Carloway Review

RESPONDENT INFORMATION FORM

Please Note this form **must** be returned with your response to ensure that we handle your response appropriately.

1. Name/Organisation

Organisation Name

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Title **Mr** ☐ **Ms** ☐ **Mrs** ☐ **Miss** ☐ **Dr** ☑ ***Please tick as appropriate***

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3. Permissions - We are responding as…

Individual ☑ / **Group/Organisation** ☐ ***Please tick as appropriate***

(a) Do you agree to your response being made available to the public through the Carloway Review web site?

Please tick as appropriate ☑ **Yes** ☐ **No***

(b) Where confidentiality is not requested, we will make your responses available to the public on the following basis

Please tick ONE of the following boxes

Yes, make my response, name and address all available ☑

or

Yes, make my response available, but not my name and address ☐

or

Yes, make my response and name available, but not my address ☐

(c) The name and address of your organisation ***will be*** made available to the public through the Carloway Review web site).

Are you content for your ***response*** to be made available?

Please tick as appropriate ☐ **Yes** ☐ **No**

(d) The independent Carloway Review is preparing a report for the consideration of the Cabinet Secretary for Justice, which may lead to proposals from the Scottish Government for legislation. If you have agreed that your response may be made public, the Scottish Government may wish to contact you in the future, but they require your permission to do so. Are you content for the Scottish Government to contact you in relation to this consultation exercise?

Please tick as appropriate ☑ **Yes** ☐ **No**

Annex A

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Annex B

RESPONSE FORM – ALL QUESTIONS AND TEXT BOXES FOR RESPONSES

Before addressing the specific questions raised, we wanted to raise a general issue concerning the background assumptions and methodology of the Consultation Document. The Consultation Document sets out a very clear account of the issues arising from the decision in *Cadder*. One fundamental concern is the absence of evidence from the discussion in the document. The whole public debate post-*Cadder* has been framed in terms of the potentially catastrophic consequences of the decision on the operation of criminal justice in Scotland, however it is not clear how real this concern is, or the extent to which it is based only on anecdotal evidence. Given that it is in part the role of the consultation to bring clarity and perspective to this debate, it would have been useful to have statistical evidence where this is readily available. (We appreciate that timescales do not necessarily allow for the commissioning of research at this stage.) The kind of basic information that it would be useful to have included in the Consultation Document relate to such things as: (i) the number of suspects detained under the 1995 Act in, say, the 10 years preceding *Cadder*; (ii) the number of those detained who were subsequently arrested and charged; (iii) the number of arrests on warrant; (iv) how many of those arrested exercised their right to legal advice; (v) the number of arrests under statutory powers where there was reasonable suspicion that an offence had been committed; and (vi) how many of the arrests under either (iv) or (v) led to a charge. The collation and presentation of this kind of information would allow a measured assessment of the impact of *Cadder* and scale of the problem potentially created. It might also inform responses to other questions. For instance, if the power to arrest on reasonable suspicion is already widely exercised in Scotland, this might inform a response to whether this is the appropriate way forward for the law post-*Cadder*.

This leads to a second point. The Consultation Document explicitly has in its terms of reference the need to refer to the law and practice of other jurisdictions. While there is some discussion of the law in other jurisdictions, notably England and Wales, there is little or no explicit reference to practice or to academic commentary on that practice. In the case of England and Wales, in particular, there has been a substantial amount of research carried out into the operation of the Police and Criminal Evidence Act 1984. To the extent that the option of arrest on reasonable suspicion is being actively considered, it would be useful (notwithstanding important differences between the two systems) to consider how the system has operated in England and to reflect on critical commentary on the Act more generally. There is also extensive discussion in the academic literature of other issues central to the Consultation, such as corroboration, adverse inferences from silence, and the right to legal advice and assistance. We have referred where appropriate in our responses to such literature, and have also included a short bibliography at the end, but it is our strongly held view that this research can contribute to a better informed discussion of the issues.

