SHRC
Scottish
Human Rights
Commission

Chapter 8: Access to justice and the right to an effective remedy

Getting it Right?
Human Rights in Scotland

Scottish Human Rights Commission October 2012

Contents Page

Theme 8: Access to Justice and the Right to Effective Remedy

Introduction

The Scottish Human Rights Commission (SHRC) seeks to empower people to know and claim their rights, and to increase the ability and accountability of public and private bodies to deliver on human rights in Scotland. In support of these goals SHRC promotes the evidence based and inclusive development of Scotland's National Action Plan for Human Rights – a road map to the further realisation of all human rights in practice in Scotland.

The report as a whole presents a summary of some of the key gaps and good practices which have emerged from a scoping project undertaken by the SHRC. This specific section summarises the findings relating to theme of Access to Justice and the Right to Effective Remedy. It is not intended to be a comprehensive 'state of human rights in Scotland' report, but a prompt for discussion in the development of Scotland's National Action Plan for Human Rights. With this in mind, individuals and organisations are encouraged to consider their views in response to two key questions as they review this thematic section:

1. Based on the evidence presented in the report *Getting it right? Human rights in Scotland*, or your own experience, what do you consider to be the most urgent human rights issues which should be addressed in Scotland's National Action Plan for Human Rights?

2. What specific and achievable actions do you consider would best address the concerns you identify in your response to question 1?

Scoping Project Methods Summary[1]

The data collection began in 2010 and was divided into two phases - a first phase focussing on collating and analysing a range of secondary data sources[2] and a second phase where SHRC convened a series of small focus groups and in-depth interviews with a range of communities, groups and individuals in Scottish society.[3] In line with the SHRC's statutory mandate, particular attention was given to hearing from those who tend to be marginalised and whose voices are less often heard in mainstream debates surrounding human rights. In taking this approach SHRC sought to put a 'human face' on the issues uncovered in the scoping project.

Introduction to Access to Justice and the Right to Remedy

This thematic section explores the theme of 'Access to Justice and the Right to Remedy' in Scotland, which is one of the eight core themes that were drawn from the rights analysis. Access to Justice and the Right to Remedy encompasses both civil and criminal justice spheres and overall, this scoping project identified a number of relevant areas where human rights could be engaged. Following the prioritisation process[4], nine core areas are discussed in further detail in this thematic section, namely: Legal Advice; Cost & Standing; Equality of Arms; Access to Justice for

Particular Groups; Appeals; Investigations & Corroboration; Victims/survivors' Rights & the Right to Remedy; Juvenile Justice; and Time Limits. A list of cases referred to in this thematic section can be found at the end of this thematic section.[5]

The focus of this scoping project has primarily been on issues of human rights concern that are within the competence of the Scottish Parliament. Across all thematic areas, there are some, often complex issues, which raise issues of concern that are devolved, whilst others are reserved to Westminster,[6] including equality legislation. The Equality Act 2010, however, dose place a duty on the Scottish Government to abide by the public sector equality duty,[7]which could bring about a more substantive role for Scottish equality duties in the future.[8]

Legal Advice

The Access to Justice Committee of the Law Society of Scotland identified has identified the importance of legal advice as one of the most pressing issues in Scotland.

> *"Access to civil or criminal justice in Scotland is a constitutional and human right. We believe that Scotland's legal system is a public service, not a commodity, which should deliver that right in the same way that schools deliver education, or the NHS delivers a health service. The courts must therefore be free at the point of use and should never be used as a means of generating income for the state"(The Journal, 2010).*
>
> *"Accordingly, we believe that citizens in Scotland are entitled to access the appropriate legal advice, assistance, and representation, whenever their liberty, life, wellbeing, children, home, work, environment, and community are significantly threatened. We hold these principles to be self-evident" (The Journal, 2010).*

The right to a fair trial, which applies to any criminal charge as well as to the determination of civil rights and obligations, is fundamental to the rule of law and to democracy itself.

The right to free legal assistance is not an absolute right. Even in criminal matters the right to free legal aid for an accused depends on two circumstances; a) that the accused lacks sufficient means to pay for legal assistance and b) that the provision of legal aid is required by the interests of justice**.** In relation to the first the level of proof required for an accused that he or she lacks resources should not be set too high. In relation to the second, the Court found that in determining what is required in the interests of justice consideration should be given to a number of factors such as the gravity of the offence, the likely penalty if convicted,[9] the complexity of the case, the principle of equal treatment of the parties and the personal situation of the accused (e.g. his or her mental health or the existence of a mental disability, linguistic skills, etc.).[10]

The case of *Cadder*[11] *v HMA*[12] has had a significant impact on Scottish criminal law. The question in this appeal to the Supreme Court of the UK was whether a person who has been detained by the police in Scotland on suspicion of having committed an offence has the right of access to a lawyer prior to being interviewed. Under Scots

criminal law at the time a suspect could be held for up to six hours for the purposes of questioning without the right to legal advice or representation.

