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# **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.<sup>1</sup> 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*.<sup>2</sup> 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.<sup>3</sup> Following an unsuccessful appeal at the High Court of Justiciary, Mr Cadder's case was

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<sup>1</sup> 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.

<sup>2</sup> [2010] UKSC 43, 2010 SLT 1125.

<sup>3</sup> 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.<sup>4</sup>

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."<sup>5</sup> The Act introduced a right to a private consultation with a solicitor both before any questioning begins and at any other time during questioning.<sup>6</sup>

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".<sup>7</sup> As an immediate result of the the Supreme Court's ruling in *Cadder*, the Crown did not proceed with a total of 867 prosecutions.<sup>8</sup> 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,<sup>9</sup> to a whole series of other changes including the proposal to remove the corroboration requirement<sup>10</sup> and an increase in the maximum time permitted for

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<sup>4</sup> At para 50 per Lord Hope; para 93 per Lord Rodger.

<sup>5</sup> Policy memorandum accompanying the 2010 Act, para 2.

<sup>6</sup> s.15A(7) of the Criminal Procedure (Scotland) Act 1995 as inserted by the 2010 Act.

<sup>7</sup> 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](http://www.copfs.gov/News/Releases/2011/02/Crown-review-cases-after-Cadder-V-HMA).

<sup>8</sup> Ibid.

<sup>9</sup> *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]

<sup>10</sup> Report para 7.2.55.

detention.<sup>11</sup> 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.<sup>12</sup> 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.<sup>13</sup> 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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<sup>11</sup> Report para 5.2.38.

<sup>12</sup> PR Ferguson, “Repercussions of the *Cadder* case: the ECHR’s fair trial provisions and Scottish criminal procedure” [2011] Crim LR 743.

<sup>13</sup> Leverick, n 1 above, 361-375.

carried out by Lord Bonython of additional safeguards that may be necessary following the removal of the corroboration requirement.<sup>14</sup> 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.

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<sup>14</sup> 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.<sup>1</sup> It was only with the enactment of the Sheriff Courts and Legal Officers (Scotland) Act 1927,<sup>2</sup> 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

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<sup>1</sup> *Cadder* at para 74 per Lord Rodger.

<sup>2</sup> 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)”.<sup>3</sup>

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.<sup>4</sup> 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*,<sup>5</sup> 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,<sup>6</sup> later developing into a police force with a county structure,<sup>7</sup> 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

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<sup>3</sup> Macdonald, *A Practical Treatise on the Criminal Law of Scotland* (first edition, 1867), p290.

<sup>4</sup> Described in s.17 of the Criminal Procedure (Scotland) Act 1887 as a ‘law agent’.

<sup>5</sup> *HM Advocate v Goodall* (1882) 2 White 1.

<sup>6</sup> Under the Burgh Police (Scotland) Act 1833.

<sup>7</sup> 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.<sup>8</sup> However, following the Criminal Evidence Act 1898, which afforded the accused the right to give testimony during his trial,<sup>9</sup> and the Summary Procedure (Scotland) Act 1908, which gave the accused the right to emit a declaration,<sup>10</sup> judicial examination was on the wane.<sup>11</sup> 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.<sup>12</sup> Cases exist that show that suspects proceeded to provide voluntary statements which were deemed admissible.<sup>13</sup> In *Chalmers v HM Advocate*,<sup>14</sup> Lord Justice General Cooper made clear the shortcomings in such evidence when considering the issue of what is a fairly obtained statement:<sup>15</sup>

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<sup>8</sup> *Cadder* at paras 80-81 per Lord Rodger.

<sup>9</sup> S.2, Evidence of Person Charged.

<sup>10</sup> S.77(1).

<sup>11</sup> 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).

<sup>12</sup> *Cadder* at para 83 per Lord Rodger.

<sup>13</sup> *Hartley v HM Advocate* 1979 SLT 26.

<sup>14</sup> 1954 JC 66.

<sup>15</sup> 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.<sup>16</sup> 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.<sup>17</sup> 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”.<sup>18</sup> 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.”<sup>19</sup> 8

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<sup>16</sup> Thomson Committee, Criminal Procedure in Scotland: Second Report (Cmnd.6218: October 1975).

<sup>17</sup> Criminal Justice (Scotland) Act 1980, Part 1, ss.2(2), 3(4).

<sup>18</sup> Para.2.03.

<sup>19</sup> 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'.<sup>20</sup>

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*.<sup>21</sup> 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

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

<sup>21</sup> 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.<sup>22</sup>

Later that year in *Paton v Ritchie*,<sup>23</sup> 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,<sup>24</sup> as existing safeguards are already in place.<sup>25</sup> 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<sup>26</sup> 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.<sup>27</sup>

The final significant challenge was in *Dickson v HM Advocate*.<sup>28</sup> 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.<sup>29</sup> They also clearly expressed their view that there was no

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<sup>22</sup> At 132.

<sup>23</sup> 2000 J.C. 271.

<sup>24</sup> At 275.

<sup>25</sup> At 275-276

<sup>26</sup> *Robertson v Maxwell* 1951 J.C. 11. This is still the case – see the discussion in chapter three.

<sup>27</sup> *Paton v Ritchie*, at 275.

<sup>28</sup> 2001 J.C. 203.

<sup>29</sup> At para 24.

requirement for a solicitor to be present during a police interview under the Convention or Scots law.<sup>30</sup>

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.<sup>31</sup> 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*.<sup>32</sup> The facts of the case have been described in detail elsewhere,<sup>33</sup> 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,<sup>34</sup> 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".<sup>35</sup> The leading judgement continued:<sup>36</sup>

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<sup>30</sup> At 217.

<sup>31</sup> The cases attracted no notable academic criticism at the time.

<sup>32</sup> (2009) 49 EHRR 19.

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

<sup>34</sup> 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.

<sup>35</sup> Para 55.

<sup>36</sup> 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.<sup>37</sup> 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*.<sup>38</sup> 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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<sup>37</sup> 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.

<sup>38</sup> [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,<sup>39</sup> 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.<sup>40</sup> 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.<sup>41</sup> 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.<sup>42</sup> 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:<sup>43</sup>

“...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*.<sup>44</sup> As with *Salduz*, the precise facts of the case need not concern

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<sup>39</sup> Para 27.

<sup>40</sup> Para 25.

<sup>41</sup> Paras 24-26.

<sup>42</sup> 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.

<sup>43</sup> Para 31.

<sup>44</sup> [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<sup>45</sup> 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.<sup>46</sup> The claim was refused by the High Court but was ultimately determined by the UK Supreme Court, under the procedure governing devolution issue appeals.<sup>47</sup>

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

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<sup>45</sup> At para 5.

<sup>46</sup> At para 10.

<sup>47</sup> 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.”<sup>48</sup>

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.<sup>49</sup>

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*]”.<sup>50</sup> The Act introduced a right to a private consultation with a solicitor both before any questioning begins and at any other time during questioning.<sup>51</sup> 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.<sup>52</sup> “Consultation” means “consultation by such methods as may be appropriate in the circumstances, for example by telephone”.<sup>53</sup> 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.<sup>54</sup> The maximum

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<sup>48</sup> *Cadder*, at para 93.

<sup>49</sup> Standing Orders of the Scottish Parliament, 4th edn (2011) Chapter 9, Public Bill Procedures, rule 9.21.

<sup>50</sup> Scottish Parliament, Official Report col 29673 (27 October 2010).

<sup>51</sup> s.15A(7) of the Criminal Procedure (Scotland) Act 1995 as inserted by the 2010 Act.

<sup>52</sup> s.15A(2) & (6).

<sup>53</sup> s.15A(5).

<sup>54</sup> s.15A(8).



time for which a suspect may be detained was extended from six to twelve hours.<sup>55</sup> 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.<sup>56</sup>

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.<sup>57</sup> 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”.<sup>58</sup> 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

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<sup>55</sup> s.14(1).

<sup>56</sup> s.14(2).

<sup>57</sup> *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]

<sup>58</sup> 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.<sup>59</sup>

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.<sup>60</sup> 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.<sup>61</sup> 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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<sup>59</sup> *ibid* para 1.0.7.

<sup>60</sup> 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.

<sup>61</sup> 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<sup>62</sup> 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.<sup>63</sup> 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.<sup>64</sup>

Stage 1 consideration of the Bill has been completed by the Justice Committee. This culminated with the debate of the Bill in Parliament.<sup>65</sup> 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.<sup>66</sup> 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).<sup>67</sup> However, close to the submission of this thesis, at the meeting of the

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<sup>62</sup> See the Consultation paper – both generally and specifically at para 9.26.

<sup>63</sup> 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>.

<sup>64</sup> CJSB s.70(2).

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

<sup>66</sup> 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](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.

<sup>67</sup> 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,<sup>68</sup> 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.<sup>69</sup> 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.<sup>70</sup> 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”.<sup>71</sup> Notwithstanding, he recommended that in order to be fully compliant with Article 6 following ECtHR case law,<sup>72</sup> and the European Directive on the Right to Legal

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

<sup>69</sup> s.17(2).

<sup>70</sup> Criminal Procedure (Sc) Act, s 15A(3), as inserted.

<sup>71</sup> Report para 6.1.18.

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

Assistance,<sup>73</sup> 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,<sup>74</sup> 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.<sup>75</sup> 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".<sup>76</sup> 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.<sup>77</sup> 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

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<sup>73</sup> 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).

<sup>74</sup> s.15A(3).

<sup>75</sup> Report para 6.0.3.

<sup>76</sup> CPSA s.15A(5) as amended by the 2010 Act.

<sup>77</sup> 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.<sup>78</sup>

### *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.<sup>79</sup>

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,<sup>80</sup> 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:

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<sup>78</sup> s.36(3)

<sup>79</sup> Report para 6.1.33.

<sup>80</sup> 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,<sup>81</sup> 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.<sup>82</sup> The Scottish Government accepted this proposal, and has included it within the provisions of the Bill.<sup>83</sup> Lord Carloway recognized, however, that determining who may or may not be a vulnerable adult can be difficult<sup>84</sup> 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

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<sup>81</sup> Report para 6.1.47.

<sup>82</sup> *ibid* para 6.3.31.

<sup>83</sup> s.25(3).

<sup>84</sup> Report para 6.4.12.

capacity.<sup>85</sup> 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.<sup>86</sup>

(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.<sup>87</sup> 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".<sup>88</sup> 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.<sup>89</sup>

#### 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.<sup>90</sup> 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.<sup>91</sup> Lord Carloway

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<sup>85</sup> Report para 6.3.30.

<sup>86</sup> s.25(2).

<sup>87</sup> Report para 6.3.30.

<sup>88</sup> CJSB, Policy Memorandum, para 115.

<sup>89</sup> S.25(3)(5).

<sup>90</sup> CP(Sc)A 1995, s.14, as amended by the 2010 Act, ss.3(1)(b) & 3(2).

<sup>91</sup> 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”,<sup>92</sup> 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.<sup>93</sup> 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.<sup>94</sup> The CJSB has followed Lord Carloway’s recommendation.<sup>95</sup>

#### 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.<sup>96</sup>

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

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<sup>92</sup> Report para 5.2.34.

<sup>93</sup> CP(Sc)A 1995, s.14(2)

<sup>94</sup> Report para 5.2.38.

<sup>95</sup> s.11.

<sup>96</sup> 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.<sup>97</sup> Crucially for the suspect, no adverse inferences can be drawn from a failure to answer police questions,<sup>98</sup> 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”.<sup>99</sup> 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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<sup>97</sup> CP(Sc)A 1995, ss 14(9) and 14(10) .

<sup>98</sup> *Larkin v HM Advocate* 2005 SLT 1087

<sup>99</sup> Report para 7.5.26.

## **CHAPTER THREE**

### **ARE SUSPECTS BETTER PROTECTED?**

#### **3.1 Introduction**

The overall aim of this thesis is to assess the extent to which suspects are left better protected by the changes in the law that have occurred post-*Cadder* in Scotland. In order to address this aim, it is necessary to identify what it is that we are trying to protect suspects from. In doing so, it is useful to refer to the existing literature on the protections that legal assistance might offer to suspects. It has been suggested that there are four main justifications for the right to legal assistance (RLA) at the pre-trial stage. On the assumption that the suspect has taken up the RLA,<sup>1</sup> the various protections that might be offered are (i) protection from ill treatment; (ii) prevention of emotional distress; (iii) assisting suspects in understanding and implementing the right to silence (RTS); and (iv) safeguarding against wrongful conviction.<sup>2</sup> In this chapter I will take each of these in turn and will address four questions: (a) from what is it that we wish to protect suspects and why is it important? (b) how well were suspects protected prior to *Cadder*? (c) how (if at all) has the introduction of a RLA improved protection? and (d) have the post-*Cadder* changes reduced protection in any respect? In the following chapter, I will conclude whether or not, on balance, in each of these respects suspects are left better protected in the post-*Cadder* regime taking into account the additional concern that a significant proportion of suspects are likely to waive their RLA. As stated in chapter 1, the assessment will be undertaken on the assumption that the provisions of the Criminal Justice (Scotland) Bill (CJSB) subsequently come into force.

#### **3.2 Preventing ill treatment**

*a) What is it the suspect should be protected against in respect of ill treatment?*

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<sup>1</sup> For the purposes of this chapter, it will be assumed for the point of the argument that suspects do not waive their RLA. In reality this is not the case, as will be discussed in the chapter that follows.

<sup>2</sup> F Leverick 'The Right to Legal Assistance During Detention' Edin. L.R. 2011, 15(3), 361-375.

One area in which the RLA might protect suspects is by providing them with protection from ill treatment during the time they are in police detention.<sup>3</sup> Two distinct types of ill treatment may arise. Firstly, there are those that are unrelated to the interview room and encompass the general conditions which physical detention brings, such as the size and comfort of the cell, the provision of food and drink and so on. Secondly, there are those relating to the contact that the suspect has with police officers (or others concerned with his detention). There is potential for ill-treatment here both inside and outside the interview room and it may encompass either physical violence or, more likely, psychologically coercive techniques.

The concern that physical violence will be used during (or outside) police questioning is discussed by Walkley, who found that half of all police officers he interviewed admitted feeling what one officer encapsulated. The police officer said, “Some suspects expect rough treatment in the police station and, if it suits the circumstances, I don’t do anything to allay their fears”.<sup>4</sup> Walkley was, however, writing in the 1980s and it has to be said though that this is perhaps less of a concern in the modern era.

Of more concern is perhaps the use of other more subtle coercive tactics. Tactics including isolation, lengthy durations of interrogation, maximization and minimization of the seriousness of the alleged offence, the tendering of invented evidence, inferred as well as unambiguous threats of punishment or assurances of leniency, all are in the arsenal of an interviewer intent on the manipulation of a suspect to provoke a confession.<sup>5</sup> In practice, the interrogation room can be imbued with an atmosphere of implied violence and physical coercion, none of which would be permitted in the courtroom context.<sup>6</sup> A case that serves as an example of the type of tactics we might be concerned about here is *Codona v. H.M. Advocate*,<sup>7</sup> where the Appeal Court quashed the murder conviction of a fourteen-year-old girl on the basis that her confession should

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<sup>3</sup> Leverick, n 2 above, 364.

<sup>4</sup> J Walkley, *Police Interrogation* (1987), cited in R Milne and R Bull, *Investigative Interviewing: Psychology and Practice* (John Wiley & Sons, West Sussex 1999) 73-74.

<sup>5</sup> K Newring and W O'Donohue, “False Confessions and Influenced Witnesses”(2008) 4(1) *Applied Psychology in Criminal Justice* 81.

<sup>6</sup> AM Dershowitz, *“Is There a Right to Remain Silent?: Coercive Interrogation and the Fifth Amendment After 9/11”* (OUP, Oxford 2008) 62-63.

<sup>7</sup> 1996 SCCR 300.

never have been admitted as evidence. The police repeatedly asked the appellant if she had kicked the deceased, despite her repeated denials, at a time when she was crying and distressed. The interview lasted for two and a half hours. The court stated that, “...their [the police officers] questioning was of such a character as to demonstrate an intention on their part to extract from her admissions about her participation in the assault which she clearly was not willing to make voluntarily. Of particular concern in this case is the *length of the interview*.”<sup>8</sup>

As in the case of physical violence, however, it does have to be questioned whether such tactics are used to the same extent today. Recent research suggests that they are very rare. Soukara et al, in an extensive study of this issue, found that, “coercive tactics were used very infrequently”.<sup>9</sup> Soukara’s research was undertaken in England and Wales but there is no reason to think that things are any different in the Scottish context. Nonetheless, however ‘very infrequently’ ill treatment occurs now, it does not mean that one should not be concerned about it, for when ill treatment does take place its impact is great both on the suspect himself and on the integrity of the criminal justice process.