Finally, we wish to raise a more general and abstract point, which is to caution against the sense that if protection is given to a suspect at one point there is a need to 'rebalance' the system by removing or restricting protections elsewhere. As the Consultation Document properly recognises, the traditional Scottish approach is one of fairness, balancing the rights or interests of the accused against those of the community. We have no disagreement with this approach, and nor do we regard the decision in *Cadder* as being necessarily inconsistent with this tradition. However, if 'fairness' is to remain as the measure by which the system as a whole as well as individual parts of it are assessed then there needs to be a full and detailed consideration of its meaning in relation to the aims of particular rules as well as the integrity of the system as a whole. Thus, for example, the right to silence does not necessarily become any less fair simply because there are changes in the right to legal assistance. This type of

issue can only be determined with respect to a full consideration of exactly what is being protected by the right or privilege under consideration. Equally, there are dangers in regarding the distinction between the rights of the accused or suspect and the interests of the community as in opposition, where one must always be balanced against the other. The rights of the accused are part of the interests of the community, for how an accused is treated (and the fact that any individual might potentially find themselves in the position of an accused) reflects a deeper community interest in the justice and integrity of the criminal law. While this might seem rather abstract, we have attempted to flesh the point out in response to particular questions.

1.0 – Key elements of Custody

1.1 The suspect

1. Should the terms of Article 5 be incorporated into Scots Law to provide the sole grounds for taking a person into custody?

2. Should the law recognise the suspect as having a distinct legal status with statutorily defined rights?

We are unsure what advantage would be gained by the suggestion in Q1. Surely the grounds for taking people into custody must already comply with Article 5?

In response to Q2, it is difficult to see what this would achieve if the category of 'detention' is abolished (which we would support). A suspect would gain a distinct legal status and accompanying rights by virtue of being arrested on reasonable suspicion. A separate legal category of being 'a suspect' but not being under arrest would be very difficult to define in statute. Those who are not under arrest are not entirely without rights as they could not, for example, be detained for questioning against their will as there would be no legal basis for this (on this, see also our response in section 1.4).

1.2 Rights relating to custody and questioning

3. When should a suspect's right to legal assistance arise?

4. Should there be a statutory provision on the waiver of rights?

The question of when a right to legal assistance (RLA) arises cannot be sensibly considered without also considering the purpose(s) of the RLA as the two are inter-dependent. If, for example, the RLA is seen as important in order to provide a check on ill-treatment of suspects, then the RLA should be available at the earliest opportunity and certainly at the outset of detention. If, however, the RLA is seen as important in assisting suspects in understanding/enforcing their right to silence (RTS), then legal assistance need only be available at some point prior to (and possibly during) questioning. Further discussion of this issue and the implications of the various rationales of the RLA for the timing and scope of the right can be found in Leverick (2011).

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Our view is that the RLA has various important functions, including ensuring that suspects understand the RTS; assisting them in making an informed choice about its exercise; supporting them in enforcing that choice during questioning; and providing some protection against the risk of wrongful conviction (in limited circumstances). For this reason, we would favour a RLA that commenced prior to questioning and extended to the presence of the legal adviser during the interview (at least for relatively serious offences).

There should be provisions of some sort on waiver of rights, but these need not necessarily be within the legislation. There may be some advantage in drawing up a detailed Code of Practice to accompany the legislation as has been done in England and Wales (see Police and Criminal Evidence Act 1984 Code C (Code of Practice for the Detention, Treatment and Questioning of Persons by Police Officers)). The waiver provisions should specify that waiver must be made in writing by the suspect and there should also be special provisions on waiver for children (see section 1.5 below).

1.3 Putting rights into effect

5. What forms of legal advice are sufficient?

6. In what circumstances, if any, should a suspect be entitled to a solicitor of choice?

7. What obligations, if any, should there be on the police in relation to the disclosure of information prior to questioning?

In answer to Q5, it is once again necessary to consider this in light of the underlying purpose of the RLA. If it is merely to provide a check against ill treatment or coercive questioning, then there is no need for a legally qualified adviser. If, however, its purpose is to assist the suspect in making an informed choice about whether or not to exercise his RTS, then the adviser probably needs to be a trained one (although not necessarily a formally qualified solicitor).

Our own view is that the system in operation in England and Wales (E&W) is a reasonable one. Here, initial assistance can be provided by paralegals, who can refer the case on to a legally qualified solicitor if it is a particularly complex one. There were some initial concerns in E&W about the quality of advice provided by paralegals but an accreditation scheme whereby all those providing advice to suspects must undergo a Law Society training programme has been widely perceived as successful in improving performance (see Bridges et al, 2000; Bridges and Choongh, 1998; Bridges and Hodgson, 1995).

