for the right of a person in police *custody* to have a private consultation with a solicitor at any time.

2.9.2 *The dimensions of the RLA*

The second issue of relevance is the precise method by which legal assistance is delivered. The emergency legislation introduced the right to a "private consultation with a solicitor" but then stated that this means "consultation by such means as may be appropriate in the circumstances" which can include "consultation by means of telephone".[76] It did not provide for any right for the solicitor to be physically present while the suspect was being questioned.

Lord Carloway proposed that subject to the caveat of "reasonable remuneration" in legal aid cases, it should be for the suspect to decide whether legal advice 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.[77] The CJSB essentially followed his recommendation. Section 24 of the Bill provides for the right of a person reasonably suspected of committing an offence to have a solicitor present during police interview. It applies to a person who is either in police custody or has voluntarily attended a police station, or other place, for the purpose of being interviewed

[73] European Commission Proposal COM(2011) 326/3 for a Directive of the European Parliament and of the Council on the Right of Access to a Lawyer in Criminal Proceedings and on the Right to Communicate Upon Arrest, art 3(1).

[74] s.15A(3).

[75] Report para 6.0.3.

[76] CPSA s.15A(5) as amended by the 2010 Act.

[77] Report para 6.1.40.

by a constable. It also retains the provision from the emergency legislation that prior to a suspect being interviewed there is an entitlement to a private consultation, but that this consultation can be by such means as considered appropriate, for example, by telephone.[78]

2.9.3 *Can a request for legal assistance be refused?*

The next question is whether the police can ever commence questioning if the suspect has requested but not yet received legal assistance. In his review, Lord Carloway accepted 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.[79]

Once again, the Scottish Government accepted Lord Carloway's recommendations when drafting the 2013 Bill. Section 24(3) provides that unless a person has consented to be interviewed without a solicitor present, a constable must not start to interview the person about the alleged offence until a solicitor is present and must not deny the solicitor access to the person at any time during interview. However, s.24(4) allows a constable to interview the person without a solicitor present if satisfied it is necessary to interview the person without delay in the interests of the investigation or prevention of crime, or the apprehension of offenders. If a solicitor becomes available during such time as the police are interviewing a person, the solicitor must be allowed access to that person.

2.9.4 *Can the right be waived?*

The emergency legislation did not contain any provisions on waiver of the RLA. Lord Carloway did however address this issue. In keeping with the relevant ECHR jurisprudence,[80] he accepted that waiver of the right of legal assistance should be permitted. However, he made specific recommendations for waiver for vulnerable and non-vulnerable suspects, children and young adults within this framework as follows:

[78] s.36(3)

[79] Report para 6.1.33.

[80] This will be discussed in chapter 4, which examines the issue of waiver in detail.

(i) Non -vulnerable adults:

Lord Carloway recommended legislation should expressly provide that adults who are not vulnerable may waive the RLA. It should state that waiver must be express and recorded. Lord Carloway proposed that the right cannot be waived unless and until the person has been fully informed of the right,[81] therefore protecting the unintentional relinquishing of their RLA. These recommendations have been followed in the Bill, s. 24(6) of which provides that: "Where a person consents to being interviewed without having a solicitor present, there must be recorded (a) the time at which the person consented, and (b) any reason given by the person at that time for waiving the right to have a solicitor present."

(ii) Vulnerable adults:

In relation to vulnerable suspects, Lord Carloway recommended that the minimum that the statute should provide is the services of an appropriate adult as soon as practicable after detention and prior to any questioning. Most pertinently for the purposes of this thesis, he recommended that a vulnerable suspect should only be able to waive their RLA if the appropriate adult also agrees to this.[82] The Scottish Government accepted this proposal, and has included it within the provisions of the Bill.[83] Lord Carloway recognized, however, that determining who may or may not be a vulnerable adult can be difficult[84] and this is discussed further in chapter four.

(iii) Under 16s:

The most fundamental change in this area Lord Carloway proposed related to children under the age of 16 years of age. Lord Carloway recommended that no child under the age of 16 years should be able to reject the services of a legal representative, making waiver invalid for all children, irrespective of personal circumstances or mental

[81] Report para 6.1.47.

[82] *ibid* para 6.3.31.

[83] s.25(3).