*b) What measures existed for suspects pre-Cadder to help protect them against ill treatment?*

Prior to the post-*Cadder* reforms, there were no specific measures to check the conditions in which detained suspects were being held, or at least no independent ones (aside that is from any general inspections of police facilities carried out by independent bodies such as Her Majesty’s Inspectorate of Constabulary in Scotland). The suspect had the right to notify one person and a solicitor that he was being held, but no more than these rights as they stood under sections 14 and 15 of the unamended CP(Sc)A 1995. He had no right for anyone to be present with him while being questioned, and any protection against ill-treatment prior to *Cadder* was therefore reliant on the police officers involved in the detention process regulating themselves and their supervisors keeping an eye on the tactics used by junior officers. However, there were some protections from violent and coercive tactics being used during interview, the main one being that interviews were (and still are) routinely audio-recorded. As Leverick notes,

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<sup>8</sup> At 321E - 322A (italics added).

<sup>9</sup> S Soukara et al, “What really happens in police interviews of suspects? Tactics and confessions” (2009) 15 Psychology, Crime and Law 493.

modern technology, such as the recording of police interviews, can go some way to mitigating the extent of abuse which might take place. This must be tempered, however, as Leverick states:<sup>10</sup>

“On the other hand, this still leaves the possibility of other coercive pressures being applied. Tape recording is an ineffective means of safeguarding against this as it does not capture facial or bodily gestures and only captures events that occur while the recorder is running”.

So although by no means fool-proof, it would appear that interviews being tape recorded goes some way to alleviate potential abuse concerns and to reduce the capacity for abuse to arise between suspect and examiners during interrogation.

A second area in which protection already existed is that any confessions secured by violence or coercion would be inadmissible. Two possible tests existed for determining the admissibility of statements by a suspect in response to police questioning: Firstly, the common law route which has established rules to protect a suspect from physical, emotional, mental coercion, or oppressive conduct on the part of the authorities. Here confessions will only be admitted as evidence if the court is satisfied that they have been fairly obtained.<sup>11</sup>

Secondly, there is the safety net catch all of the Convention assessing whether the suspect’s Article 6 right to a fair trial has been contravened.<sup>12</sup> We can conclude then that prior to *Cadder* although there were general protections in place, these were protections that would become operational mainly at the trial stage and certainly post detention interrogation i.e. at the point when the court would be asked to consider whether or not any statement made by a suspect is admissible as evidence against him or whether overall the accused’s trial was fair. It might be said that a likely knock-on effect of this would be that police officers would be less likely to use coercive tactics during an interview because if they did so, any evidence they obtained would most likely be unusable so their tactics would be pointless. However, such protection operates only in

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<sup>10</sup> Leverick, n 2 above, 364.

<sup>11</sup> *Lord Advocate’s Reference (No 1 of 1983)* 1984 JC 52; *Codona v HM Advocate*, 1996 S.C.C.R. 300 at 323; *Black v Anann*, 1996 S.L.T. 284; *HM Advocate v Davidson*, 1968 S.L.T. 17.

<sup>12</sup> For violation of Article 6 rights see *Austria v Italy* (1961) 4 Y.B. 116 at 784; 2 Digest 722.

an indirect manner and only applies to ill-treatment in the narrow confines of the interview room. Very little protection actually therefore existed for suspects in terms of checking on and preventing ill treatment during the period of detention more widely.

*c) Has the introduction of a RLA helped to improve the protection available to suspects in respects of the prevention of ill treatment?*

The next question is whether the introduction of the RLA has improved the position of suspects in respect of their protection from ill-treatment. In theory, the RLA certainly has the potential to improve matters in this respect. A solicitor can utilise his role to ensure that police officers do not cross a line which would be considered to be ill-treating his client and to act as a witness should such an abuse of authority arise.<sup>13</sup> If the suspect has someone physically present from the outset of the interrogation and throughout its duration such potential abuse, whether it be physical or through emotional and mental coercion, would be safeguarded against and the risk diminished. According to the European Committee for the Prevention of Torture, effective legal assistance advice requires a solicitor's presence at interrogation to address this very concern.<sup>14</sup> Furthermore, a solicitor may act as an independent and objective witness to any ill-treatment that does occur. As Dixon states, "[a] legal advisor can effectively be used as a witness of an interrogation. His or her presence will make it difficult to successfully make allegations of maltreatment or to challenge the accuracy of any confession".<sup>15</sup>

All of this is however subject to at least one caveat, which is that there is some evidence from England and Wales that legal advisers tend to take a very passive role in interviews and are not as effective in preventing hostile or coercive questioning as one might expect. Baldwin, in a study of legal practices undertaken in the 1990s for the Royal Commission in England and Wales, concluded that:<sup>16</sup>

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<sup>13</sup> See Leverick, n 2 above, 364.

<sup>14</sup> See e.g. CPT/Inf (2008) 2 concerning a visit to the Netherlands in 2007, available via: <http://www.cpt.coe.int/en/states/nld.htm>.

<sup>15</sup> D Dixon, "Common sense, legal advice and the right of silence" [1991] PL 233 at 239.

<sup>16</sup> J Baldwin, "Legal advice in the police station" [1993] Crim LR 371 at 372.

“I was very much struck by the extreme passivity of most of the legal advisers who featured in the 182 interviews that I examined. I came across many examples of legal advisers remaining silent when questioning was very persistent, harrying or confusing, when officers were rude to suspects, or where they were clearly operating on the basis of crude assumptions of guilt from the outset. [It] was easy for me to list examples of cases in which I took the view that a reasonably competent legal adviser ought to have intervened . . . Taking the 182 cases together, two-thirds of legal advisers said nothing at all in interviews and, when they intervened to any significant extent, it was almost as often to help the police interviewers as it was to assist their clients.”

This study was undertaken some time ago and in the context of England and Wales and may be of limited application to the current Scottish context but it is a point worth making that this protection is only going to arise if solicitors are active in challenging any ill-treatment or more subtle coercion that arises during the interview.

To summarise, then, although by no means foolproof it would appear that any type of “surveillance” which acts as an independent witness will reduce the likelihood for abuse to arise between suspect and examiners during interrogation should the suspect utilize their RLA. Given that section 24 of the CJSB provides for the right of a person in police custody to have a solicitor present when being questioned by police, we can conclude then that the introduction of a RLA has improved the protection available for suspects in a significant respect as any suspect who requests it can now have a solicitor present in the interview room.

It can also be said that protection outside of the confines of the interview room has improved, at least in comparison to the protection that existed previously. Under section 36(1) of the CJSB a suspect is entitled to a private consultation with a solicitor. This is not dependent on questioning and can act as a more general check on such things as the conditions of detention and the physical condition of a suspect. It is however, subject to two important limitations. First, it does rely on a legal adviser actually attending at the police station. It would be extremely difficult for a legal adviser to check the conditions in which a suspect is being held by telephone. If a video link is set up, it might be possible to check the physical condition of the suspect, but again this is not the ideal



way for physical condition to be examined. Notably, the CJSB does not provide a right for the consultation with a solicitor to be face to face (or at least not until the point of the interview itself, when the suspect does have the right to have a solicitor physically present under section 24 of the Bill). Up until this point, the Bill states that consultation, “means consultation by such as may be appropriate in the circumstances and includes (for example) consultation by means of telephone”,<sup>17</sup> which does limit the role that a solicitor can play. Second, even if a solicitor does attend at the police station, he is not (aside from exceptional circumstances) going to be able to do so immediately, which does leave some scope for ill-treatment occurring undetected before he arrives. Even given these limitations, however, it is the case that the RLA does add some additional protection to suspects in respect of possible ill-treatment during detention.

*d) Have any post-Cadder changes decreased the level of protection afforded to suspects in respect of ill treatment?*

The next question to be addressed is whether any of the measures contained in the CJSB have worsened the degree of protection. There is nothing in the Bill which directly reduces the level of protection against ill treatment. There is, however, one provision that indirectly places the suspect in a worse position and that relates to the maximum length of detention. Given that the CJSB has extended the time limit for detention from six to 12 hours<sup>18</sup> – twice as long as the original length of detention permitted under s.14 of the CPSA – this facilitates the police in putting further pressure on the detained, and possibly psychologically stressed, suspect. This was introduced in part to allow extra time for a solicitor to arrive should his presence be requested. However in its response to The Carloway Review Consultation, the Law Society of Scotland states that, “...there is no evidence to suggest that such delays would occur, only speculation and what evidence we have now suggests that such delays are rare”,<sup>19</sup> as regards solicitors not

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<sup>17</sup> Section 36(3).

<sup>18</sup> s.11.

<sup>19</sup> The Carloway Review Consultation, ‘*The Law Society of Scotland’s Response*’, June 2011, p. 15, para 1.

being able to attend within the six hour period.<sup>20</sup> Whether the doubling of detention times under the CJSB was intended to allow sufficient time to provide legal assistance or to give the police longer to carry out inquiries, either way it will result in a suspect being potentially held in detention for longer, bringing with it all the above associated concerns.

In this section, we have seen then that the prevention of ill-treatment during detention is a concern (albeit perhaps not such a major concern as it would have been historically) and that we are concerned here with both the general conditions of detention and with any physical or psychological pressure placed on suspects during police questioning. Prior to *Cadder*, there was little direct protection in existence. There were no independent checks on detention conditions in which individual suspects were being held, nor on the police interview process. It was the case that ill-treatment may have been deterred by the fact that a confession obtained unfairly would be inadmissible but this was very much an indirect protection, even if it might have had some deterrent effect. The introduction of the RLA has improved matters – a solicitor can check the conditions in which a suspect is being detained, can act as a deterrent to coercive tactics during questioning and can act as a witness to any ill-treatment of this nature that does occur. He can also step in and actively object to any inappropriate tactics, although this does depend on him being willing to do so. Balanced against this is the fact that the overall maximum length of time of detention permitted has been increased, so the period in which a suspect might potentially be ill-treated is now longer.

This assessment will be re-visited in chapter four, where the issue of the take up of legal assistance will be added into the analysis. For now, this chapter moves on to the second issue – that of the prevention of emotional distress.

### **3.3 Prevention of emotional distress**

*a) What is it the suspect should be protected against in respect of emotional distress?*

A second possible way in which the RLA might protect suspects is by preventing emotional distress. In his speech in *Cadder*, Lord Rodger suggested that the provision of

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<sup>20</sup> Publicly available information from ACPOS suggests that on average across Scotland, 83.5% of detentions are carried out within a six hour period; 15.7% within six to twelve hours and 0.8% over twelve hours. ACPOS Solicitor Access Data Report (June 2011), available at <http://www.acpos.police.uk/Documents/News%20Releases/SolicitorAccessDataReport.pdf>

emotional support to suspects was an important justification of the RLA. He stated that “[a] right to legal advice...could be derived from the need for legal assistance...for example, to support the accused in distress”.<sup>21</sup> Thus, providing emotional support to a suspect may be considered one important role played by the RLA.<sup>22</sup> As Skinns suggests, detention can be a frightening, distressing, unpredictable and alienating place, especially for those who are being held for the first time. She presents a picture of the exposed and isolated individual in custody by stating that:<sup>23</sup>

“...police custody areas are pressured environments and detainees, who often have complex needs, bear the brunt of long periods in stark conditions (e.g. in solitary confinement) contemplating the uncertainties of what lies ahead. Undoubtedly, this must be frightening, especially for the inexperienced or the vulnerable”.

The first experience and period of detention is likely to have the most impact on those detained, especially so if they have no warning of their arrest. Detention can be traumatic, particularly if people have no time to plan and to make emergency arrangements relating to child-care and or work activities.<sup>24</sup> Choongh found in one study of those detained in custody that one-fifth found the experience “intolerable”, and over half found it “distressing”, describing their emotions at the time as “angry”, “powerless” and “trapped”.<sup>25</sup>

If the emotional distress caused to detained suspects is a general concern, it is even more of a concern where the suspect is vulnerable due to advancing age; mental disorder or disability; a complication in understanding English; or a hearing or speech impairment. This is a pertinent issue as research has shown that psychological

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<sup>21</sup> *Cadder* at para 70.

<sup>22</sup> Leverick, n 2 above, 362.

<sup>23</sup> L Skinns, “I’m a detainee get me out of here: predictors of access to custodial legal advice in public and privatised police custody areas” (2009) 49 BJ Crim 399 at 412.

<sup>24</sup> A principal aim of PACE in England and Wales was to rule out the unnecessarily lengthy detention of suspects in custody which left them to “cool their heels” in the hope of obtaining a confession. See M Maguire, “Effects of the PACE Provisions on Detention and Questioning” (1988) 28(1) British Journal of Criminology 19 at 24.

<sup>25</sup> S Choongh, *Policing as Social Discipline* (Clarendon, Oxford 1997).

vulnerability is extremely prevalent in detained suspects. Recent research undertaken by Herrington and Roberts shows that there exists a prevalent psychological vulnerability in the population of adult suspects and that:<sup>26</sup>

“There are cognitive challenges facing individuals with a mental illness or intellectual disability. Such vulnerabilities can place individuals at a disadvantage during social interactions in general, and with the police in particular.”

The underlying psychological vulnerability of those detained at a police station is supported by Finn et al. They found that as many as 80 per cent of those who were part of an arrest referral link worker scheme required psychiatric treatment to combat a serious mental health problem.<sup>27</sup> Furthermore, according to Barron et al. 45 per cent of all suspects detained have some form of learning difficulties whilst 40 per cent will have been through special needs schooling.<sup>28</sup> When one considers the findings from the Office of National Statistics which suggest that 25 per cent of the population experience some form of mental illness each year,<sup>29</sup> the potential magnitude of Herrington and Roberts’ findings suggesting an underlying prevalent psychological vulnerability becomes apparent and must be taken seriously. Although this research does all stem from England and Wales, there is no reason to think that the make-up of the Scottish suspect population is any different.

Furthermore, given that mental health problems appear comparatively frequently amongst juvenile suspects, occurring on average at least three times more in young people within the youth criminal justice system than in the general population of young

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<sup>26</sup> V Herrington and K Roberts, “Addressing Psychological Vulnerability in the Police Suspect Interview” (2012) *Policing: A Journal of Policy and Practice* 6(2) 177-86.

<sup>27</sup> W Finn, J Hyslop and C Truman, “Mental Health, Multiple Needs and the Police: Findings from the Link Worker Scheme” (2000) London: Revolving Doors Agency.

<sup>28</sup> P Barron, A Hassiotis and J Baner, ‘Offenders with Intellectual Disability: The size of the problem and therapeutic outcomes.’ (2002) *Journal of Intellectual Disability Research* 46: 454–463.

<sup>29</sup> Office for National Statistics (2001). *Psychiatric Morbidity*. London: HMSO.

people,<sup>30</sup> the potential emotional distress caused to vulnerable child suspects is even more of a concern. To put this in perspective, it has been suggested that over 60 per cent of children who offend have communication problems, and of this group about half have poor or very poor communication skills. Approximately a quarter of children who offend have IQs of less than 70 and a further 30 per cent have borderline learning difficulties.<sup>31</sup> Although these figures stem from England and Wales, once again there is no reason to think they do not apply to Scotland and thus it quickly becomes apparent that emotional support will be essential to a vulnerable child suspect.

The reality of the experience of detention, then, is that it is likely to put any one of us at some risk, although there are particular increased risks that adults and children with mental health problems may be more likely to face compared to that of the general population. The first is the impact on their mental health of being in custody. In addition to the stress of being arrested, there is the bleak nature of the environment in which one is held, given that conditions in cells are very basic. There may also be additional stresses, for example, if an individual is deemed at risk of self-harm or suicide, as they may have their clothes removed and alternative clothing given. Furthermore, the work of Gudjonsson and MacKeith demonstrates that those who are psychologically vulnerable or suffering from mental illness can give unreliable testimony including false confessions.<sup>32</sup>

We can conclude then that the detained suspect faces a number of potential challenges when trying to protect himself against emotional distress. He faces not only physical challenges in relation to his immediate surroundings, but there also exist concerns regarding the mental welfare of the suspect in relation to his time spent in detention and

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<sup>30</sup> A Hagell, "The Mental Health of Young Offenders" (2002) London, Mental Health Foundation; J McGuire, A Haycox, R Houten, S Lane, J McGuire, T Nathan, RE Perkins, S Richards and R Whittington, "Evaluation of the Youth Justice Liaison and Diversion (YJLD) Pilot Scheme" (2012) Final Report, University of Liverpool.

<sup>31</sup> See R Harrington and S Bailey, "Mental Health Needs and Effectiveness of Provision for Young Offenders in Custody and in the Community" (2005) London: Youth Justice Board; Child and Adolescent Mental Health Services Interdepartmental Project Board Report 2005.