We are of the opinion, though, that physical presence of the adviser is preferable to an advice service that operates by telephone. There are some purposes for which it is impossible to satisfactorily provide legal assistance over the telephone – for example checking the conditions of detention and assisting suspects during questioning – and an adviser who is present in person will be able to see the physical or mental condition of the suspect and advise accordingly. But as an overall point of principle, the quality of legal assistance provided in person is always going to be better than that provided by telephone, especially if the suspect lacks verbal articulation skills. However, we do recognise that this might sometimes be impractical, due to geographical limitations.

In answer to Q6, a suspect who is paying for his or her own legal assistance should be entitled to a solicitor of his/her own choice in so far as this is reasonably practical to put into effect. The provisions of PACE Code C (para 6B) in this respect seem reasonable to us.

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These allow a suspect to nominate up to three preferred solicitors to be contacted in order of preference. If none of these three choices are available it is then within the discretion of the custody officer to allow further choices to be nominated.

For a suspect who is relying upon Legal Aid, we do not see it as essential that he or she has the right to a solicitor of his/her own choosing.

We have no firm view on Q7, except to say that in our view it is essential that an obligation of disclosure be placed on police if adverse inferences provisions are introduced in Scotland (although we would not support the introduction of adverse inference provisions – see section 3.3) .

1.4 Police questioning

8. Are the parameters of legitimate police questioning clear?

9. When must questioning stop?

In answer to Q8, the parameters of legitimate police questioning appear reasonably clear to us at present. However, some thought will need to be given to this issue if the separate category of detention is abolished and replaced with a single category of arrest upon reasonable suspicion. While suspects who have been arrested will be protected by existing case law and by the RLA, what is and is not acceptable police behaviour in relation to those who have not been arrested will need to be made clear. In E&W, many of the provisions of PACE Code C apply to all those assisting a police investigation, even those doing so voluntarily (see Note of Guidance 1A), so some assistance may be derived from this source. See in particular paras 3.21-3.22, which deal specifically with those voluntarily assisting the police.

In answer to Q9, there seems no obvious reason why questioning must automatically stop once a suspect has been charged, as long as the accused is sufficiently protected by a RLA and an unqualified RTS.

1.5 Child and vulnerable suspects

10. What age should define the child suspect? Should any distinction be drawn between older children and younger children?

11. Are current safeguards sufficient to protect the Convention rights of the child suspect? If not, what other provision should be made for the protection of child suspects?

12. How should the question of waiver be approached in respect of children?

13. How should the vulnerable adult suspect be defined?

14. What rights of the vulnerable adult suspect, beyond those in the European Convention, require to be safeguarded and how should those rights be defined?

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We have no firm view on Q10 and will leave it to those better qualified to offer advice. The view expressed in the consultation document that a child should be defined as someone aged below 18 is certainly persuasive.

In our view consideration should be given to making legal assistance mandatory for children or, at the very least, adopting provisions similar to those in England and Wales, whereby an appropriate adult can request legal assistance for a child who has declined it, if it would be in the child's best interests (PACE Code C para 6.5A). Research has shown that children have particular problems in understanding the caution (see e.g. Weisselberg, 2008) and are particularly prone to providing information which may be unreliable, misleading or self-incriminatory, something that has been explicitly recognised in England and Wales (see PACE Code C note 11B and also Kassin et al (2010) at 19-20).

In relation to Q13, we do not have sufficient expertise to assist in defining vulnerable adults, although we do note that the issue is a very difficult one as research has shown that it is not always obvious when an adult suspect is vulnerable (Pearse, 2006).

We have no firm view on Q14 either, except to say that some assistance might be gained by studying the provisions of PACE Code C on vulnerable adults (paras 3.12-3.20). It should be noted that 'vulnerable adults' cannot be grouped into a single category as the needs of individuals will differ (for example, a suspect with a visual impairment will not have the same needs as a suspect with a mental disorder). Again, PACE Code C may be of some assistance here.

2.0 – Key stages of Custody

2.1 Arrest and detention

15. Should the concepts of detention and arrest continue or should a system of arrest on reasonable suspicion replace them?

16. Does the police charge serve any useful practical function?

17. Instead of charging a suspect should the police simply notify the suspect that the case is to be referred to the Procurator Fiscal to consider whether charges should be brought and, if so, what form those charges should take?

Given that the RLA is now available upon detention, there seems to be no convincing reason to maintain detention as a procedure distinct from that of arrest. A system of arrest on reasonable suspicion would suffice.