[84] Report para 6.4.12.

capacity.[85] Furthermore, he recommended that no parent, guardian, or other person to whom the child is legally entrusted should be able to waive this right on the child's behalf. The Scottish Government has followed Lord Carloway's proposal and made it explicit within the terms of the CJSB that under 16s cannot waive their RLA.[86]

(iv) 16-17 year olds:

The *Carloway Review* recommended that where the child is 16 or 17 years they may waive their RLA but only with the agreement of a parent, carer or responsible person.[87] The Scottish Government considered making the provision of legal advice mandatory to all under eighteens. However, it decided that it was important to distinguish between the different needs, stages of development and potential circumstances of older and younger children. Therefore, "while it might appear attractive to treat all individuals under 18 years consistently, the age-based laws which allow for seventeen year olds to be living independently and married reflect the quite different contexts and degrees of self-determination that can exist between a 10 and a 17 year old".[88] The Scottish Government therefore followed Lord Carloway's recommendation regarding this and the Bill provides that 16 and 17 year olds can agree to be interviewed by police without a solicitor only if a "relevant person" (parent, carer etc) agrees.[89]

2.9.5 *The maximum time of detention pre-charge*

Following the amendments made by the 2010 Act in the wake of *Cadder,* the length of time a suspect could be detained and questioned by police prior to charge was extended to a maximum period of 12 hours at first instance, with a further 12 hours being authorised with the approval of a custody review officer.[90] Lord Carloway recommended that the maximum period for questioning be 12 hours (with a requirement for review after the first six hours), and that no extension be permitted.[91] Lord Carloway

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[85] Report para 6.3.30.

[86] s.25(2).

[87] Report para 6.3.30.

[88] CJSB, Policy Memorandum, para 115.

[89] S.25(3)(5).

[90] CP(Sc)A 1995, s.14, as amended by the 2010 Act, ss.3(1)(b) & 3(2).

[91] Report para 5.2.38.

states in his Report that,"[h]aving regard to all the circumstances, and the absence of significant criticism of the operation of the 2010 Act as a generality, a period of twelve hours is reasonable",[92] for a suspect to be detained pre-charge. Lord Carloway justifies this timescale on the basis that modern investigative tools and the effect of *Cadder* necessitate a longer detention period than the original 6 hours previously permitted for questioning and initial investigation.[93] Lord Carloway said that he was "influenced" by the relatively low number of cases in which an increase in the current time scale introduced by the 2010 Act had actually been required.[94] The CJSB has followed Lord Carloway's recommendation.[95]

2.9.6 *Corroboration*

By far the most radical proposal is the abolition of the requirement for corroboration, the requirement that the essential facts of a case must be proven by evidence from two separate sources, a principle of iconic status in Scots law. The proposal to remove the requirement for corroboration plays a central role in my argument, which is that contrary to the intention of the Supreme Court, suspects may end up being less well protected following *Cadder* than they were under the previous regime. Lord Carloway believes corroboration should be entirely abolished for all categories of crime, recommending that it has no place in a contemporary legal system where judges and juries should be free to consider all relevant evidence and answer the single question of whether they are satisfied beyond reasonable doubt that the accused person committed the offence libelled.[96]

Despite the opposition of many of those in the judiciary, legal profession and the Law Commission, the government accepted Lord Carloway's controversial proposal. As such, section 57 of the Bill provides that "subject to the conditions set out in sections 58 and 59, where a fact has been established by evidence in any criminal proceedings, the

[92] Report para 5.2.34.

[93] CP(Sc)A 1995, s.14(2)

[94] Report para 5.2.38.

[95] s.11.

[96] Report para 7.2.55.

judge or jury is entitled to find the fact proved by the evidence although the evidence is not corroborated".

2.9.7 *Right to silence*

Finally, Lord Carloway examined the issue of the right to silence (RTS). At present, Scots law recognises an extensive RTS for detained suspects. They do not have to provide any information other than basic identity details of name, address, date, place of birth and nationality.[97] Crucially for the suspect, no adverse inferences can be drawn from a failure to answer police questions,[98] although any answers they may choose to give remain admissible. Lord Carloway recommends that this position be maintained as adverse inference provisions would "not fit well with the presumption of innocence, the right to silence and the privilege against self-incrimination...instead of promoting efficiency and effectiveness, it would bring unnecessary complexity to the criminal justice system".[99] The CJSB likewise contains no provisions that would change this position.

2.10 Summary of chapter 2

This chapter has been concerned with setting out the background to the introduction of a RLA in Scots law and with setting out the changes that (assuming the CJSB is passed in its present form) that will be made to Scottish criminal procedure in the wake of the introduction of this right. The main developments of note concern the proposed dimensions of the RLA (which include a provision that a suspect is entitled to the physical presence of a solicitor when he is being questioned); some radical provisions on waiver of the RLA; the changes made to the maximum time period for which a suspect can be detained without charge; the abolition of the requirement for corroboration; and the decision not to introduce adverse inference provisions. The implications of all of these changes will be considered in chapters three and four, which will assess the extent to which these changes leave suspects better protected in a number of key areas than they were prior to *Cadder*.

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[97] CP(Sc)A 1995, ss 14(9) and 14(10) .

[98] *Larkin v HM Advocat*e 2005 SLT 1087

[99] Report para 7.5.26.