<sup>32</sup> G Gudjonsson and J MacKeith, "*Disputed confessions and the Criminal Justice System*" (2002) Maudsley Discussion Paper 2 [online]. Available at: [www.iop.kcl.ac.uk](http://www.iop.kcl.ac.uk). [Accessed: 17th January 2014] See also the discussion in SM Kassin, SA Drizin, T.Grisso, GH Gudjonsson, H Gisli, RA Leo and AD Redlich, "Police-induced Confessions, Risk Factors and Recommendations" (2010) 34 *Law and Human Behavior* 3. The issue of false confessions will be discussed below in section 4 ( 'Preventing Wrongful Conviction').

the potential for ill treatment that such an environment may provide during interrogation and detention itself. Emotional distress in the form of isolation, fear and uncertainty are all possible reactions a suspect may experience during detention. Clear decision making becomes all the more difficult for the distressed suspect in such a position. It is therefore very important that steps are taken to protect such individuals in custody by providing emotional support at this stage.

*b) What measures existed for suspects pre-Cadder to help protect them against emotional distress?*

As chapter 2 outlined, prior to *Cadder*, a suspect was entitled to have intimation of the arrest or detention and the location of the police station sent to a solicitor and one other reasonably named person, but no right to actually consult a solicitor.<sup>33</sup> This would do little to reduce a suspect's emotional distress. It may be that emotional support would have been provided by other people, but it is difficult to see who would do that other than the police, who are not an obvious source of emotional support in a custodial setting.

Vulnerable suspects fared better as they were entitled to the access of an 'appropriate person'. The detention of a child suspect had to be intimated to his or her parent or other responsible person in whose care the child rests.<sup>34</sup> However, the appropriate adult was subject to, "any restrictions required for the purposes of investigation",<sup>35</sup> and could only be present in a capacity to emotionally comfort and assist in communication, not to advise on matters of law or that of the child suspect's defence. For the purposes of a vulnerable adult suspect, pre-*Cadder* Scottish Government guidance stated that an appropriate professional adult was required, "...to facilitate communication between a mentally disordered person and the police and, as far as is possible, ensure understanding by both parties".<sup>36</sup> However, as in the case of a child suspect, the parameters are clearly set out and limited. The guidance states:<sup>37</sup>

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<sup>33</sup> s.15(1)(b).

<sup>34</sup> 1995 Act s.15(4)(5).

<sup>35</sup> *ibid.*

<sup>36</sup> See <http://www.scotland.gov.uk/Topics/Justice/law/victims-witnesses/Appropriate-Adult> [Accessed on February 15th 2014].

<sup>37</sup> *ibid* para 7.

“The presence of the appropriate adult is about trying to ensure equality for the person being interviewed. It is not about advocacy or speaking on behalf of a person with a mental disorder, rather it is about an independent third party checking that effective communication is taking place and that the person being interviewed is not disadvantaged in any way due to their mental disorder”.

We can conclude then that, prior to *Cadder*, although vulnerable suspects had at least some emotional assistance and support available to them by way of access to an appropriate adult, very little protection existed for those suspects who were not deemed vulnerable in terms of preventing emotional distress or providing emotional support at a time of acute vulnerability, stress and uncertainty. The one thing that could be said, however, was that the maximum detention time permitted under the law as it stood prior to *Cadder* was very short, at six hours, which did go at least some way to mitigating the lack of support available.

*c) Has the introduction of a RLA helped to improve the protection available to suspects in respect of the prevention of emotional distress?*

The benefit a legal adviser might bring is to potentially reduce some of the distress a suspect experiences in custody. It might also possibly provide comfort to a detainee's family about the state of their loved one's welfare. It may be that the suspect takes added emotional confidence and therefore psychological comfort from the fact that a lawyer, who has the pre-requisite legal knowledge to aid his case and offer advice, is present.

Section 36 of the CJSB provides for the right of a person in police custody to have a private consultation with a solicitor at any time. This means the RLA operates as soon as detention commences, rather than being dependent on questioning. One might question how much support a lawyer is able to give. He is not a trained counsellor, after all, and one might therefore question whether a lawyer is necessary to serve this purpose. But compared to the situation prior to *Cadder* it is an improvement in that there is now at least someone on whom all suspects can call for emotional support in custody.

We can conclude then that the introduction of a RLA has improved the protection available for suspects in respects of helping to prevent emotional distress from occurring. The suspect can now request legal assistance, and should they do this a legally qualified source of assistance will be available to suspects from the point at which a solicitor is able to arrive. As was discussed in relation to the prevention of ill-treatment, however, there are two limitations to the support a solicitor will be able to provide. The first is that, unless the solicitor is already on-site at the police station, there will, inevitably, be a period of time where the suspect is left unsupported while he awaits the arrival of his solicitor. The length of this period of time will vary, depending on factors such as the geographical location of the police station and the time of day at which he awaits the arrival of his solicitor. The second is that there is no guarantee in the Bill that assistance will be provided in person. The Bill only creates a right to a private consultation and does not guarantee that this will take place face to face, or at least not until the point at which the suspect is actually interviewed (when he acquires a right to have a solicitor present during that interview).<sup>38</sup> The emotional support that could be provided by telephone may be limited compared to the reassurance that could be provided face to face.<sup>39</sup>

*d) Have any post-Cadder changes decreased the level of protection afforded to suspects in respect of emotional distress?*

The next question is whether any of the post-Cadder changes have impacted negatively on the degree of emotional distress that is likely to be experienced by suspects. Before the 2010 Act, suspects could only be detained for a maximum period of six hours. Following the 2010 Act, the maximum period for which suspects could be detained was increased to 24 hours,<sup>40</sup> although under the CJSB this was reduced to twelve hours.<sup>41</sup> So although the CJSB has added the right to consult a solicitor at the detention stage, it has also extended the time limit for detention from six to twelve hours. This is still twice as

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<sup>38</sup> See the discussion and sources in section 2.2 above.

<sup>39</sup> Leverick, n 2 above, 363.

<sup>40</sup> s.3(2), inserting ss.14(2) and 14A(2) into the CPSA.

<sup>41</sup> s.11.



long as the original length of detention and makes the position for suspects considerably worse in this regard.

Even if the law has changed to allow a suspect to be detained for a maximum of 24 hours (or twelve if the CJSB is passed), this would not necessarily leave suspects in a worse position if the additional time was not being used in practice. However, figures collected by Lord Carloway from the Association of Chief Police Officers in Scotland (ACPOS) show that in the period from the introduction of the emergency legislation to the time of his Report's writing in November 2011, 15.7 per cent of cases of detention exceeded the six hours that was originally permitted prior to *Cadder*.<sup>42</sup> Lord Carloway concludes that, "[i]f this pattern persists, this would relate to more than 5,500 detentions every year".<sup>43</sup> Furthermore, although according to the ACPOS data, "less than half of one per cent of detentions has involved an extension beyond the twelve hour initial maximum",<sup>44</sup> this translates to 350 suspects a year or roughly one a day. Looked at in that context, it is a sizable number.

We can conclude then that in some respects the changes that have occurred subsequent to *Cadder* have left the suspect worse off than he was previously. As the suspect must now endure a doubling of the time he can be held in detention, the opportunity for emotional distress is that much greater. If suspects really do find the experience of being held in custody as distressing as *Skinns* and *Choongh* suggest,<sup>45</sup> then this doubling of the maximum detention period seriously decreases the level of protection suspects have against experiencing emotional distress.

### **3.4 Protecting the Right to Silence**

*a) What protection should the suspect be afforded in respect of the RTS?*

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<sup>42</sup> ACPOS Solicitor Access Data Report, 23 June 2011.

<sup>43</sup> Report para 5.2.20.

<sup>44</sup> *ibid.*

<sup>45</sup> See the discussion in (a) above.

A third key protection that the RLA might secure is protection of the suspect's legal rights at the point of detention, and the right that has most often been discussed in this respect is the right to silence (RTS). The RTS is a right that has been derived from the presumption of innocence, an important right that forms part of most international conventions of human rights that deal with criminal matters (it is, for example, contained in Article 6(2) of the European Convention on Human Rights). It is important at the outset to be clear about terminology.<sup>46</sup> The presumption of innocence refers to the right of a suspect to be presumed innocent until proven guilty by the State. From this a privilege against self-incrimination can be derived - the privilege of the suspect to refuse to assist the prosecution in proving the case against him. From the privilege against self-incrimination two further rights can be derived - the RTS (which covers the right of a suspect to refuse to answer questions or provide oral testimony) and the right not to provide other forms of material assistance to the State (such as bodily samples or real evidence).

Our interest here is in the RTS and it should be stressed that this is rarely (if ever) an absolute right and it has certainly not been held to be so by the European Court of Human Rights.<sup>47</sup> In all of the major common law jurisdictions it is restricted in some way, the two most common ways of doing that being either directly penalising a suspect for refusing to provide information,<sup>48</sup> or by drawing adverse inferences at a later stage from a refusal to answer questions.<sup>49</sup> In Scotland the RTS is relatively extensive. There are, for example, no adverse inference provisions of the sort that operate in England and Wales. However, even here it is not absolute as there are various statutory restrictions

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<sup>46</sup> See the discussion in J Chalmers and F Leverick, "Substantial and radical change: a new dawn for Scottish criminal procedure" (2012) 75 MLR 837 at 857.

<sup>47</sup> See, for example, *Condon v United Kingdom* (2001) 31 EHHR 1.

<sup>48</sup> As is the case in various road traffic legislation - see for example section 172 of the Road Traffic Act 1988 which makes it a criminal offence to fail to provide information about who was driving a vehicle suspected to have been involved in a criminal offence in various circumstances.

<sup>49</sup> As is done in England and Wales where a suspect fails to mention when being questioned by the police, information he later relies upon at trial - see the Criminal Justice and Public Order Act 1994 ss 34 & 35.

that penalise a failure to provide information,<sup>50</sup> including some relating to the provision of information prior to or during the detention process itself.<sup>51</sup>

Unfortunately, suspects might not understand the RTS and the effect upon their defence it may have. Weisselberg states that “the social science literature now shows that we cannot assume that warnings effectively enable suspects to understand their rights, given the varying language of the warnings and the varying capabilities of suspects, among other reasons”.<sup>52</sup> It can be said then, that legal assistance may play a key role in assisting the suspect to navigate the law on the RTS - whatever that law may be in the jurisdiction in question. The role that legal assistance might play in this regard can be broken down into three types of protection: protecting the suspect by helping him to understand the RTS; protecting the suspect by helping him to identify the most appropriate choice in respect of whether or not he decides to remain silent in the face of police questioning; and protecting the suspect by helping him to enforce this choice during the police interview.<sup>53</sup> Each will be discussed in turn.

The first issue that we might be concerned with, then, is that a suspect might not understand the legal provisions relating to the RTS. When one considers that the lack of cognitive understanding of an accused may be impaired at such an emotionally charged moment as detention, this danger is heightened. The way in which information is given about the RTS to a suspect is normally via the caution that is read by police when a suspect is detained. However, there is evidence to suggest that understanding of the caution is poor among those who pass through the criminal justice system. The studies by Shepherd et al,<sup>54</sup> and Clare et al,<sup>55</sup> suggest that a significant proportion of individuals who are arrested and detained for questioning are at risk of not understanding this aspect of their legal rights. These studies showed that only eight and 42 per cent respectively of adult participants fully understood the caution. Little wonder then that in

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<sup>50</sup> For example, section 172 of the Road Traffic Act 1988 applies to Scotland.

<sup>51</sup> These will be outlined in section (b) below.

<sup>52</sup> C D Weisselberg, “Mourning Miranda” (2008) 96 Cal LR 1521 at 1564-1569.

<sup>53</sup> Leverick, n 2 above, 365-366.

<sup>54</sup> EW Shepherd, AK Mortimer, R Mobasheri, “The police caution: comprehension and perceptions in the general population” (1995) *Expert Evidence* 4: 60–67.

<sup>55</sup> ICH Clare, GH Gudjonsson, PM Harari, “Understanding of the current police caution (England and Wales)” (1998) *Journal of Community & Applied Social Psychology* 8: 323–329.

the conclusion of their paper Clare et al state that, “[t]he complexity of the current caution means that it is essential for suspects to receive good quality legal advice prior to, and during, police questioning, and at court.”<sup>56</sup> Understanding is important not only because it is unfair to the suspect if he cannot understand, but also because if it is found that a suspect did not understand the caution at the time of interview, his statements may be ruled inadmissible.<sup>57</sup> This may potentially lead to the acquittal of factually guilty persons on the basis that any confession they made is ruled as having been unfairly obtained.

The research carried out by Shepherd et al and Clare et al referred to above was undertaken in England and Wales where the caution is relatively complex because of the adverse inference provisions there. Little research has been undertaken into the understanding of the caution in Scotland, but the research that does exist suggests that despite the fact that the caution is relatively simple, understanding is still problematic, not least among juvenile suspects. A study of the comprehension of a Scottish version of the caution undertaken by Cooke and Philip,<sup>58</sup> amongst 100 young offenders,<sup>59</sup> suggests that many suspects simply did not understand the standard caution. The study’s findings showed that, “[t]he overall level of comprehension was low: while 89% per cent claimed to fully understand the caution only 11% per cent were considered to have a complete understanding”.<sup>60</sup>

Cooke et al’s study focused on juvenile suspects. We might equally be concerned, however, about vulnerable adult suspects. One of the most comprehensive and well known studies in this area was that undertaken by Cloud et al.<sup>61</sup> They conducted an empirical study to find out the extent to which vulnerable adults suffering from mental illness understood the Miranda warning.<sup>62</sup> Admittedly this study was undertaken in the

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<sup>56</sup> *ibid* p.328.

<sup>57</sup> See e.g. *Tonge v HM Advocate* 1982 JC 130.

<sup>58</sup> D Cooke and L Philip, “Comprehending the Scottish caution: do offenders understand their right to remain silent?” (1998) *Legal and Criminological Psychology* 3: 13–27.

<sup>59</sup> With a mean age of 18 years.

<sup>60</sup> Cooke and Philip, at 13.

<sup>61</sup> M Cloud, GB Shepherd and AN Barkoff, “Words without meaning: the constitution and mentally retarded suspects” (2002) 69 *University of Chicago Law Review* 495.

<sup>62</sup> The caution that is given to suspects in the US: see *Miranda v Arizona* 384 US 436, 470 (1966).

US context, but the caution is not dis-similar to that given in Scotland and does not contain any references to adverse inferences, as the English caution does. They found that their subjects simply did not comprehend the caution; that the meaning of the words incorporated within the caution were incomprehensible to them; nor could they form an opinion about the caution that enabled them to make meaningful and knowledgeable decisions. Their study comprised three tests, each of which analyzed crucial components in the understanding the Miranda right - the vocabulary, warning, and concept tests.<sup>63</sup> Each were designed to test the vulnerable subject's ability to understand, communicate and make decisions in relation to waiver.<sup>64</sup> Of the vulnerable adults suffering from mental illness who took part, only 20 per cent, 27 per cent and 38 per cent respectively for each test<sup>65</sup> understood what the words, meaning and implications of the caution actually meant. As regards juvenile suspects, the study concluded that age by itself did not influence any of the four tests used to measure understanding of the caution.<sup>66</sup> Cloud et al concluded that the Miranda right was, and remains, problematic for all sections of suspects to understand, be they juvenile or adult, but especially so amongst those vulnerable suspects with mental disability. If a suspect suffers from this then other factors will, "...not overcome the disabled person's inability to understand the warnings".<sup>67</sup>

Understanding of the RTS, therefore, is clearly a potential problem that is not necessarily addressed by simply reading the caution to a suspect, as Lord Hope noted in *McGowan v B*, when, after reviewing the relevant research, he stated that, "[I]t serves as a warning that it should not be taken for granted that everyone understands the rights that are being referred to".<sup>68</sup>

Second, there is the issue that a suspect might need assistance in making the most appropriate choice as to whether to exercise his RTS, given the legal consequence of

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<sup>63</sup> Cloud et al, at 532-536.

<sup>64</sup> 'Waiver' will be discussed separately in Chapter 4.

<sup>65</sup> Cloud et al, at 539.

<sup>66</sup> *ibid* at 564.

<sup>67</sup> *ibid* at 590.

<sup>68</sup> *McGowan v B* [2011] UKSC 54 at para 47. *McGowan* is the leading Scottish case on waiver of the RLA and will be discussed in detail in chapter 4.

doing or not doing so.<sup>69</sup> Even suspects who do understand the law might not understand the likely consequences of different decisions they could take and thus identify their best strategy accordingly. The Royal Commission on Criminal Procedure, for example, whose recommendations formed the basis of PACE in England and Wales, held this view when they stated that those accused may not be fully aware of the “implication” or the benefits in, “exercising” this right.<sup>70</sup>

Third, for those suspects who have chosen to exercise their RTS, they may need assistance in order to maintain this decision in the face of the coercive atmosphere of the interview room.<sup>71</sup> In his speech in *Cadder*, Lord Hope observed that the RTS must be respected once exercised. He stated:<sup>72</sup>

“A person is ... free to speak to the police and can provide them with self-incriminating answers if he is willing to do this, and his answers will be admissible if they are truly voluntary...The test is whether the will of the person to remain silent ... has been respected.”