We have no firm view on Q16 or Q17 and defer to those with greater expertise.

2.2 Length of custody

18. What should the time limits for custody be and under what circumstances should they be extended?

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19. Should the police have the power to liberate a suspect from custody temporarily subject to certain conditions?

20. Should a Saturday Custody Court be reintroduced?

In our view, the current limit of 12 hours, with possible extension to 24 hours is appropriate. In E&W, suspects can be detained under arrest for 24 hours (PACE 1984, s.41) with possible extension to 36 hours under certain circumstances (s.42). We would not support adoption of these provisions without first seeing evidence that a 12/24 hour period is seriously detrimental to the police's ability to perform their duties. 24 hours is a long time for which to subject an individual to compulsory detention and, given the right to liberty and security contained in Article 5, any restrictions on liberty prior to charge must be convincingly justified.

As to the circumstances in which extensions can be granted, the formulation in s.42(1) of PACE is, in our view, a reasonable one. These are also the conditions that were inserted into the Criminal Procedure (Scotland) Act 1995 by the Criminal Procedure (Legal Assistance, Detention and Appeals) (Scotland) Act 2010 and so, in our view, the law in this area need not be changed.

One other issue that should be considered is introducing (either in the legislation or – ideally – in a Code of Practice) provisions on mandatory rest/refreshment periods for suspects who are detailed beyond a certain length of time. The PACE Code of Practice may be of assistance here (see paras 12.2 and 12.8).

We have no firm view on Q19 or Q20.

3.0 – Evidence

3.1 Sufficiency of evidence

21. Should the requirement for corroboration be abolished?

22. What should the test for sufficiency of evidence be?

We would caution against making any changes to the law on corroboration on the basis of this review alone. To abolish such a longstanding and fundamental principle of Scottish criminal law on the basis of a review, the main focus of which is on only one aspect of the criminal justice system, would be foolhardy. The various component parts of the criminal justice system of any jurisdiction are interdependent. Any review of the corroboration requirement needs to look not just at the police questioning stage but also at other features of the system which may either guard against wrongful conviction (such as the rules on disclosure) or may increase the risk of wrongful conviction (such as the majority jury verdict). It also needs to examine (a) the underlying purpose of the corroboration requirement and undertake a detailed survey of other jurisdictions in which there is no such requirement (whilst also taking care not to simply transplant features of an alien criminal justice system into Scots law); and (b) the extent to which there is evidence that the corroboration requirement is either providing an obstacle to obtaining convictions and providing effective protection to accused persons against wrongful conviction. Some assistance in this task may be afforded by examining the body of academic literature on the corroboration requirement (e.g. Chalmers, 2004; Redmayne, 2006), and especially that surrounding the Royal Commission on Criminal Justice in England and Wales' Report (Royal Commission, 1993), where a corroboration requirement was mooted in relation to

confessions, but rejected by the majority (for academic criticism see e.g. McConville, 1993; Bridges, 1994; Dennis, 1993; Jackson, 1993).

Having said that, it cannot be denied that the law relating to corroboration would benefit from review. In some areas, such as confessions, the corroboration requirement has already been watered down considerably and in others there is doubt as to its application (whether or not *mens rea* requires corroboration, for example – on this, see Chalmers, 2004). Our own view is that it may be appropriate to relax the corroboration rules in some areas (*mens rea* could be one such example; sexual offences could be another – on the latter, see Redmayne, 2006) but we would stress again that this should be done only after a review of the law as a whole.

As to what the test of sufficiency of evidence should be absent a corroboration requirement, we feel that this question is best left until an informed decision has been taken in respect of the corroboration requirement itself.

3.2 Admissibility of statements

23. If exclusionary rules exist, should they be set out in statute?

24. Should the Common Law fairness test for the admissibility of statements be clarified in statute?

25. What standard of proof should be applied in determining whether a statement was fairly obtained?

26. Should all statements made by accused persons be admissible as proof of fact?

We have no firm view on whether exclusionary rules should be set out in statute. We do support the general 'fairness' test in relation to the admissibility of statements but this seems reasonably well defined in case law at the moment.

In relation to Q25, we see the more important issue here as being the *burden* of proof that a statement was fairly obtained, which we feel should continue to rest with the Crown. Absent any evidence that the system is not presently operating fairly to accused persons, we see no reason for changing the standard to that of beyond reasonable doubt.