In *Her Majesty's Advocate v McLean* [2009] HCJAC 97, the High Court of Justiciary (sitting with seven judges) held that, notwithstanding the decision in *Salduz v Turkey* (2009) 49 E.H.R.R. 19, it was not a violation of Articles 6(1) & 6(3) (c) ECHR for the Crown to rely at trial on admissions made by a detainee while being interviewed without having had access to a solicitor. This was because the guarantees otherwise available in the Scottish legal system and, in particular, the requirement that there be corroborated evidence in order to convict were sufficient to provide for a fair trial.

The Supreme Court allowed the appeal in *Cadder* on the basis that while *McLean* was in line with previous domestic authority, it could not survive in light of the European Court of Human Rights decision of *Salduz* and subsequent cases. [13] Properly interpreted, *Salduz* requires the right of a detainee not to incriminate themselves to be protected by providing access to a lawyer from the time of the first interview unless there are compelling reasons, in light of the particular circumstances of the case, to restrict that right. The exception applies only if there are particular circumstances in the individual case and does not allow a systematic departure from the rule such as provided for in Scots Law under the Criminal Procedure (Scotland) Act 1995.

Following the decision in *Cadder* the Scottish Parliament passed emergency legislation they considered necessary to ensure compliance with ECHR. However, the Criminal Procedure (Legal Assistance, Detention and Appeals) (Scotland) Act 2010[14] went further than ensuring legal assistance and representation, which had already been put in place through guidelines issued by the Lord Advocate. It also increased the length of time a person could be detained to 12 hours with a possible extension to 24 hours and introduced a number of unrelated changes to the criminal justice system with very little scrutiny by Parliament.

The legislation is not retrospective and the judgment does not permit the reopening of closed cases, but live appeals, pending and on-going cases are affected. Subsequent cases [15]have further clarified aspects of the right to access to a lawyer. For example in in the Scottish case of *Ambrose v Harris,*[16] the UK Supreme Court took account of ECtHR cases such as *Zaichenko v Russia*[17]and declared that the right to a fair trial under Article 6(1) is not engaged in all situations of police questioning. The test to be applied is whether the suspect's situation would be '*substantially affected'*[18] by the investigation. This will normally require being charged with an offence or being taken into custody.[19]

The 2010 Act and subsequent cases have provided some clarity on the issue of access to a lawyer, however, the implications of the *Cadder* case continue to be felt. The judgment had no effect on concluded cases but The Crown Office estimated that 867 pending cases were abandoned, including 60 serious cases, nine of which were High Court cases.[20]

In response to *Cadder* the Scottish Government commissioned Lord Carloway to review criminal procedure. The Carloway Review[21]covers a wide range of criminal

procedure matters in Scotland. The report makes a series of recommendations on various issues including:

- The Sufficiency of Legal Advice
- Periods of Detention
- When Should a Suspect's Right to Legal Assistance Arise?
- Waiver of Rights
- Inference from Silence

The Sufficiency of Legal Advice

A key concern raised by the Carloway Review was whether the current system allows for sufficient legal advice to be given to suspects. The review considered whether it was sufficient for advice to be given by telephone rather than through personal attendance by a lawyer. The Law Society of Scotland (Law Society) argued that:

> *"telephone advice is plainly insufficient in many cases and should not be regarded as the norm"(Law Society of Scotland, 2011).*

SHRC also raised concerns, noting that attendance in person allows a lawyer to ensure the witness is not 'vulnerable',[22] something which may not be apparent through a phone call. A face to face interview further provides the opportunity to check that the conditions of detention are suitable and there has been no ill-treatment. Personal attendance could also have a bearing on the advice which is given, as it might not be the case that the best advice is always to remain silent (SHRC, 2011b).

In considering this issue, the Carloway Review underlines that the right of access to a lawyer must be "*practical and effective*"[23] and therefore the sufficiency of advice is very important. The right does not extend to ensuring the provision of a solicitor of the suspect's choice,[24]but it does require that a qualified solicitor is contacted to provide assistance (Carloway, 2011).

Despite the concerns outlined during the consultation, Carloway concludes:

> *"it is ultimately for the suspect to decide whether the advice from the solicitor should be provided by telephone or in person" (Carloway, 2011).*

The review (ibid.) does not consider it necessary to define in statute what will constitute effective advice as this will differ from case to case. Importantly, however, the review argues that attendance by a lawyer should be available at least in cases where an offence is likely to be tried in the High Court or where the suspect might be considered 'vulnerable' (Carloway, 2011).