As already discussed in section 3.2 above, however, the interview room, by its very nature, can be a pressurized and stressful environment. Questioning is likely to be, “...prolonged, and the atmosphere is likely to be coercive”.<sup>73</sup> Respecting the will of the suspect who wishes to stay silent in this context might require more than simply telling him that he can do so. Even those who do decide that they wish to stay silent may find this difficult to put into effect in practice, especially if this is their first time in custody and they are unfamiliar with the environment. This even more so if they are a vulnerable adult or a juvenile suspect.

We can conclude, then, that the suspect faces three main challenges regarding his RTS. Firstly, the suspect might not understand it; secondly, he needs to make the appropriate choice regarding exercising it or not. Furthermore, should the suspect choose to exercise his RTS he will require the strength to maintain and implement the choice in the

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<sup>69</sup> Leverick, n 2 above, 369.

<sup>70</sup> Royal Commission on Criminal Procedure Report (Cmnd. 8092, 1981).

<sup>71</sup> Leverick, n 2 above, 370.

<sup>72</sup> *Cadder* [2011] UKSC 43 per Lord Hope at 56.

<sup>73</sup> *Cadder*, per Lord Hope at 57.

stressful atmosphere of the interview room. In respect of all these challenges, as noted above, there is a convincing case for providing the suspect with assistance of some description in order that he can exercise this right effectively. Without such assistance many suspects, including the most vulnerable, will not be protected.

*b) What measures existed for suspects pre-Cadder to help facilitate the RTS?*

The first point to note is that in Scotland, prior to *Cadder* (and indeed subsequently to *Cadder* as the law has not changed in this area), suspects have a relatively extensive RTS. It is not permissible for a court to draw adverse inferences from a suspect's failure to answer police questions,<sup>74</sup> (as it is in, for example, England and Wales). The suspect does have to provide some basic information regarding his identity to a police officer if he is suspected of committing a criminal offence,<sup>75</sup> but aside from this (and any other minor statutory restrictions of the right to silence that apply in Scotland), the RTS is very wide.

Prior to *Cadder* very little was done to help suspects understand and exercise their RTS. They would be read the standard caution, but as we have seen above, simply reading the caution to a suspect does not necessarily mean that he understands it. A suspect who wished to consult a solicitor to weigh up his choices prior to being interviewed had no right to receive this advice, and he certainly had no right to have a solicitor present in the interview room to help him exercise his choice. The exception to this was that a vulnerable adult suspect or a child suspect would have had access to an appropriate adult (discussed in section 2.3 above) but as was discussed earlier the role of such a person is to provide emotional support and facilitate communication and not to provide any legal assistance. This would be helpful in the context of explaining the RTS in appropriate language but not much beyond this that is relevant in the present context.

We can conclude, then, that prior to *Cadder* very little protection existed for suspects, aside from child suspects or vulnerable adult suspects, in terms of helping them to enforce their RTS or to understand how to make an informed choice regarding this right.

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<sup>74</sup> *Larkin v HM Advocate* 2005 SLT 1087.

<sup>75</sup> Under section 14(9) and 14(10) of the Criminal Procedure (Scotland) Act a suspect is obliged to provide his name, address, date and place of birth and nationality to police upon detention and it is a criminal offence to fail to do so.

Even for child and vulnerable adult suspects, the support that was available was not from a legally qualified individual and therefore likely to be of only limited assistance in terms of things like identifying the best strategy in terms of answering questions or not (which requires a modicum of legal knowledge). The final thing that could perhaps be said is that the relatively short maximum period of detention (six hours) meant that suspects would not face questioning for lengthy periods and thus any suspect who wished to stay silent would have only a limited time in which he needed to stick to his decision. However, this is not a very convincing argument as six hours, while low in comparison to other jurisdictions,<sup>76</sup> is still a long time in which to face questioning and thus this can hardly be seen as much of a positive.

*c) Has the RLA helped to improve the protection available to suspects in respect of the RTS?*

The next question is whether the RLA has improved the protection available to suspects in respect of understanding the RTS, identifying the most appropriate course of action and in sticking to any decision to remain silent throughout police questioning. It is suggested here that it has – with some qualifications. Each of these three areas will be discussed in turn.

To take understanding first, the RLA has definitely improved the position. We saw earlier that many suspects do not understand even the relatively straightforward Scottish caution, especially if they are young or vulnerable. A lawyer is likely to be of considerable assistance here in helping suspects to understand what the RTS means and its implications. It was discussed earlier that as the law stands at the moment, a suspect does not have a right to a face to face consultation with a solicitor until the point of police questioning, as legal assistance can in theory be provided by any means possible, such as the telephone. In the context of understanding, however, this is unlikely to matter as the RTS can easily be explained in a telephone conversation.

On the issue of identifying the appropriate choice of whether or not to exercise the RTS, the RLA constitutes an improvement here too. A suspect will be in a much better

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<sup>76</sup> See for example, England and Wales, where with the agreement of a magistrate a suspect can be detained for up to 96 hours without charge: see PACE ss.43 and 44.



position to do this in conjunction with a legal adviser, who will be able to explain the legal consequences of exercising or not exercising the right in the context of the nature of the charge and the evidence against them.<sup>77</sup> If what we are concerned about here is to allow the suspect to make “...decisions about co-operation to be made on a more informed basis”,<sup>78</sup> then the RLA has certainly made things better in this respect. Like explaining the RTS, helping a suspect to identify his best interests in terms of exercising it can probably be done reasonably effectively by telephone and thus the fact that the RLA does not extend to physical presence until police questioning starts is not a major barrier in this respect.

The final issue is whether the RLA has improved the suspect’s position in terms of assisting him in enforcing any decision to remain silent in the face of police questioning. It can be concluded without doubt that the RLA has improved matters. It is especially significant in this respect that the CJSB has established a right for a solicitor to be physically present during police questioning.<sup>79</sup> It would be difficult for a legal adviser to assist a suspect in this respect if he was not present in the interview room and the law in some other jurisdictions has been criticized for not extending the RLA to include this. In Canada, for example, the right only extends to a consultation with a solicitor during the interview (i.e. the right to stop questioning and consult with a lawyer before questioning resumes) and not to the physical presence of the lawyer in the interview room.<sup>80</sup> Thus Scots law, in allowing the solicitor to be present during questioning, is far superior in this regard and much more effective in terms of providing the assistance that a suspect would need in helping him to stick to a decision to remain silent. This is especially important given Sanders and Bridges found that when suspects who were recommended by way of telephone advice to stay silent, only a minority followed the solicitor’s direction.<sup>81</sup>

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<sup>77</sup> Leverick, n 2 above, 369.

<sup>78</sup> *ibid.*

<sup>79</sup> CJSB, s.24.

<sup>80</sup> See *R v Sinclair* [2010] 2 SCR 310. For criticism see the dissenting opinion of Binnie J in this case and also Leverick (n 2) and R Pattenden, “Right to counsel at the police station: United Kingdom and Canada” (2011) 15 *International Journal of Evidence and Proof* 70.

<sup>81</sup> A Sanders and L Bridges, “The right to legal advice”, in C Walker and K Starmer (eds), *Miscarriages of Justice: A review of Justice in Error* (OUP, Oxford) 2004) 83 at 95.

The one note of caution that might be sounded here (aside from the fact that not all suspects will take up the RLA, which will be discussed in chapter four) is that there is some evidence from England and Wales to suggest that solicitors are sometimes very passive during police questioning and do little to intervene if questioning becomes hostile or stressful (see the discussion in section 3.2 above). If this is true in the Scottish context (and there is no evidence to suggest that it is) then the degree to which the RLA will assist a suspect in enforcing his decision to remain silent might be rather more limited, as this does require the solicitor to take an active role at least to some extent.

We can conclude, then, that the introduction of a RLA has improved the protection available for suspects to a significant degree as there is now a legally qualified source of advice available to suspects who request it. A solicitor can explain what RTS means; can help the suspect identify their best interests in terms of choosing whether or not to exercise their RTS; and can help the suspect to enforce his decision to remain silent whilst being questioned. This conclusion is supported by the fact that in some other jurisdictions it has been said that for the RTS to be effective it simply *has to be* accompanied by a RLA: the Canadian Supreme Court, for example, has said that “[i]n the context of custodial interrogations, you can’t have one without the other”.<sup>82</sup> Until the post-*Cadder* changes Scotland *did* have one without the other and thus in this respect the introduction of a RLA has definitely improved the position. Furthermore, as there is clear evidence that young Scottish offenders do not understand the caution/right to silence, as the research undertaken by Cooke et al above indicates, making a right to legal assistance compulsory for a child suspect (an issue that will be discussed in more detail in chapter four) is a very real increase in protection.

*d) Have any post-Cadder changes decreased the level of protection afforded to suspects in respect of the RTS?*

The next question is whether any of the post-*Cadder* changes have diminished the protection available to suspects in terms of understanding and enforcing their RTS. As

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<sup>82</sup> *R v Sinclair* [2010] 2 SCR 310 at para 124.

we have already seen, presently, no adverse inferences may be drawn from silence either at the police questioning stage or at trial.<sup>83</sup> As part of his remit, Lord Carloway did consider whether the law should be changed in Scotland to permit adverse inferences to be drawn from silence. However, as noted in chapter 2, Lord Carloway concluded that introducing an adverse inference from silence would be incompatible with the presumption of innocence and the right not to self-incriminate.<sup>84</sup> His recommendation was followed by the Scottish Government and the CJSB makes no change to the law on the right to silence.

Thus in one important respect where there was the potential for the position to be made worse for suspects, this has not happened. Indeed, the changes that have stemmed from Lord Carloway's review do nothing to worsen the protections that suspects receive in this area, aside from perhaps the impact of a longer detention period which might mean that suspects find it more difficult to remain silent in the face of police questioning if they are being questioned for longer periods. If he had chosen to recommend a change in the law relating to the RTS in Scotland by introducing adverse inference provisions, this would have left suspects worse off as the complexities of the law in this area would have been even more difficult to understand,<sup>85</sup> but he did not do that for the reasons set out above. We can therefore conclude that the protection the RTS afforded a suspect pre-*Cadder* is not diminished in any significant way by the post-*Cadder* changes.

### 3.5 Preventing wrongful conviction

*a) What is it the suspect should be protected against in respect of wrongful conviction?*

The final area in which we need to consider the protection afforded to suspects is that of preventing wrongful conviction. Before proceeding it is important to clarify the relevant terminology. In Scots law, an appeal against conviction will succeed if it is established

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<sup>83</sup> *Larkin v HM Advocate* 2005 SLT 1087.

<sup>84</sup> Report para 7.5.26. While his decision has been applauded, his reasoning has been criticised but it is beyond the scope of the thesis to discuss this. See Chalmers and Leverick, "A new dawn for Scottish criminal procedure" (n 53) at 857-860.

<sup>85</sup> On this, see Chalmers and Leverick, "Substantial and radical change" (n 53 above) at 858.

that there has been a miscarriage of justice.<sup>86</sup> A miscarriage of justice in this context does not necessarily mean that the appellant is factually innocent – it simply means that either there was some sort of procedural impropriety that calls into question the safety of the conviction or that fresh evidence has emerged which casts doubt on whether the appellant should have been convicted. Our concern here is not with a miscarriage of justice in this “legal” sense but with preventing the conviction of those who are genuinely factually innocent. To avoid any confusion with the legal miscarriage of justice terminology, I shall use the term “wrongful conviction” instead of “miscarriage of justice”.

In the past two decades, there have been many more newspaper stories, magazine articles, and television documentaries on the plight of the wrongfully convicted than ever before.<sup>87</sup> As a result, there is greater appreciation by professionals in criminal justice that the wrongful conviction of the innocent is a real and ongoing problem. No study has attempted to estimate the extent of wrongful conviction in Scotland and thus we do not know the scale to which the conviction of the innocent is occurring in this jurisdiction.<sup>88</sup> In trying to arrive at an answer to this question, we could look at the number of successful appeals against conviction. The latest set of figures tells us that 2,191 people appealed against a criminal conviction in 2008-09 and that 25 percent of those appeals were successful.<sup>89</sup> Equally, we could also look at the number of cases referred by the Scottish Criminal Cases Review Commission (SCCRC), the body charged with investigating miscarriages of justice in Scotland. In Scotland, in the first ten years of operation of the Commission (i.e. since the SCCRC’s founding in 1999 to March 2010), it referred a total of 74 convictions to the appeal court, 44 of which were successfully appealed.<sup>90</sup> These figures, however, only give a very partial and incomplete picture of wrongful conviction. For a start there may be factually innocent people who have not appealed against their conviction or applied to the Commission. In addition,

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<sup>86</sup> CP(S)A 1995 s.106.

<sup>87</sup> R Warden, “The revolutionary role of journalism in identifying and rectifying wrongful convictions” (2003) 70 UMKC Law Review 803-846.

<sup>88</sup> D Nicolson and J Blackie, “Corroboration in Scots law: archaic rule or invaluable safeguard?” (2013) 17 Edin LR 153 at 163.

<sup>89</sup> Scottish Government, Criminal Appeal Statistics, Scotland, 2008/09 (2009).

<sup>90</sup> See the figures available on the SCCRC website: <http://www.sccrc.org.uk>.

and most importantly, the fact that a conviction was quashed does not necessarily mean the person concerned was factually innocent as this is not the test the appeal court uses to quash convictions in Scotland. As noted above, the test that it does use is whether or not there has been a miscarriage of justice, and this is not the same thing as factual innocence.

Some assistance in assessing the scope of the problem of wrongful conviction might be gained from other jurisdictions. In the US context, the National Institute of Justice (NIJ) examined wrongful conviction in 2010 through their expert working group and found that on a conservative estimate a figure of one per cent to 3.3 per cent existed but on a less conservative estimate the rate might be as high as five per cent.<sup>91</sup> Likewise, Risinger estimates the wrongful conviction rate to be around one to two per cent in the United States.<sup>92</sup> On the assumption that these figures translate to the Scottish context, it can be concluded that there is some basis for thinking that wrongful conviction is a problem. Now admittedly this is a major assumption to make – we do not have any evidence in the Scottish context that wrongful conviction is such a widespread problem as this. But even if it is not so at present, this may simply be because the legal system is currently effective at preventing it and we cannot assume that it will continue to do so (on which see the discussion of the removal of the corroboration requirement below).

What is of particular interest here is the extent of wrongful conviction based on false confessions. Sanders and Bridges note that miscarriages of justice have historically arisen in England and Wales when confession evidence was the only evidence.<sup>93</sup> The Innocence Project, a U.S. non-profit legal clinic that assists those wrongfully convicted of crimes, claims that 8% of wrongful convictions are due to false confessions prompted

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<sup>91</sup> M Jolicoeur, “International Perspectives on Wrongful Convictions: Workshop Report” National Institute of Justice, U.S. Department of Justice, 2010). Available electronically at: <http://www.innocencenetwork.org.uk/wp-content/uploads/2011/11/international-perspective-on-wrongful-convictions.pdf>

<sup>92</sup> DM Risinger, “Innocents convicted: an empirically justified factual wrongful conviction rate” (2007) 97 *Journal of Criminal Law and Criminology* 761-806.

<sup>93</sup> Sanders and Bridges (n 82).

by police.<sup>94</sup> In Bedau and Radelet's study,<sup>95</sup> false confessions were the third leading cause of wrongful conviction. In Warden's study they were the single leading cause.<sup>96</sup> There are various causes of wrongful conviction, but the subject of this thesis is the RLA and false confessions are the cause that legal assistance at detention stage has the best chance of preventing. With the other main causes (eyewitness misidentification, unreliable forensic evidence, lying witnesses),<sup>97</sup> providing legal assistance at the detention stage is much less likely to have an impact on them. As there is not space here to examine all the possible causes, I have therefore chosen to focus on false confessions for the reasons above. I do, however, recognise that the removal of the corroboration requirement may have implications for some of the other main causes of wrongful conviction (especially eyewitness misidentification), but I am not going to examine that issue here.

We have seen that there is evidence to suggest that this is concerning and although it is very difficult to assess how frequently false confessions are made, there is more than enough evidence to suggest that they do occur.<sup>98</sup> Why are false confessions such a significant cause of wrongful conviction? In part the answer lies in the fact that a confession is such a persuasive form of evidence. Kassin et al state that, "[i]nterrogation is an evidence-gathering activity that is supposed to occur after detectives have conducted an initial investigation and determined, to a reasonable degree of certainty, that the suspect to be questioned committed the crime".<sup>99</sup> Given this approach to interrogation of a suspect the confession, once made, would appear to confirm and close

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<sup>94</sup> S Drizin and R Leo, "The problem of false confessions in the post-DNA world" (2004) North Carolina Law Review at 905.