We have no firm view on Q26.

3.3 Inferences from silence

27. Should the court be allowed to draw an adverse inference from a suspect's silence when questioned by the police?

28. What practical difference would such a provision make, especially where silence is maintained upon the advice of a solicitor?

We would not support the introduction of 'adverse inferences' provisions into Scots law. If adverse inferences are permissible, fairness requires that a suspect should be given a RLA,

but this logic does not apply the other way round. It is certainly not the case that if a RLA is provided, adverse inference provisions (AIPs) must necessarily be introduced in an attempt to 'rebalance' the system.

Introducing AIPs would involve placing a qualification on the suspect's RTS. While this is clearly permissible under Article 6 (see *Condron v United Kingdom* (2001) 31 EHRR 1), there are certain principled reasons for recognising an absolute RTS. Roberts and Zuckerman (2010, p.549) divide these into three categories: intrinsic rationales (such as the protection of privacy and the prevention of cruel choices); conceptualist rationales (such as adversary procedure and the presumption of innocence); and instrumental rationales (essentially the prevention of wrongful conviction). Taken together, these in themselves serve as reason not to qualify the RTS. However, in addition to these conceptual arguments, we feel that there are a number of further compelling reasons not to introduce AIPs in Scotland. In framing these arguments, we have drawn much assistance from the experience of AIPs in England and Wales (E&W) under s.34 of the Criminal Justice and Public Order Act 1994.

In our view, then, the main arguments against AIPs are as follows:

The first is that AIPs would leave the law extraordinarily complex. In order to comply with Article 6 (and specifically *Condron*), the qualifications that must be placed on their operation are numerous and the resulting direction that must be given to juries is immensely complex (see the Judicial Studies Board Specimen Direction No 40 addressing "Defendant's Failure to Mention Facts when Questioned or Charged – Section 34, CJPOA"). This is likely to lead to juror confusion and there is a real danger that the complex qualifications introduced to protect accused persons from unfairness are simply ignored.

Related to this, the legal position is also going to be difficult for suspects to understand and for them to identify their best interests accordingly. It might be thought that this can be effectively countered by providing a RLA. But research has shown in England and Wales that around 55 per cent of suspects decline legal assistance (Pleasance et al 2010, p.10) and that the reason for this is not necessarily that they do not want it (it is often because they fear it will prolong detention). Thus in a significant number of cases adverse inferences may be drawn from those who have not had the benefit of legal advice. Given the complexity of the legal position and the fact that the European Court of Human Rights (ECtHR) has stressed the importance of the RLA if suspects are to make an informed choice about whether or not to stay silent at police questioning stage (see *Salduz v Turkey* 2009 49 EHRR 19) this is a matter for serious concern and has led some commentators to doubt whether the English provisions would survive the ECtHR's scrutiny (see e.g. Jennings et al, 2000).

Second, research carried out in E&W following the introduction of AIPs found that there had been no practical effect on the conviction rate (see Bucke et al, 2000; Leng, 1993). Burke et al's research did establish that the proportion of suspects refusing to answer questions put to them fell (from ten to six per cent). However, the view of the police officers involved with the research was that this had not necessarily led to more confessions but to an increase in lies from suspects. If this is true, then a level of complexity and risk to suspects is being introduced into the law by AIPs for little practical benefit.

Third, it has been argued that AIPs may place unacceptable pressure on vulnerable suspects to make false confessions. This may happen anyway (see the sources noted in Leverick, 2011) but giving police the lever of the adverse inferences provisions means that an additional pressure exists. A RLA may act to counter this, but only in those cases where legal assistance is actually received and research has shown that vulnerable adults are amongst those most likely to waive the RLA (Pleasance et al, 2010).

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Finally, the interplay between the provisions on adverse inferences and those on disclosure must not be neglected. It is, in our view, entirely unreasonable to compel suspects to answer questions without knowledge of the case against them. It is a basic moral principle that one should not be expected to respond to allegations in the absence of at least some knowledge about their basis – after all, we do not expect an accused to defend himself at trial until he has heard details of the case against him (see Greenawalt, 1981). Thus in our view, if they are to be permitted at all, adverse inferences should only be permitted where there has been disclosure of the police evidence against the suspect.