Periods of Detention

Two key issues were addressed regarding periods of detention. The first being how long a suspect can be held in custody before being brought before a Court. The second whether the twelve hours for which a suspect can currently be held without charge is necessary and justified.

Anyone who is arrested or detained has the right to prompt access to judicial proceedings.[25] In determining the meaning of 'promptly' regard must have been given to the circumstances of the case but some cases have shown that somewhere around four days may be considered the maximum period of detention before being brought before Court.[26]

This may give rise to problems in Scotland when someone is arrested on a Friday night as there will be no opportunity to be brought before Court until the Monday morning. This means that the arrested person will be detained over the weekend and potentially spend three days in a cell. This problem is made worse over Bank Holiday periods when Courts may be shut on both Friday and Monday. Such periods of detention approach the threshold of being unacceptable under Article 5 of the ECHR and this was identified as a potential problem in the Carloway Review (Carloway, 2011).

Carloway (2011) considered a case study in an urban area during one weekend:

> *"Of the many persons dealt with in the custody Court on the Monday, one person had been detained from the previous Thursday morning until bailed on the Monday evening. There were six others held from the Thursday night, three from the very early hours of the Friday morning, five from before noon on the Friday and six from mid-afternoon that day who did not appear in Court, and hence were not bailed or committed to prison, until late on the Monday afternoon or early in the evening of that day. These custodies amounted to about 16[per cent] of the total" (Carloway, 2011).*

The Review argues that these statistics are not acceptable in a modern judicial system (Carloway, 2011). It therefore recommends that a maximum period of detention should be introduced to ensure that an accused appears in Court on the next Court day after charge. Further, periods of detention should be monitored by the Crown Office and Procurator Fiscal Service (COPFS) and initiatives such as Saturday Courts should be considered if these periods continue to exceed thirty-six hours (Carloway, 2011).

As reflected in the submissions to Carloway, many organisations were also concerned that the emergency legislation allowing detention for twelve hours, rather than six, was unnecessary and unjustified. SHRC argued that a reinstatement of the six-hour rule was advisable and that extensions to this should only be allowed in order to meet Article 6, i.e. to ensure a fair trial. This envisages circumstances where interpreters or support for 'vulnerable' suspects is required (SHRC, 2011b).

Although broadly agreeing with this, the Law Society of Scotland did sound a note of caution regarding certain types of offence:

> *"In serious sexual offences, a 6 or even 12 hour period may be problematic in that the police often embark on interviews with a suspect based on the complainers comment and often little else. The suspect's response invariably requires further investigation and there is an argument that being unable to realistically interrupt an interview is no benefit to anyone"(Law Society of Scotland, 2011).*

The Law Society also suggested interrupting, rather than extending the detention period in certain cases, therefore allowing further questioning at a later time once more factual knowledge about the case has emerged.

The Carloway Review considered the practical workings of the current system in some detail. It was shown that:

> "*Since the extended detention periods were introduced, ACPOS [the Association of Chief Police Officers in Scotland] data discloses that the vast majority (83.5[per cent]) of detentions have continued to be concluded within that period, and the average detention period (3 hours 55 minutes) remains well within the six hour period. This still leaves a significant proportion of cases (15.7[per cent]) where the period of detention has exceeded the six hours, but has ended within twelve hours. If this pattern persists, this would relate to more than 5,500 detentions every year*"[27].

In this period, less than 0.5 per cent of detentions were extended beyond the twelve hour period. Despite this being encouraging Carloway notes that in real terms this means there could be around 350 suspects held for longer than twelve hours (Carloway, 2011).

In response to these statistics and submissions received the Carloway Review recommends something of a compromise: that the maximum period of detention remains twelve hours but with a review after six hours to determine whether continued detention is required. The review would consider whether the suspect's fitness for interview or delays in contacting a solicitor, were being properly addressed and that his/her welfare is being taken into account. Carloway further recommended that the power to detain a suspect for more than twelve hours should only be granted by a judge in exceptional circumstances and the current position allowing for twenty-four hour detention be removed (Carloway, 2011).

In general the Review recommends that detention should be avoided unless absolutely necessary. It recommends a new approach is taken whereby the only general power to take a suspect into custody is that of arrest on *"reasonable suspicion"* (Carloway, 2011). The aim is to maintain a presumption of liberty and ensure that the police consider the proportionality of holding a suspect in custody. It is recommended that, where practical, a suspect can be released on bail and brought back for questioning at a later time. This release period would be for a maximum period of twenty eight days and could have conditions attached to ensure the suspect returns at an appointed time (Carloway, 2011).