<sup>95</sup> HA Bedau, and ML Radelet, "Miscarriages of justice in potentially capital cases" (2003) Stanford Law Review, 40: 21-179.

<sup>96</sup> Warden (n 95). See also M McConville and J Baldwin, "The Role of Interrogation in Crime Discovery and Conviction" (1982) 22 Brit J Criminal 165; KA Findley, "Learning from Our Mistakes: A Criminal Justice Commission to Study Wrongful Convictions" (2002) 38 *California Western Law Review* 333, which suggests that not far short of a quarter of all wrongful convictions in the USA may be attributable to false confessions.

<sup>97</sup> For a comprehensive account based on DNA exonerations in the US, see BL Garrett, *Convincing the Innocent: Where Criminal Prosecutions Go Wrong* (President and Fellows of Harvard College, Library of Congress, 2011).

<sup>98</sup> R Pattenden, "Should Confessions Be Corroborated?" (1991) 107 LQR 317.

<sup>99</sup> SM Kassin et al, "Police -Induced confessions: Risk and Recommendations" (2010) 34 Law and Human Behaviour 3-38 at 4.

any further investigation even in the face of a confession “contradicted by external evidence, or the product of coercive interrogation”.<sup>100</sup> With statements such as, “[t]he introduction of a confession makes the other aspects of a trial in court superfluous, and the real trial, for all practical purposes, occurs when the confession is obtained”,<sup>101</sup> one can see the power confession evidence has. Research by Blandon-Gitlin et al supports this conclusion by establishing that even when a coercive technique is suggested as having been used to obtain a confession during interrogation, juries hesitate to draw such a conclusion.<sup>102</sup> In addition, lay people find it very difficult to accept that anyone would confess to a crime they did not commit, even if coercive techniques were applied (even though research has consistently shown that this does in fact happen).<sup>103</sup>

Why then do suspects make false confessions? In examining this issue, the Royal Commission on Criminal Justice observed individuals make false confessions for a wide range of reasons:<sup>104</sup> (i) people may make false confessions entirely voluntarily as a result of a morbid desire for publicity or notoriety; or to relieve feelings of guilt about a real or imagined previous transgression; or because they cannot distinguish between reality and fantasy; (ii) a suspect may confess from a desire to protect someone else from interrogation and prosecution; (iii) people may see a prospect of immediate advantage from confessing (e.g. an end to questioning or release from the police station); and (iv) people may be persuaded temporarily by the interrogators that they really have done the act in question. It may also be the case that a suspect simply wishes to please their interrogator.

Similar conclusions have been drawn by psychologists who have researched this issue. The leading researchers in this area are the social psychologists Saul Kassin and Lawrence Wrightsman, who have identified three distinct types of false confession.

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<sup>100</sup> *ibid.*

<sup>101</sup> *Colorado v Connelly* 497 U.S. 157 (1986).

<sup>102</sup> I Blandon-Gitlin et al, “Jurors believe interrogation tactics are not likely to elicit false confessions: will expert witness testimony inform them otherwise?” (2010) 1 *Psychology, Crime and Law* 1.

<sup>103</sup> *Ibid.*

<sup>104</sup> Royal Commission on Criminal Justice (1993) *Report* (Cm 2263) (London: HMSO).

They called these “coerced-compliant”; “coerced-internalized”, and “voluntary”.<sup>105</sup> As a result of overpowering questioning, a suspect may give what is known as “coerced-compliant” confession, where, “the suspect publicly professes guilt in response to extreme methods of interrogation, despite knowing privately that he is truly innocent”. Although fully understanding that his confession is false, in order to avoid the duress and pressurization of an interrogation, he takes the pro-active decision of making a false confession. To a suspect in this position it may appear that he has little option but to yield to the accusations being made against him as he is exhausted and can see no other way to stop the traumatic and fraught experience he is going through. Others may be of the opinion that if they concede to the allegations being made, then they will be free to go or may avoid the dreaded outcome of whatever their interviewers are detailing as their fate, should they not confess. When a suspect perceives that he has no choice but to comply, his resultant compliance and confession are, by definition, involuntary and the product of coercion. “Coerced internalized” confessions describe the situation when a suspect becomes convinced that they did in fact commit the offence. The suspect becomes uncertain of their own recall of the event they are accused of. Lastly, there is what is described as ‘voluntary’ confession, “occurring in the absence of elicitation”. These are confessions made by the suspect entirely spontaneously and not in response to any questioning or other type of pressure from the police. They can occur for all sorts of reasons including attention seeking or the protection of another person.

The risk of false confessions is particularly prevalent among vulnerable suspects. Vulnerable adults who are mentally ill, cognitively impaired, psychologically fragile, drug and alcohol abusers, etc, are particularly at risk due to their lack of communication, retention and diminished conceptual understanding. Lacking the capacity to fully appreciate the consequences of their actions, this makes them particularly vulnerable to making misleading, false or incriminating statements.<sup>106</sup> The same can be said of juvenile suspects.<sup>107</sup>

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<sup>105</sup> SM Kassin and LS Wrightsman, “Confession evidence, The Psychology of Evidence and Trial Procedure” (1985) CA, Sage, 67-94.

<sup>106</sup> See Lord Rodger in *Cadder* at para 70.

<sup>107</sup> LC Malloy, EP Shulman and E Cauffman, “Interrogations, confessions and guilty pleas among serious adolescent offenders” (2014) Law and Human Behavior forthcoming (online version available).



We can conclude then that the suspect faces a number of potential challenges when trying to protect himself against wrongful conviction on the basis of a false confession he has given. The pressure of the interview room and police tactics are a constant threat to the suspect whilst he tries to retain composure in order to make clear choices and decisions regarding the case against him. Should the suspect be a vulnerable adult or juvenile who lacks capacity, this threat becomes greater still. False confession, while clearly not a regular occurrence, is a very real risk, especially among this vulnerable population and once a confession has been obtained, it is a potent source of evidence as it is very difficult to persuade a jury that anyone would ever confess to a crime they genuinely did not commit.

*b) What measures existed for suspects pre-Cadder to help protect them against wrongful conviction?*

The question then arises of what protections existed for suspects prone to making false confessions prior to *Cadder*. Before the 2010 Act, a suspect had a right to request and receive legal assistance, but only at the point of arrest. Only then could they request the right to a private meeting with a lawyer before they appeared at their first court appearance.<sup>108</sup> Little protection existed in the respect of legal assistance as the lawyer could not be in situ for the duration of his client's interview before arrest. If protection against wrongful conviction on the basis of a false confession is going to be effective, this requires a solicitor to be able to intervene during police questioning as this is where any false confession is likely to be made.

However, three things are of particular note which did help to protect a suspect from wrongful conviction based on a false confession. The first is the requirement for corroboration. The requirement for corroboration has been described as an invaluable safeguard against wrongful conviction. As the court stated in *Morton v HM Advocate*:<sup>109</sup>

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<sup>108</sup> CP(Sc) A 1995, s.17(2)

<sup>109</sup> *Morton v HM Advocate* 1938 J.C 50 at 55.

“No person can be convicted of a crime or a statutory offence except where the legislature otherwise directs, unless there is evidence of at least two witnesses implicating the person accused with the commission of the crime or offence with which he is charged. This rule has provided an invaluable safeguard in the practice of our criminal courts against unjust conviction, and it is a rule from which the courts ought not to sanction any departure.”

The rule has been described as “...one of the most notable and precious features of Scots law”.<sup>110</sup> This iconic principle of Scots law has existed for centuries and acts as a safeguard against wrongful conviction by requiring the Crown to prove by means of corroborated evidence the crucial facts of a case.<sup>111</sup> As such, the pre-*Cadder* position (and indeed the position at the time of writing) is that an accused person could not be convicted on the basis of his confession alone. There would need to be some supporting evidence. There were (and still are) special rules relating to this, in that if the accused demonstrated so called “special knowledge” as part of his confession, this would provide the necessary corroboration.<sup>112</sup> This is when the accused makes a confession which contains information within it about how the crime was committed, the rational and realistic explanation for which being that only the person who committed the crime could possibly possess such information. But the fact remains that a confession alone without this element of special knowledge or some other source of evidence could not ground a conviction. While it is not foolproof – research in the US context has shown that in some instances of wrongful conviction based on a false confession, the confession *did* actually contain details of the crime that only the perpetrator should have known<sup>113</sup> – but it is still an important protection against wrongful conviction.

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<sup>110</sup> GH Gordon, ‘At the Mouths of Two Witnesses: Some Comments on Corroboration’ in R. F. Hunter (ed.), *Justice and Crime--Essays in Honour of the Rt Hon the Lord Emslie* (T & T Clark: Edinburgh 1993) 33.

<sup>111</sup> See *Smith v Lees* 1997 JC 73. There are several statutory exceptions to this, generally relating to minor offences, e.g. Dog Fouling (Scotland) Act 2003, s. 1(4). Where offences are aggravated by various forms of prejudice, there need not be corroboration of the accused's prejudice. See, e.g., Offences (Aggravation by Prejudice) (Scotland) Act 2009, s. 1(4): ‘Evidence from a single source is sufficient to prove that an offence is aggravated by prejudice relating to disability’.

<sup>112</sup> *Manuel v HM Advocate*, 1958 J.C. 41. See also *Woodland v Hamilton* 1990 S.L.T. 565; *Allan v Hamilton* 1972 S.L.T. (Notes) 2; and *MacDonald v HM Advocate* 1987 S.C.C.R. 581.

<sup>113</sup> See BL Garrett, *Convicting the Innocent: Where Criminal Prosecutions Go Wrong* (Harvard University Press 2011) at 20.

The second is that a confession extracted unfairly would be inadmissible as Scots law (discussed in section 3.2 above). This also provides some protection against wrongful conviction. The over-riding rule is that a confession will not be admissible unless it has been obtained fairly.<sup>114</sup> For example, unfair questioning techniques,<sup>115</sup> use of threat,<sup>116</sup> entrapment,<sup>117</sup> the physical and mental state of the suspect,<sup>118</sup> age of the suspect,<sup>119</sup> overheard confessions,<sup>120</sup> or lack of proper caution,<sup>121</sup> are all factors that can mean that a confession has not been obtained fairly and is therefore inadmissible.

The third is that the suspect had (and still has) an extensive RTS, as set out in section 3.4 above. It has been said that one of the potential justifications of the RTS is that it prevents wrongful conviction by protecting suspects from making false confessions.<sup>122</sup> If it is effective in this respect,<sup>123</sup> then this is another protection that was (and still is) available, although it does have to be noted in this respect that the RTS is likely to be an effective protection only when accompanied by the RLA (see the discussion in section 3.4 above).

In conclusion, then, it does seem that, prior to *Cadder*, the combined protections of corroboration, an extensive RTS and the inadmissibility of confessions obtained unfairly, ensured that there were some measures in place to prevent wrongful conviction

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<sup>114</sup> *Brown v HM Advocate* 1966 S.L.T.105, per Lord Justice General Clyde at 107.

<sup>115</sup> *Codona v HMA* 1996 S.L.T. 1100, where a confession obtained by leading or repetitive questioning may be considered unfairly extracted.

<sup>116</sup> *Black v Annan* 1995 J.C. 58, where the threat of arrest and detention rendered a confession inadmissible.

<sup>117</sup> *HMA v Campbell* 1964 J.C. 80, where a confession given in the presence of two undercover policemen was deemed inadmissible.

<sup>118</sup> *McClory v MacInnes* 1992 S.L.T. 501, where the suspect was ill during the police interview.

<sup>119</sup> *Codona* (n 123) where the suspect was 14 years of age.

<sup>120</sup> *HMA v Higgins* 2006 S.L.T. 206, where there was evidence of design.

<sup>121</sup> *Tonge v HMA* 1982 J.C. 130, where an improperly administered caution meant that the answers given were inadmissible.

<sup>122</sup> P Roberts and A Zuckerman, *Criminal Evidence*, 2nd edn (2010) at 549.

<sup>123</sup> Roberts and Zuckerman do question the extent of the protection it provides in reality.

based on false confession, to counter balance the lack of a pre-arrest RLA available at this time.

*c) Has the introduction of a RLA helped to improve the protection available to suspects in respects of the prevention of the wrongful conviction?*

When considering in what manner wrongful conviction may be prevented by the RLA, Leverick suggests three ways in which legal advisers might prevent wrongful conviction.<sup>124</sup> These are, (i) to act as an independent observer to ensure that the suspect's dialogue with his/her interviewers are accurately recorded, thus limiting the scope for the possibility of misrepresentation of admission; (ii) to discourage the use of coercive tactics whilst interviewing by the physical presence of a legal adviser; and (iii) to facilitate a suspect to effectively implement and discharge their RTS. Method (iii) has already been discussed in the context of protecting the suspect's RTS (see section 3.4 above) so will not be considered further here.

Possibility (i) is that protection might be increased by the lawyer acting as an independent observer of the interview and thus being a witness to any untoward tactics used and to what was in fact said by the suspect. This might be thought to be only a very limited increase in protection, given that interviews are generally audio-recorded, but it does mean that the solicitor can make sure that all of the interview is in fact captured on audio-recording and no tactics were used off-camera. So it can be concluded that the introduction of the RLA does provide some (albeit small) benefit over the existing protections.

Possibility (ii) is that a solicitor can step in and prevent any inappropriate or coercive questioning (or can discourage the use of such tactics simply by just being present). Given the fact that such weight is placed upon confessions at trial by a jury listening intently to evidence obtained pre-trial,<sup>125</sup> the impact of the RLA to a suspect at this stage cannot be underestimated. The fact that a solicitor can be physically present during the interview is key here. He would be on hand to prevent any attempt at manipulating,

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<sup>124</sup> Leverick, n 2 above, 372.

<sup>125</sup> Roberts and Zuckerman, *Criminal Evidence*, 2nd edn (2010) 519.

misleading or coercing the suspect into giving false or incriminating statements. Independent monitoring of police tactics and the continual supporting, advising or reminding the suspect of his rights can all be facilitated by the fact that a legal adviser is an independent observer in situ during the interview. With the increase in access now afforded to a suspect to his legal adviser by way of the CJSB,<sup>126</sup> this can only improve the protections that were available prior to *Cadder*:

When false confessions are made voluntarily, whether they are made through diminished mental capacity, pressure, mistaken understanding, or exacerbated by police tactics, it is clear that access to a lawyer does provide some protection. Brookman and Pierpoint make this point in describing the RLA as, “a fundamental safeguard against wrongful conviction”.<sup>127</sup> Of course, should an accused be absolutely determined to supply a false confession, there is little a legal adviser could do to prevent this. However, if the suspect is coerced-compliant or coerced internalised into making an admission,<sup>128</sup> then there may indeed be scope for the legal adviser to provide emotional support in order to reduce the likelihood of his client making a false confession. The lawyer also may further a suspect’s understanding and subsequent use of his RTS, as discussed earlier.

Having said that, the degree of protection that a solicitor can provide here should not be over-stated. The evidence that lawyers (at least in England and Wales) are sometimes very passive when coercive tactics are used by the police during questioning (see the discussion in section 3.2 above) should sound a note of caution here. But it can be concluded that even if this is the case, the degree of protection that suspects have here is greater than it was prior to *Cadder* when a suspect had no right to have a solicitor present when being questioned at all.

*d) Have any post-Cadder changes decreased the level of protection afforded to suspects against wrongful conviction?*

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<sup>126</sup> S. 24(3) which provides that a suspect has the right to the presence of a solicitor while being interviewed.

<sup>127</sup> F Brookman and H Pierpoint, “Access to legal advice for young suspects and remand prisoners” (2005) 42 Howard Journal of Criminal Justice 452 at 452.

<sup>128</sup> Kassin and Wrightsman (n 105).

The final question is whether any of the post-*Cadder* changes have reduced the level of protection against wrongful conviction. At the outset it should be noted that they have done so in a minor way by increasing the maximum detention period permitted to twelve hours (under the CJSB). Suspects who are held for longer might be more prone to making false confessions, especially if they see these as a means to escape the stressful conditions of detention. The most significant way in which the post-*Cadder* regime has changed things, however, is in respect of the corroboration requirement and it is to this that we now turn.