Space precludes further discussion of these important points but it should be noted that the vast majority of academic commentators in E&W have argued for the repeal of the AIPs there (see, for example, Birch, 1999; Jackson, 2001; Dennis, 2010) and Professor Mike Redmayne (2008) has specifically warned against importing s.34 into other jurisdictions as a model for reform. If the Review team wishes to read further, there are excellent discussions in the major English texts on criminal procedure and evidence, all of which refer to the latest academic research on this issue: Ashworth and Redmayne (2010, pp. 110-107); Sanders et al (2010, pp. 260-272); and Roberts and Zuckerman (2010, pp. 570-580).

We would also caution against adopting the English position on adverse inferences where a suspect remains silent on his solicitor's advice. In E&W, adverse inferences can permissibly be drawn where a suspect failed to answer questions because he was advised not to do so by his solicitor, but only where it was unreasonable for the suspect to have followed this advice (*R v Beckles* [2005] 1 Cr App R 23 at paras 43-46). This puts the suspect in the extraordinary and unfair position of having to evaluate the reasonableness or otherwise of advice provided to him by a legal professional – as Roberts and Zuckerman (2010) put it, the law is "expecting suspects to be better lawyers than their lawyers" (p.577). We would not wish Scots law to follow English law for that reason and also because there is concern in E&W that the position is incompatible with Article 6 (see e.g. Cooper, 2006). However, the only other sensible option is to disallow adverse inferences to be drawn where the suspect remained silent on his or her solicitor's advice and this has obvious potential for abuse. Our view would be that AIPs are avoided altogether, in which case these difficult issues do not arise.

4.0 – Appeals

4.1 Appeals

29. Should there be a time limit for the lodging of a Notice of Intention to Appeal and/or a Note of Appeal beyond which no application for leave to appeal can be considered? If so what should that time limit be?

30. Should the test for allowing a late appeal and for allowing amendments to the grounds be provided for in statute? If so, what should that test be?

31. Should there be statutory provision entitling the court to dismiss an appeal, or to apply lesser sanctions, where the appellant has not conducted the appeal in accordance with the rules or the orders of the court?

32. Is there any purpose in retaining Petitions to the *nobile officium* and Bills of Advocation and Suspension as a mode of appeal or review be abolished?

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We have no firm view in relation to Q29-Q32.

4.2 SCCRC

33. Should the factors which bear upon the test of "the interests of justice" to be applied by the SCCRC be set out in legislation?

34. Should the High Court have the power to refuse to consider a reference from the SCCRC on the basis that it is not in the interests of justice?

Our comments in this respect would mirror those about the corroboration requirement. Making changes to the operation of the SCCRC on the basis of a review concerned primarily with the police questioning stage of the criminal justice process is not a sensible method of law reform. It may well be that caseload problems will arise as a result of the ruling in *Cadder*, but it is an over-reaction to make changes to the operation of the appeals system as a whole on the basis of these isolated cases. Some way will have to be found to deal with applications based upon *Cadder*, should volume problems arise. However, if changes are to be made to the operation of the SCCRC and its relationship with the High Court across the board, these should occur after a wholesale review of the issues, especially as the evidence to date indicates no problems or dissatisfaction with the operation of the SCCRC or its relationship with the High Court (see e.g. Leverick et al, 2009).

Having said that, our preliminary view would be that, in answer to Q33, we would have no real objection to spelling out the factors that might bear upon the "interests of justice" test but that if this were to be done there should be a residual category so as not to limit the SCCRC's discretion.

It would also be our preliminary view that the High Court should not have the power to refuse to consider a reference from the SCCRC on the basis that it is not in the interests of justice. This is for the reasons set out in para 4.2.11 of the Carloway Review Consultation document. The strength of the SCCRC is that it operates as a body independent of the criminal courts. There is currently no evidence to suggest that it is wasting court time by referring cases with no merit (see Leverick et al, 2009). In fact, the High Court has made reference to the Commission's work being thorough and convincing (see *McPhee v HM Advocate* [2005] HCJAC 137 at paras 7 and 20) and has even, on occasion, stated that the SCCRC was right to refer a case even though the appeal was ultimately refused (*Gray v HM Advocate* 2005 JC 233 at para 1). As such there seems no reason to change the current position. If it was the case that the High Court could refuse to consider applications that it thought were not in the interests of justice (where the SCCRC had taken the opposite view) this could well discourage meritorious applications and damage the credibility and legitimacy of the SCCRC as an independent body for righting miscarriages of justice.

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