The Scottish Government accepted Lord Carloway's proposal to remove a cornerstone of Scots criminal justice procedure, that of the requirement for corroboration.<sup>129</sup> The CJSB, s.57(2), provides that: "If satisfied that a fact has been established by evidence in the proceedings, the judge or (as the case may be) the jury is entitled to find the fact proved by the evidence although the evidence is not corroborated".<sup>130</sup> Lord Carloway's Report states that corroboration has "lain at the heart of the criminal justice system since time immemorial...and has been an invaluable safeguard against the occurrence of miscarriages of justice".<sup>131</sup> If corroboration is removed without any substitute safeguards or rules of law being put in place, there is a genuine prospect of criminal trials being conducted lacking any protection against wrongful conviction beyond the "beyond reasonable doubt" standard. Senators of the College of Justice, advocates and solicitors and legal academics alike have criticised the proposal, "amid fears it could lead to miscarriages of justice".<sup>132</sup> If one also factors in that Police Scotland are vocally

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<sup>129</sup> For a classic demonstration of the law of corroboration see *Morton v HM Advocate* 1938 JC 50.

<sup>130</sup> This is subject to s. 58, which provides that s. 57 'does not affect the operation of any enactment which provides in relation to the proceedings for an offence that a fact can be proved only by corroborated evidence'. The Explanatory Notes (para. 139) give the example of s. 89(2) of the Road Traffic Regulation Act 1984, which provides that a person cannot be convicted of speeding on the uncorroborated evidence of one witness that he was breaking the speed limit.

<sup>131</sup> Report para 7.2.3.

<sup>132</sup> 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](http://www.scottish.parliament.uk/S4_JusticeCommittee/Reports/juR-14-03w.pdf)

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.

very critical of the proposals,<sup>133</sup> there is much controversy surrounding corroboration's abolition and its subsequent impact on the protection available to suspects it currently provides.

It is not within the scope of this thesis to enter the debate on whether or not the corroboration requirement should be abolished or retained. Suffice to say that there is a large and ever increasing volume of academic literature on this issue,<sup>134</sup> alongside submissions on this subject to the various consultations that have taken place and to the Justice Committee and I do not intend to add to it. What I am concerned with here is the narrower issue of whether by removing the corroboration requirement, suspects might be left with a weaker protection against wrongful conviction based on a false confession. There is little doubt that - without additional safeguards being introduced<sup>135</sup> - that they will be. Previously a confession made by a suspect could not form the sole evidence upon which a conviction could be based - it required to be corroborated by some other form of evidence. Admittedly due to the fact that "special knowledge" could be that piece of corroborative evidence rather than evidence that is truly from an independent source, the protection this provided was not as strong as it might have been. But it was still a protection of sorts.

It might be said that this does not matter because other jurisdictions manage well without a corroboration requirement. However, two points can be made here. For one thing, some jurisdictions, even though they do not have a general requirement for corroboration, do require that confession evidence is corroborated.<sup>136</sup> Second, even in those jurisdictions that do not require a confession to be corroborated, many of these

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<sup>133</sup> BBC, 'Police Body Criticises Plan To Abolish Corroboration Rule' BBC News (21 October 2012) accessed 21 January 2014.

<sup>134</sup> See e.g. FP Davidson and PR Ferguson, "The corroboration requirement in Scottish criminal trials: should it be retained for some forms of problematic evidence?" (2014) 18 *International Journal of Evidence and Proof* 1-27; P Duff, "The requirement of corroboration in Scottish criminal cases: one argument against retention" [2012] Crim LR 513; D Nicolson and J Blackie, "Corroboration in Scots law: 'archaic rule' or 'invaluable safeguard?'" (2013) 17(2) *Edin LR* 152-184; D Thomson, "A defence of corroboration in criminal law" 2012 *SLT* 7-11.

<sup>135</sup> At this stage we do not know whether any will be introduced and if they are what these might be. This will depend on the recommendations of Lord Bonomy's review (see the discussion of this in chapter 2).

<sup>136</sup> See FP Davidson and PR Ferguson, "The corroboration requirement in Scottish criminal trials: should it be retained for some forms of problematic evidence?" (2014) 18 *International Journal of Evidence and Proof* 1 at 19-20.

jurisdictions instead have a body of rules of law designed to protect against wrongful conviction and to exert control over the quality of evidence upon which a person can be convicted. For example, in England, Wales and Northern Ireland, protections include the option of a preliminary committal hearing in court to test the quality of evidence and tighter regulation of police investigation and conduct in obtaining and recording evidence.<sup>137</sup> Unanimous verdicts are required in the first instance; and wider grounds for appeal exist where the verdict is “unsafe”.<sup>138</sup> Trial judges also retain discretion to caution juries of the dangers of convicting on the basis of certain forms of uncorroborated testimony.<sup>139</sup>

Corroboration is not the be all and end all in the protection against wrongful conviction based on a false confession.<sup>140</sup> However, it remains a protection against wrongful conviction for a suspect, unless and until it is replaced by other safeguards. One must remember that if, as the CJSB intends, a suspect can now be held twice as long in detention as he could be pre-*Cadder*,<sup>141</sup> then it also follows that there is more time for a suspect to incriminate himself, especially if he chooses not to seek legal assistance.<sup>142</sup> Nor can the Scottish Government’s potential safeguard of an increased majority jury verdict effectively mitigate corroboration’s removal.<sup>143</sup> Section 70(1) sees the Bill introduce a potential safeguard against miscarriages of justice, following the abolition of corroboration, by requiring that, “a jury of 15 members may return a verdict of guilty only if at least 10 of them are in favour of that verdict”.<sup>144</sup> If enacted, the aim of this

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<sup>137</sup> See D Nicolson and J Blackie, “Corroboration in Scots law: ‘archaic rule’ or ‘invaluable safeguard’?” (2013) 17(2) Edin LR 152.

<sup>138</sup> Ibid.

<sup>139</sup> PACE ss. 76 and 78. Guidance on when warnings ought to be given was provided in *R v Makanjuola* [1995] 1 WLR 1348. For a history of the corroboration warnings in English law, and a critique, see D.J. Birch, “Corroboration: Goodbye to All That?” [1995] Crim LR 524. See also P. Mirfield, “Corroboration After the 1994 Act” [1995] Crim LR 448.

<sup>140</sup> See P Duff, “The Requirement for Corroboration in Scottish Criminal Cases: One Argument against Retention” (2012) Crim LR 513; ID Macphail, ‘Safeguards in the Scottish Criminal Justice System’ [1992] Crim LR 144.

<sup>141</sup> CJSB, s.11.

<sup>142</sup> *Skinns* (n 23).

<sup>143</sup> See Policy Memorandum for the Bill, paras 172-175.

<sup>144</sup> S.70(2)&(3), Where a jury has fewer than 15 members, it may return a verdict of guilty only if: (a) in the case of 14 members, at least 10 of them are in favour of that verdict, (b) in the case of 13 members, at least 9 of them are in favour of that verdict, (c) in the case of 12 members, at least 8 of them are in favour of that verdict.



safeguard is to, “ensure that the weakest cases, where the level of dissent amongst jurors means that the accused’s guilt cannot fairly be said to have been proven beyond a reasonable doubt, would not proceed to conviction”.<sup>145</sup> Chalmers, Leverick and Farmer note that there would be a worrying reduction against wrongful conviction if this were to proceed as proposed. They state that, “We do not believe that requiring a majority of 10 jurors from 15, in the absence of corroboration requirement, provides an adequate safeguard against wrongful conviction”.<sup>146</sup> They go on to state that the combined lack of, “...no corroboration...near-simple majority requirement...and minimal supervision of jury verdicts”,<sup>147</sup> would only serve to reduce Scotland’s protection against wrongful conviction compared to that of any similar jurisdiction.<sup>148</sup> Indeed, Chalmers states that a 2006 study published by the Council of Europe indicates that a number of member states are doubtful about conviction on the basis of a single source of evidence in particular contexts, and apply rules that proscribe it.<sup>149</sup> He continues, “Such rules provide a lesser safeguard against wrongful conviction than the Scottish corroboration rule, but they provide significantly more of a safeguard than would remain in Scotland were the Criminal Justice (Scotland) Bill to be enacted in its current form”.<sup>150</sup> It therefore remains difficult to reconcile how guilt has been established beyond reasonable doubt by a jury who is not required to state its reasons for convicting an accused. This is further exacerbated where there has been only one piece of evidence (a confession) which has not been accepted by up to five out of fifteen jurors,<sup>151</sup> post implementation of the CJSB. This is especially problematic because, as we have seen, juries have considerable difficulty in believing that anyone would ever confess to a crime they did not commit (even though the research evidence suggests otherwise).

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<sup>145</sup> J Chalmers and F Leverick, “Majority jury verdicts” (2013) 17 Edin LR 90.

<sup>146</sup> Written submission from Professor James Chalmers, Professor Lindsay Farmer and Professor Fiona Leverick, University of Glasgow School of Law to the Justice Committee, “Criminal Justice (Scotland) Bill” [http://www.scottish.parliament.uk/S4\\_JusticeCommittee/Inquiries/CJ7.\\_Prof\\_James\\_Chalmers\\_et\\_al.pdf](http://www.scottish.parliament.uk/S4_JusticeCommittee/Inquiries/CJ7._Prof_James_Chalmers_et_al.pdf) [accessed on 30 January 2014].

<sup>147</sup> *ibid* para 11.

<sup>148</sup> On this see above, Chalmers and Leverick n 159.

<sup>149</sup> See Council of Europe, Terrorism: Protection of Witnesses and Collaborators of Justice (2006) 20-21, referring to the law of Belgium, France, Germany, Italy, Luxembourg and Portugal.

<sup>150</sup> J Chalmers “Abolishing corroboration: three bad arguments” (2014) SLT 2, 7-11.

<sup>151</sup> See F Crowe, “A case for the abolition of corroboration in criminal cases?” (2011) S.L.T. 179 at 184.

To conclude, then, the CJSB leaves suspects considerably worse off in terms of protection from wrongful conviction than they were prior to *Cadder*. It does so both because of the increase in the maximum time permitted for the detention of suspects and, more significantly, because it will remove the longstanding requirement for corroboration in criminal cases. It is not known at the moment what – if any – protections against wrongful conviction will be put in place to compensate for this. This will only be known after Lord Bonython's review has reported and the Scottish Government has reflected on his recommendations. As things stand at the moment, though, the only conclusion that can be drawn is that there is, at least, considerable potential to make things much worse in this respect.

### **3.6 Summary of chapter 3**

This chapter of the thesis has identified the various protections that might be important to provide to detained suspects. In respect of each of these, it has assessed the level of protection that existed prior to *Cadder*, how this has been improved (if at all) by the introduction of the RLA in Scotland and how any other post-*Cadder* changes have impacted on the level of protection provided. It has, however, only provided a partial account because it has proceeded on the assumption that the RLA will be taken up by all suspects (or at least all suspects who would benefit from it). This is likely to be far from the case and therefore it is necessary now to add this additional factor into the discussion. As such, chapter four goes on to look at likely take up rates of the RLA and the impact that these may have on the level of protection provided in each of the four areas identified.

## **CHAPTER FOUR**

### **ASSESSMENT**

#### **4.1 Introduction**

Having identified and examined the protections legal assistance might offer to suspects, this chapter will attempt to make an overall assessment of whether or not, on balance, suspects are left better protected in the post-*Cadder* regime following the introduction of the right to legal assistance (RLA). To make this assessment I will examine the RLA's overall impact on the prevention of ill treatment; the prevention of emotional distress; the protection of the right to silence (RTS); and the prevention of wrongful conviction. Each will be examined separately and a conclusion reached. However, before I attempt to reach any conclusions a final concern must be discussed: that of suspects who, in spite of the additional protections now afforded by way of the RLA, might waive this right and therefore might not benefit from the improved protection it potentially provides. The issue of waiver and take up rates of legal assistance will now be examined.

As such, this chapter proceeds as follows. First, it examines the law on waiver as it presently stands (assuming that the CJSB comes into force). Second, it examines the available evidence on the rate of waiver of the RLA, both the limited evidence that exists in Scotland to date and the evidence that exists from England and Wales, where the RLA has been in existence for longer. Third, and finally, against the background of this information, the chapter reassesses the extent to which detained suspects are likely to be better protected as a result of the post-*Cadder* changes.

#### **4.2 The law on waiver**

The first issue to be discussed is the legal provisions on waiver. It is not an absolute requirement of any legal system in which the RLA exists that waiver of the RLA be regulated. The law could simply stay silent on this issue, as it did in the emergency legislation, in which case any suspect could waive the RLA in any circumstances

without it being any concern of the legal system in question. There is an argument for this state of affairs – the notion that it should be made a compulsory legal requirement even if the suspect is adamant that he does not need or require such legal assistance might be seen as objectionable to both one's personal freedom of choice and one's freedom of action.<sup>1</sup>

However, there are reasons why this might not be appropriate. The argument could be made that the benefits of having access to legal assistance far outweigh any imposition upon the individual or his personal autonomy when one considers the possible legal repercussions that may result from decisions made while the suspect is in custody (such as the decision on whether or not to exercise the RTS).<sup>2</sup> It could also be argued that suspects should not be permitted to waive rights that they have not been informed about, that they do not understand or where they do not fully understand the implications of doing so. Furthermore, it could be argued that for certain types of suspects the RLA is so critical during the process of custodial interrogation that they should not be permitted to waive the right at all. The obvious candidates here are young people and adults who are vulnerable, whether through mental health difficulties or some sort of disability.

If the law was going to regulate the issue of waiver of the RLA, it could do so in two possible ways. It could prescribe the circumstances in which waiver of the RLA is valid and/or it could make the RLA compulsory for certain types of vulnerable individuals by not permitting waiver at all (or by permitting it only in certain restricted circumstances). In Scotland, post-*Cadder*, the law does both of these to some degree and each will now be discussed in turn.

#### *4.2.1 The conditions of a valid waiver*

The first way in which Scots law regulates waiver is by setting out the conditions in which waiver is valid. If these conditions are not met, any confession made by a suspect

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<sup>1</sup> See F Leverick, "The right to legal assistance during detention" (2011) 15 Edin LR 352 at 379; J Chalmers and F Leverick, "Substantial and radical change: a new dawn for Scottish criminal procedure" (2012) 75 MLR 837 at 847.

<sup>2</sup> Chalmers and Leverick (n 1) at 847.

who has waived his RLA may be deemed inadmissible.<sup>3</sup> There were no provisions on waiver inserted into the CPSA by the 2010 Act, but Lord Carloway did examine this issue and recommended in his report that waiver should be regulated for all suspects. He suggested that, as a general rule, waiver of the RLA should be allowed but must be express and recorded, and the suspect must have been “fully informed of the right”.<sup>4</sup> At around the same time that Lord Carloway was writing, however, the issue of waiver was examined in detail by the UK Supreme Court in the case of *McGowan v B*,<sup>5</sup> and it is this case that is the leading authority on waiver of the RLA in Scotland.<sup>6</sup>

In *McGowan v B*, before the commencement of a police interview, B had been given the offer of legal assistance but declined. His waiver of the RLA took place without his lawyer having had the opportunity to advise him separately regarding the consequences of waiver. Due to this, B’s solicitor lodged a Devolution Minute stating that B’s right to a fair trial under Article 6(3)(c) would be breached if the Crown were to lead evidence of his police interview. The Supreme Court had to consider two questions which effectively both concerned the issue of whether it would necessarily be incompatible with articles 6(1) and 6(3)(c) of the ECHR for the Lord Advocate to lead and rely on evidence answers given during a police interview of a suspect in custody where he was informed of his RLA but, without receiving advice from a lawyer, stated that he did not wish to exercise it. The Supreme Court held unanimously that no rule existed that whilst in police custody, a suspect could only waive his RLA before and during police questioning if he had first received legal advice as to whether or not he should do so.<sup>7</sup> More importantly for our purposes, however, the Supreme Court set out the minimum

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<sup>3</sup> *Birnie v HM Advocate* [2011] UKSC 55 at para 33 per Lord Hope.

<sup>4</sup> Report, para 6.1.47.

<sup>5</sup> [2011] UKSC 54.

<sup>6</sup> The case is discussed in RM White and PR Ferguson, “Sins of the father: the sons of Cadder” [2012] Crim LR 357 at 363-364. Another case (that of *Birnie v HM Advocate* [2011] UKSC 55) was decided at roughly the same time by the Supreme Court and also touched on the issue of waiver of the RLA but it added nothing of significance to the decision in *McGowan*: see White and Ferguson at 364.

<sup>7</sup> Lord Kerr dissented on some issues of detail (notably the extent to which ECtHR jurisprudence should be relied upon and the precise steps which should be taken to ensure that waiver was valid) but not on this key point.

conditions that must be satisfied if waiver of the RLA will be held to be valid. Lord Hope clearly summarized the Supreme Court's decision. He stated that:<sup>8</sup>

“Where the accused, having been informed of his rights, states that he does not want to exercise them, his express waiver of those rights will normally be held to be effective. The minimum guarantees are that he has been told of his right, that he understands what the right is and that it is being waived and that the waiver is made freely and voluntarily.”

The decision in *McGowan* is in line with and was informed by relevant case law from the ECtHR to the effect that it will not prevent, “...a person from waiving them [Convention rights including the RLA] of his own free will”,<sup>9</sup> however, waiver must be unequivocal,<sup>10</sup> and the individual has to be aware of the consequences stemming from his decision.<sup>11</sup>

It is worth noting two further points from *McGowan*. First, the majority of the Supreme Court were of the opinion that it is not a necessary condition of a valid waiver of the RLA that the suspect is asked why he wishes to waive the right.<sup>12</sup> Nonetheless, the CJSB includes a provision in section 24(6) that where the right is waived, the reason given by the suspect for doing this must be recorded. Second, all of their Lordships were of the opinion that vulnerable suspects might require additional protection in that they may need to have the nature of the RLA and the consequences of waiving it explained to them before it could be validly waived. As Lord Hope put it:<sup>13</sup>

“... it should not be taken for granted that everyone understands the rights that are being referred to. People who are of low intelligence or are vulnerable for

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<sup>8</sup> *McGowan* at para 46 per Lord Hope.

<sup>9</sup> *Scoppola v Italy* (No.2) (2010) 51 EHRR 12 at para 135.

<sup>10</sup> *Pishchalnikov v Russia* (app no 7025/04) 24 September 2009 at para 77.

<sup>11</sup> *Talat Tunk v Turkey* (no 2343/96), 27 March 2007; *Jones v United Kingdom* (2003) 37 EHRR (CD) 269.

<sup>12</sup> See e.g. Lord Hope at paras 50-51.

<sup>13</sup> *McGowan* at para 47. See also Lord Dyson at para 70; Lord Hamilton at para 94; Lord Kerr at para 127.

other reasons or who are under the influence of drugs or alcohol may need to be given more than standard formulae if their right to a fair trial is not to be compromised.”

*McGowan* has since been followed in a number of subsequent cases, where the test has been applied and in none of them has waiver been found to be invalid.<sup>14</sup>

#### *4.2.2 Preventing waiver of the RLA by certain vulnerable groups*

The second way in which Scots law regulates waiver (or at least how it will do assuming the CJSB comes into force) is by prohibiting waiver by certain categories of suspects. As discussed in chapter two, in relation to vulnerable adult suspects Lord Carloway recommended that they should only be able to waive their RLA if an appropriate adult also agrees to this.<sup>15</sup> The Scottish Government accepted this proposal, and has included it within the provisions of the Bill.<sup>16</sup> As regards children aged 16 or 17 years, Lord Carloway proposed that they be allowed to waive their RLA but only with the agreement of a parent, carer or responsible person.<sup>17</sup> The Scottish Government followed Lord Carloway’s recommendation 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.<sup>18</sup> Lastly, Lord Carloway recommended that no child under the age of 16 years can reject the RLA.<sup>19</sup> Again, the Scottish Government followed Lord Carloway’s proposal and made it explicit within the terms of the legislation that under 16s cannot waive their RLA nor can a parent, guardian or other person to whom the child is legally entrusted waive the child’s right on his or her behalf.<sup>20</sup> As noted by Chalmers and Leverick,<sup>21</sup> this is the most radical of all of the

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<sup>14</sup> See e.g. *Birnie v HM Advocate* 2012 SLT 935; *Sabiu v Wylie* [2013] HCJAC 160.

<sup>15</sup> Report para 6.4.15.

<sup>16</sup> Section 25(3).

<sup>17</sup> Report para 6.3.32.

<sup>18</sup> Section 25(3)(5).

<sup>19</sup> Report para 6.3.31.

<sup>20</sup> Section 25(2).

<sup>21</sup> See Chalmers and Leverick, n 1 above, 848.

provisions on waiver and goes beyond the equivalent provisions in England and Wales, where an appropriate adult can request legal assistance for a child who has said that he does not want it, but the child cannot be forced to meet with a solicitor if he does not want to.<sup>22</sup>

To summarise, then, waiver of the RLA is permitted in Scotland but only if certain conditions are met: (i) express waiver requires to be clearly communicated by the suspect; (ii) the suspect must be informed of his right of waiver; (iii) the suspect clearly understands what that right is and that he is, in fact, waiving it; (iv) and that the suspect is making the decision freely and voluntarily. It is also the case that waiver is prevented outright if the suspect is a child under 16. For children ages 16 and 17 and for vulnerable adults waiver is only permitted if an appropriate person agrees with the suspect's decision.

The impact of these provisions will be discussed subsequently in this chapter. Before doing so, however, it is necessary also to examine the evidence on rates of waiver.

### **4.3 Take up rates for legal assistance**

In the previous section, it was established that waiver of the RLA is permissible (as long as the suspect is not a child), although some groups (vulnerable adults and suspects aged 16-17) require the permission of another person before they can do so. The next question to consider, then, is the extent to which suspects who do not fall into these categories are likely to waive the right.

Evidence on rates of waiver both from Scotland and from England and Wales can be examined in this respect. In the Scottish context, figures published by the Association of

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<sup>22</sup> See Police and Criminal Evidence Act 1984, Code C para 6.5A. See the discussion of this in Chalmers and Leverick (n 1) at 848-849. The importance of access to a lawyer for children is also recognised by all relevant international rules, such as the Guidelines of the Committee of Ministers of the Council of Europe on child-friendly justice, the Beijing Rules and the 2007 UN General Comment N°10 on the Children's rights in juvenile justice. None, however, suggest that the right should be made compulsory.



Chief Police Officers in Scotland (ACPOS),<sup>23</sup> show that since emergency legislation was introduced post-*Cadder* to the date of their publication of figures,<sup>24</sup> 75 per cent of Scottish suspects waived their RLA. This is a remarkably high statistic. It does have to be taken into account that, at this point, there was no legal provision preventing waiver by children and vulnerable adults, but even so this is still a very high figure.

The high figure may be due in part however to the fact that the RLA had only been in existence for a short period of time when these statistics were collected. It is worth noting in this respect that Lord Carloway in his Report assumed that the figures on waiver in Scotland would be likely to fall significantly over time and that within a few years, “waiver will cease to be the norm”.<sup>25</sup> This has been questioned by Chalmers and Leverick, who have accused him of being complacent in this respect.<sup>26</sup> It is worth therefore looking at evidence from England and Wales where the RLA has existed for a far longer period of time.

A number of academics have extensively researched this area in England and Wales and the most recent studies have concluded that take-up rates range from as high as 60 per cent in a study conducted in 1997,<sup>27</sup> to 45 per cent based on 2009 records.<sup>28</sup> It is this last study, undertaken by Pleasance et al in 2009, that is probably the most reliable, as it involved the greatest number of suspects and covered the greatest geographical range of police stations. This does suggest that as the right becomes more established in Scotland the proportion of suspects who waive the right may fall, but if England and Wales is a valid guide, then they are not going to fall by that much as it seems that a *majority* of suspects in England and Wales still decline the RLA.

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<sup>23</sup> Association of Chief Police Officers in Scotland, ACPOS Solicitor Access Data Report (2011) at 8, available at <http://www.acpos.police.uk/Documents/News%20Releases/SolicitorAccessDataReport.pdf> (last visited 2 August 2012). It is no longer possible to visit this website as ACPOS is no longer in existence in Scotland following the merger of all of Scotland’s eight territorial police forces into a single unitary authority known as “Police Scotland” on 1st April 2013. However the figures are also referred to by Lord Carloway in his Report at para 6.1.44.

<sup>24</sup> 23 June 2011.

<sup>25</sup> Report para 6.1.46.

<sup>26</sup> Chalmers and Leverick, n 1 above, 848.

<sup>27</sup> L Skinns, ‘The right to legal advice in the police station: past, present and future’ (2011) Crim. L.R. 19.

<sup>28</sup> P Pleasance, V Kemp and NJ Balmer, “The Justice Lottery Police station advice 25 years on from PACE” (2011) Crim LR 3, 5

This would not be of any particular concern, however, if all of those who declined legal assistance were genuinely in no need of it. It is necessary therefore to look at the available evidence on the reasons why suspects decline the RLA. Academics have suggested various reasons why a suspect may decline their RLA. Kemp has carried out the most extensive research in this area. She carried out an observational study in four large police stations in England and Wales and found that suspects refuse legal assistance for reasons that include fear of delaying their detention, manipulation tactics by police, prior bad experiences at the hands of previous solicitors and the simple belief that their particular case does not require legal assistance.<sup>29</sup> Her research stressed in particular the first of these and she concluded in this respect that:<sup>30</sup>

“... it was evidence from comments made that there was a perception that having a solicitor would lead to delays and thereby extend their time in custody. Not surprisingly, such concerns led to some suspects rejecting legal advice.”

In his review, Lord Carloway quoted from other recent studies carried out in England and Wales, where a variety of factors influencing a suspect’s decision to waive the RLA were also identified. These also tally with the reasons suggested by the academics above. Reasons listed in the Review include:<sup>31</sup>

“... factors connected to suspects (including ethnicity, haste, offence seriousness, self-defined guilt/innocence, prior experience of custody and of legal advisers); the police (including ploys and informal conversations); and legal advisers (including their availability, experience and competence)”.

This “let’s get it over with” mentality, was also flagged up by Skinns,<sup>32</sup> who found in her study that suspects waived the RLA “...in part, because the police tell suspects that it takes longer if they have a legal adviser”. Taking the findings of these studies together, therefore, although it must not be ruled out that some suspects will waive their RLA for

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<sup>29</sup> V Kemp, ‘No time for a solicitor: implications for delays on the take up of legal advice’ (2013) Crim. L.R. 184.

<sup>30</sup> Kemp at 198.

<sup>31</sup> Report para 6.1.45.

<sup>32</sup> Skinns, n 27 above, 23.

the simple reason that they have no need for it, this cannot be assumed.<sup>33</sup> Factors such as a fear that asking for legal advice will prolong detention are also influential.

Criminal Solicitor Advocate John Scott QC raises similar concerns.<sup>34</sup> He reports that at a seminar in Brussels,<sup>35</sup> Jodie Blackstock of 'JUSTICE' presented findings from a recent consultation with Scottish defence agents in which she found that the police were eluding to suspects that should they wish to exercise their RLA, it would most likely result in a delay in their release from detention. Scott concludes by saying that, "Blackstock stated that this demonstrated a tendency towards encouraging waiver, and this, coupled with the length and complexity of the SARF,<sup>36</sup> has fostered a 'systemic' issue of obstructed lawyer access in Scotland".<sup>37</sup> This might be dismissed as the anecdotal evidence of a single individual but it does chime with the findings of the more systematic research undertaken in England and Wales discussed above.

To summarise, then, the available evidence on the rate of waiver of the RLA suggests that a majority of suspects in England and Wales waive the right. Based on this evidence, it is likely that take up rates of the RLA in Scotland are likely to continue to be low. As discussed, this is of some concern because it is not only suspects who have no genuine need for legal assistance who waive the right. At least some suspects waive it because, for example, they simply wish to be released from custody and think that doing so will accelerate this process.

This worry is tempered to a certain extent by the fact that once the CJSB comes into force, waiver will not be permitted for children aged under 16 and vulnerable adults and suspects aged 16-17 can only waive the right with the agreement of another person, which will make some difference to the eventual figures for waiver in Scotland. It has to

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<sup>33</sup> See also A Sanders and L Bridges, 'The Right To Legal Advice' in C Walker and K Starmer (eds), *Miscarriages of Justice* (London: Blackstone, 1999).

<sup>34</sup> J Scott and N McDonald, "Cadder EU Style" [2013] *The Journal of the Law Society of Scotland*, available at <http://www.journalonline.co.uk/Magazine/58-1/1012082.aspx> [last accessed on 9 April 2014].

<sup>35</sup> "Legal aid: Improving the quality and effectiveness of legal advice", 27 November 2012.

<sup>36</sup> 'Solicitor Access Recording Form'. Should a suspect exercise his right to waive the RLA, he is asked to sign a 'SARF', which records this decision. The form records that the right of solicitor access has been explained to the suspect and he has of his own volition, made the decision to waive that right.

<sup>37</sup> Scott and McDonald (n 35)

be said that these provisions might not be entirely effective in some respects. For one thing it is extremely difficult to identify those in the adult population who are vulnerable, a point that has been made by a number of academic studies.<sup>38</sup> The signs which Lord Carloway used in his Report of mental illness, personality disorder or learning disability are, as he himself makes clear, not always obvious.<sup>39</sup> As Smith and Tilney have commented, the importance of adequate police training in the identification of vulnerable witnesses cannot be overstated.<sup>40</sup> For another thing, even if a child or vulnerable adult is not permitted to waive the RLA, providing legal assistance does not mean that the suspect will necessarily listen to it or follow it, a point Lord Carloway himself also recognises.<sup>41</sup> However, having said all of that, the child/vulnerable adult waiver provisions do mark a significant increase in protection compared to what previously existed for these groups and compared to the equivalent provisions in England and Wales.

Having summarised the law and available evidence on waiver, this chapter now revisits all the four areas of protection discussed in chapter three in order to arrive at an overall assessment of each one in terms of whether or not things have improved post-*Cadder*.

#### **4.4 Preventing ill treatment: Are suspects left better or worse off post-*Cadder*?**

It was argued in chapter three that the RLA is an important safeguard against ill-treatment of detained persons. As noted in that chapter, prior to *Cadder* suspects were protected against ill treatment in a very limited and general manner, namely by tape recording of police interviews, and the inadmissibility of any evidence obtained by way of coercion. The suspect had no more protection than the rights as they stood under sections 14 and 15 of the unamended CP(Sc)A 1995 - there was no right for anyone to be present with him while being questioned, only the right to notify one person and a solicitor that he was being held. Appropriate adults (or medical professionals for a suspect with obvious health issues) might have been able to check the general detention

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<sup>38</sup> See e.g. J Pearce, "Police interviewing: the identification of vulnerabilities" (2006) 5 Journal of Community and Applied Social Psychology 147.

<sup>39</sup> Report para 6.4.12.

<sup>40</sup> K Smith and S Tilney, "Vulnerable adult and child witnesses" (OUP, Oxford University Press 2007).

<sup>41</sup> Report para 6.3.30.

conditions in which suspects were being kept but there was no general right for an independent person to be present for a suspect in detention.

In the post-*Cadder* regime, protection from ill treatment has improved in a number of respects. First, any suspect who requests it can now have a solicitor present in the interview room. In situ and acting as an independent witness, a solicitor's presence may deter abuse arising during interrogation, should of course the suspect not waive his RLA. Protection outside of the confines of the interview room has also improved post-*Cadder* as under section 36(1) of the CJSB a suspect is entitled to a private consultation with a solicitor. This is a more general safeguard on such things as the conditions of detention and the physical condition of a suspect.

However, in one respect protection has worsened, given that the CJSB has extended the time limit for detention from six to 12 hours. This does mean that should the police wish to exert pressure on a detained suspect, they do now have a longer period in which to do so.

The right of waiver, however, does now have to be factored into this analysis. As section 4.3 showed, there is evidence to suggest that the majority of suspects are likely to waive their RLA, which means that for these suspects any additional protections potentially secured by the RLA will not transpire. Against this, it does have to be said that vulnerable adult and child suspects either cannot waive the right or can only do so in limited circumstances, so for these suspects the position has improved significantly, with the only caveat being the change to the maximum length of detention permitted. Having said all of this, as chapter three noted, there is no evidence that ill-treatment is a particular problem among detained suspects in Scotland, so in terms of assessing the level of protection provided by the RLA this is perhaps not the most important area to focus on.

#### **4.5 Prevention of emotional distress: Are suspects left better or worse off post-*Cadder*?**

Of perhaps more significance is the issue of preventing emotional distress during detention and, as chapter three argued, there exist several areas of concern regarding the mental welfare of the suspect in relation to his time spent in detention. It is worth

reiterating the findings of research undertaken by Choongh (discussed in chapter 3), who interviewed 72 non-vulnerable suspects following their detention at police stations and found that although one-quarter were unmoved by their experience, one-fifth said their experience had been “intolerable” and over half found it “distressing”.<sup>42</sup> One must bear in mind that Choongh’s study was concerned with non-vulnerable suspects. A vulnerable or child suspect is likely to feel even more amplified feelings of distress in this situation.

Prior to *Cadder*, very little existed by way of emotional support for suspects in detention, aside from the protections referred to in the previous section (appropriate adults for child suspects and adult suspects with vulnerabilities or medical professionals). In the post-*Cadder* regime, prevention of emotional distress has improved in a number of respects. As section 36 of the CJSB provides for the right of a person in police custody to have a private consultation with a solicitor at any time, the distress a suspect experiences in custody may be reduced if an independent and supportive solicitor is present. Furthermore, 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. Certainly compared to the situation prior to *Cadder* it is improvement in that there is now at least someone in whom suspects can call on for emotional support in custody. However, prevention of emotional distress has also worsened in one respect. Whilst the CJSB added the right to consult a solicitor at the detention stage, it has also increased the time limit for detention from six to twelve hours.

How then does the issue of waiver impact on these conclusions? The first thing to be said is that those who are most likely to suffer emotional distress in custody – children and vulnerable adults – either cannot waive the RLA or cannot do so unless additional safeguards are satisfied. This is a real improvement in protection. It does have to be questioned how much emotional support a solicitor will provide – as noted previously, he is not after all a trained counsellor – but compared to the situation prior to *Cadder* this has to be an improvement. A solicitor can provide a type of reassurance that an appropriate adult cannot – in terms of advising on the legal rules relating to detention and the limits of police powers. However, aside from children and adults identified as

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<sup>42</sup> S Choongh, *Policing as Social Discipline* (Clarendon, Oxford 1997).

vulnerable, concern has to be raised because as we have seen the general rate of waiver among suspects is likely to be high. In police custody, many “normal” suspects are also likely to be vulnerable, and regarding even those who do have mental health issues or disabilities, these will not necessarily be identified and thus the additional protections preventing waiver may not be applied. For these groups, emotional support will only be given to those who do not waive the right and, as we have seen, at least some suspects waive the right because they perceive that exercising it might delay their release. It is not difficult to imagine that emotionally distressed suspects might be particularly prone to doing this, which means that those who are in most need of protection from emotional distress may well be those who are least likely to receive it.

We can conclude, then, that in some respects the changes that have occurred subsequent to *Cadder* have left the suspect worse off than he was previously. Although the post-*Cadder* protection has improved as the CJSB provides for the right of a suspect in police custody to have a private consultation with a solicitor at any time, thus helping to alleviate emotional distress, it has also worsened in one major respect. The doubling of the maximum detention period seriously decreases the level of protection suspects have against experiencing emotional distress, even with the changes made to the availability of legal assistance. Adding into this the fact that the majority of suspects are likely to waive the RLA (aside from those for whom it is compulsory) and that those who are in most distress may waive it because they perceive that it will shorten their period in custody, it cannot be said that *Cadder* has improved the position overall in terms of suspects being protected against emotional distress.

#### **4.6 Protecting the right to silence: Are suspects left better or worse off post-*Cadder*?**

As chapter three explained, there are three concerns we might have about suspects in relation to the right to silence (RTS).<sup>43</sup> The first issue that we might be concerned with is that a suspect might not understand the legal provisions relating to the RTS. As we have seen in the previous chapter, research has demonstrated that many suspects are unable to fully comprehend the right to silence and its implications due to their mental

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<sup>43</sup> Leverick, n 1 above, 365-366.

illness, learning difficulties or simply the general stress of the moment. Second, given the important legal consequences for a suspect's case in deciding to either exercise the RTS or not, there is the issue that a suspect might need assistance in making the most appropriate choice in this regard, as a suspect might not understand and comprehend the impact of exercising their RTS.<sup>44</sup> Third, given the combative and pressurised nature of the interview room, those suspects who have chosen to exercise their RTS may need assistance in order to maintain their decision.<sup>45</sup>

Prior to *Cadder* very little was done in terms of addressing these three concerns. Suspects were told about their RTS, but only by the police. They would not have received any support in terms of helping them exercise it while being questioned, should they have wished to do so (aside from any appropriate adult who would be present when a child or vulnerable adult suspect was being questioned).

In the post-*Cadder* regime, the RLA has helped to improve the protection available to suspects in respects of the RTS in a number of ways. This will be of particular significance in the case of child or vulnerable suspects. First, section 36 of the CJSB provides for the right of a person in police custody to have a private consultation with a solicitor at any time. The increased availability of a solicitor is likely to be of marked assistance here in helping suspects to understand what the RTS means and its implications, given that, as chapter three established, research has shown that many suspects do not understand the Scottish caution. Second, 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. This will facilitate a suspect in enforcing his RTS, as his legal adviser will be able to explain the legal consequences of exercising or not exercising the right in the context of the nature of the charge and the evidence against them.<sup>46</sup> It is significant in this respect that section 24 specifically provides for the presence of a solicitor during the interview – something that, as chapter three discussed, is not the case in all common law jurisdictions. However, having said that, protection has worsened in one respect. The impact of a longer detention period means

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<sup>44</sup> *ibid* at 369.

<sup>45</sup> *ibid* at 370.

<sup>46</sup> *ibid* at 369.



that there is now more scope and potential for a suspect to be pressurised by means of coercive techniques to give up their RTS in the face of police questioning over longer time periods.

What difference, then, does the issue of waiver make? The first point to note is that it is especially significant that waiver is not permitted for children and vulnerable adults (or in the latter case not without additional conditions being satisfied). This is because these are precisely the sort of suspects who were identified in chapter three as being likely to have difficulties understanding the RTS. For vulnerable and child suspects, they are almost certainly left a lot better off after the post-*Cadder* changes as they will now be able to have the assistance of a legal adviser in explaining what the RTS means and the consequences of choosing to enforce it (or not). For other suspects, however, it is less obvious. The fact that the majority of them are likely to waive the RTS (and that it is not necessarily because they have no need for it) is a concern as here, clearly, the potential improvement in protection offered by a solicitor is not going to transpire in practice.

Overall, then, it is suggested here that in terms of the protection of the RTS, the introduction of a RLA has appreciably improved the protection available for suspects as it does mean that there is now a legally qualified source of advice available to suspects who request it, who can explain what the RTS means for them, who can help identify their best interests, and who can help them stick to a decision to remain silent in the course of the interview. It is just that because of the likelihood of waiver (aside from those suspects who are prevented from waiving the right), this benefit is not going to be felt by all suspects who need it.

#### **4.7 Preventing wrongful conviction: Are suspects left better or worse off post-*Cadder*?**

Chapter three established that wrongful conviction of the factually innocent is a real and concern, wrongful conviction based on false confessions being a leading cause. As chapter three established, certain protections did exist in the pre-*Cadder* regime, most

notably the corroboration requirement and the fact that any confession that had been obtained unfairly would not be admissible.

In the post-*Cadder* regime, protection against wrongful conviction has improved in one respect. With the increase in access now afforded to a suspect to his legal adviser by way of section 24 of the CJSB, a solicitor can now be physically present during the interview. In that situation a solicitor can step in and prevent any inappropriate or coercive questioning (or can discourage the use of such tactics simply by just being present). However, it has also worsened in a two respects. First, by increasing the maximum detention period permitted to twelve hours (under the CJSB), this creates the possibility that suspects who are held for longer might be more prone to making false confessions, especially if they see these as a means to escape the stressful conditions of detention. Second, and most significantly, the removal of the corroboration requirement means suspects will be left with a weaker protection against wrongful conviction based on a false confession, (see chapter 3.5(a) above), unless and until additional safeguards are introduced, to replace its once significant protection.

What difference, then, is made by adding the issue of waiver into the overall analysis? Again it is highly significant that the RLA cannot be waived by those who may need it most in this respect – the young and vulnerable. There is a mandatory legally qualified source of advice available to suspects under 16, along with a safeguard in place to prevent the vulnerable adult waiving his RLA without authorization. This is a very important protection. Research into the causes of wrongful conviction undertaken in the US context has found that young suspects and adults with mental disabilities account for the vast majority of people who are wrongfully convicted on the basis of a false confession they have made.<sup>47</sup> Psychologists have also warned of the prevalence of false confessions among juvenile suspects and those with “cognitive impairments or psychological disorders”.<sup>48</sup> The fact that it is precisely these suspects who are most likely to receive the protection of the RLA (as they either cannot waive it or can only do so if another person agrees) is a real increase in protection against wrongful conviction

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<sup>47</sup> See BL Garrett, *Convicting the Innocent: Where Criminal Prosecutions Go Wrong* (2011) at 38.

<sup>48</sup> SM Kassin, SA Drizen, T Grisso, GH Gudjonsson, RA Leo and AD Redlich, “Police-induced confessions: risk factors and recommendations” (2010) 34 *Law and Human Behavior* 3 at 30.

based on false confessions. However this does have to be offset against two factors. The first is that the presence of a lawyer during questioning is not going to prevent all false confessions, as chapter three discussed. Second, even if the RLA does provide some limited protection in this respect, this increase in protection has to be offset against the removal of the requirement for corroboration.

Outwith these two categories of suspect, the picture is even less clear. Working on the assumption that the majority of non-vulnerable suspects will waive their RLA, there will be a large category of suspects who do not receive even this limited protection and they too will be left without the additional protection of the corroboration requirement acting as a safeguard against wrongful conviction. It may be that this is of little concern because those suspects who waive the RLA would not have made a false confession anyway. However this cannot be concluded with any confidence. It has been demonstrated that at least some suspects waive the RLA because they wish to escape detention and they perceive that asking for a lawyer will lengthen their detention period. As chapter three discussed, psychological research has demonstrated that one of the reasons why suspects do sometimes falsely confess is because they believe that confessing will lead to release (what Kassin et al term a coerced-compliant confession).<sup>49</sup> There does seem to be some cross-over between these groups – those who wish to escape detention are both prone to making false confessions and are also likely to waive the RLA.

In conclusion, then, I would argue that the CJSB leaves suspects considerably worse off in terms of protection from wrongful conviction than they were prior to *Cadder*. It does so both because of its increase in the maximum time permitted for the detention of suspects and, more significantly, because it will remove the longstanding requirement for corroboration in criminal cases, without (as things stand under the CJSB) proper protections replacing it. The requirement for corroboration was not a perfect protection against wrongful conviction based on a false confession. As chapter three noted, confessions could be “self-corroborating” and thus a genuinely independent source of

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<sup>49</sup> SM Kassin and LS Wrightsman, “Confession evidence, The Psychology of Evidence and Trial Procedure” (1985) CA, Sage, 67-94.

evidence was not required. However it was still a protection of sorts – and a not inconsiderable one.

It may be that Lord Bonomy's Review changes this position (by, for example, recommending a supporting evidence requirement where a criminal case is based on a confession alone) but we cannot assume at present that this will be the case. We can conclude then that, as a result of the reforms, suspects are almost certainly less protected than they were prior to *Cadder* now that the corroboration requirement has gone. Although suspects do now have a RLA, which is of some help in preventing wrongful conviction based on false confession, this is only ever going to prevent a small subset of false confessions, certainly not all of them. Furthermore, the RLA does little to stop juries or judges convicting at trial on the basis of a (false) confession alone and no other evidence. Given that research has shown that not all suspects will take up their RLA, and that at least some who decline it would most likely have benefitted from it, this creates the alarming scenario of a suspect severely weakened and stripped of protections that were once considered central in Scots criminal law.

## **CHAPTER FIVE**

### **CONCLUSION**

This thesis aimed 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. It did so against the background of the changes that have been already made by way of the 2010 Act and also the proposed legislation stemming from Lord Carloway's Review, that of the CJSB, which is currently going through the Scottish Parliament. The overall conclusion reached is that in Scotland's post-*Cadder* world, suspects are now left overall less well protected in key areas than they would have been before *Cadder*.

There is no doubt that some improvements have been made following the introduction of the RLA in each of the areas this thesis examined. In respect of preventing the ill-treatment of suspects, the introduction of section 24 of the CJSB means that any suspect who requests it can now have a solicitor present in the interview room. Similarly, the suspect is now better protected outside of the confines of the interview room as under section 36(1) of the CJSB a he is entitled to a private consultation with a solicitor. This does mean that a solicitor can check on detention conditions and can act as a deterrent to any ill-treatment that might have occurred during questioning, although this protection is only going to arise if the suspect's solicitor uses his presence which the right has now afforded to be pro-active during the interview.

In respect of preventing emotional distress there have also been some improvements. The RLA may help to relieve a suspect's negative and stressful experiences whilst in custody, given that a non-partisan and objective solicitor can now be present if requested. Furthermore, whilst not purporting to be a trained counsellor, the suspect might obtain strengthened emotional assurance and solace from the fact that a qualified lawyer who can offer meaningful advice, is physically present during this extremely stressful time. This would be especially relevant for those who are experiencing

detention for the first time; may have child care or other dependent concerns; or are vulnerable by way of mental capacity or age. However, even with the best of intentions, there will be a period of time when the suspect's solicitor is not present until he physically arrives, and the suspect is therefore left vulnerable whilst on his own in detention. Furthermore, there is no guarantee in the Bill that assistance will be provided in person. The Bill only creates a right to a private consultation and does not guarantee that this will take place face to face, or at least not until the point at which the suspect is actually interviewed.<sup>1</sup>

In terms of protecting the right to silence (RTS), there have also been some improvements. The right to have a private consultation with a solicitor at any time will facilitate suspects in understanding what the RTS means and in identifying their most appropriate choice in respect of exercising it. Furthermore, the presence of a solicitor during questioning will aid a suspect in enforcing his RTS, although as discussed above, this will also require the solicitor to take an active role in proceedings.

Finally, protection against wrongful conviction has improved in one respect, as a solicitor can now be physically present during his client's interview by way of section 24 of the CJSB. As such, he can be on guard to thwart any incongruous or coercive questioning that might lead to a false confession, although the extent of protection should not be over-stated. As chapter 3 discussed, a solicitor is not going to prevent all types of false confession and for any real increase in protection to occur this requires that the solicitor is not passive whilst present.

These improvements are, however, potentially undermined in three major respects. The first of these is the increase in maximum detention time that will be permitted under the CJSB, which will now be twelve hours. This is not as bad as it could have been. The present situation is that detention can last for a maximum of 24 hours, whereas the CJSB does at least bring this back down to twelve hours. However, this is twice as long as the original length of detention permitted and means that the potential for ill treatment and emotional distress is that much greater. It might be said that this is of no concern as there is no evidence that a large number of suspects actually will be detained for twelve hours. ACPOS figures show that in the period from the introduction of the

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<sup>1</sup> See the discussion and sources in section 2.2 above.

emergency legislation to the time of Lord Carloway's Report in November 2011, only 15.7 per cent of cases of detention exceeded the six hours that was originally permitted prior to *Cadder*.<sup>2</sup> This would only equate to 350 suspects per annum who would be held beyond the twelve hour maximum proposed detention time contained within the CJSB. Whilst this translates to only less than half of one percent of all detentions, it is still a significant number of suspects. There is also the danger that this become the norm over time, in which case it would mean that things would get even worse for suspects.

The second issue that limits the improvements in protection is that of waiver. As discussed in chapter 4, as many as 75 per cent of Scottish suspects waive their RLA.<sup>3</sup> If this pattern continues, many suspects will not get the benefit of the improved protection. This is mitigated to an extent by the radical proposals to prevent waiver for children and prevent vulnerable adults from waiving unless other conditions are satisfied. It is also unlikely that the figure will remain quite this high. Evidence from England and Wales suggests that it will reduce over time, as chapter four discussed. But it still leaves a large body of suspects not benefitting as much as was promised in any of the four areas of protection discussed. This is a problem because as the previous chapter demonstrated, suspects waive their RLA for reasons other than the fact they do not need it, for example because they want to shorten detention time.

The final issue that compromises the increase in protection is the removal of the requirement for corroboration. Of all the areas where in which suspects need to be protected, this is the most important as preventing wrongful conviction is going to have the biggest impact on the life of a suspect. This protection will be seriously weakened if the corroboration requirement is removed. Beforehand, a confession made by a suspect could not constitute the sole evidence upon which a conviction could be based - it required to be corroborated in some way. The concern is that with wrongful conviction based on false confessions, the protection that the corroboration requirement provided is not adequately compensated for. The RLA only provides minimal protection in this regard as there is a limit to what a solicitor can do to prevent false confessions. It does not in any way compensate for the removal of the corroboration requirement. As discussed in chapter three, the corroboration requirement did not provide perfect

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<sup>2</sup> See the discussion in section 3.3(d) above.

<sup>3</sup> See the discussion in chapter four.

protection against a wrongful conviction based on a false confession, as a confession could be corroborated by special knowledge. However the protection it did provide was far more than would be provided by the presence of a solicitor during detention.

In conclusion, then, given the combination of increased detention time, high rates of waiver by suspects of their RLA and minimal safeguards currently proposed to counter balance the removal of corroboration, it is extremely difficult to confidently assert that in the post-*Cadder* world, a suspect is now left better protected than before. The 12 hour detention period is clearly here to stay and is probably necessary given the introduction of the RLA. There is probably not very much that can be done about waiver rates either, without seriously encroaching on the personal autonomy of the suspect. The CJSB does at least remove the worst difficulties in this regard by preventing waiver by the most vulnerable groups – those who are most in need of all the protections outlined in this thesis. However, the one hope expressed here is that Lord Bonython's review will address the third issue, that of protection against wrongful conviction based on a false confession by, for example, retaining a supporting evidence requirement where a confession is the only evidence against a suspect. This would at least ensure that the most serious weakening of protection that stemmed from the *Cadder* decision and Lord Carloway's review would be addressed.



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