When Should a Suspect's Right to Legal Assistance Arise?

The Carloway Review does not recommend that the right of access to a lawyer should be extended beyond situations where a suspect has been detained. It does consider, however, that interviews out with a police station will always be subject to the overarching requirements of fairness under Article 6 and stresses that the police should inform anyone being questioned that they have the right to access a lawyer (Carloway, 2011).

This position has been criticised by the Scottish Legal Action Group (SCOLAG) which has argued that:

> *"The proposal could go further in requiring access to legal advice for those who are to be questioned as suspects but not detained. Whilst we acknowledge the practical difficulties with such a requirement in some circumstances, these should not prove insurmountable. It may well be that developments in the Strasbourg jurisprudence will in the future, require access to such advice to be provided" (SCOLAG, 2011a).*

To ensure clarity SHRC has recommend that any suspect, whatever his or her location, who is to be questioned under caution is afforded the right to legal assistance and is advised of that right at the time he or she is first cautioned (SHRC, 2011b).[28]

Waiver of Rights

Although Article 6 of the ECHR protects the right to a fair trial, it does not prevent a suspect from choosing to waive certain aspects of this right. This has been explicitly stated in recent Strasbourg case law, namely:

> *"Neither the letter nor the spirit of Article 6 prevents a person from waiving them [ECHR rights] of his own free will, either expressly or tacitly".*[29]

However, in order to be effective a waiver of rights must be made in an unequivocal manner and there must be adequate safeguards in domestic law.[30] The waiver of rights must be made voluntarily and the suspect must be made fully aware of the consequences of the waiver before making a decision.[31]

Waiver of the right to legal advice was recently considered in domestic law in the case of *Jude, Hodgson & Birnie v HMA.*[32]In that case a suspect was deemed to have waived his right of access to a lawyer although the judgment expressed difficulty in accepting that this waiver had been valid. On reconsideration at the Supreme Court it was found that:

> *"…there is no absolute rule that the accused must have been given legal advice on the question of whether or not he should exercise his right of access to a lawyer before he can be held to have waived it"*[33]

It will thus depend on the facts of each particular case as to whether a waiver is valid.

SHRC has highlighted *waiver* as a topic needing further consideration and raised concern that so many suspects appear to waive their right to legal assistance (SHRC, 2011b). Carloway answers this concern directly by noting that approximately 75 per cent of suspects waive their right of access to a lawyer.[34]

The Carloway consultation also asked whether a statutory provision on the waiver of rights would be advisable. The organisation JUSTICE argued that without a statutory provision "*the parameters for the police are less* clear"(JUSTICE, 2011)and whilst guidelines and codes of practice are useful such a provision would be welcome. However, it was stressed that such a statutory provision would have to be very carefully drafted and contain adequate safeguards which take into account the individual characteristics of the suspect.[35]

The Carloway Review (2011) recommends a standard wording be put in place to inform suspects of their rights and the opportunity of waiver.[36]Carloway further recommends that a right to waive access to a lawyer be expressly stated in legislation for adults who are not 'vulnerable' and that such waiver must be express, recorded and limited to situations where the suspect is fully informed of the implications (Carloway, 2011).

Inference from Silence

Although not specifically mentioned in Article 6 of the Convention, the ECtHR has held that the right to remain silent under police questioning and the privilege against

self-incrimination are at the heart of the notion of a fair procedure under Article 6. The drawing of adverse inferences from silence is not absolutely prohibited by the ECHR, but the circumstances in which such inferences may be drawn will depend on, amongst other things the weight attached to such inferences by Courts and the degree of compulsion. For example an exception is where the evidence against the accused "*calls*" for an explanation, in which case "*common sense inferences*" may be drawn.[37]In this situation the accused should have procedural safeguards (such as warnings that an inference may be drawn from silence).[38]

In Scotland the right to remain silent during questioning is considered to be of great importance and is derived from the fundamental basis of a criminal justice system that an accused is presumed innocent until proven guilty (Carloway, 2011).In considering whether an adverse inference should be drawn from silence, Carloway restated the position in *Adetoro v UK*[39] which stated "*the right to silence is not an absolute right.*"[40]The Court advised that:

> *"…particular caution is required before a domestic Court can invoke an accused's silence against him. It would be incompatible with the right to silence to base a conviction solely or mainly on the accused's silence or on a refusal to answer questions. However, it is obvious that the right cannot and should not prevent that the accused's silence, in situations which clearly call for an explanation from him, be taken into account in assessing the persuasiveness of the evidence adduced by the prosecution."*[41]

The Review concluded that introducing an adverse inference from silence would be incompatible with the presumption of innocence, the right to silence and the right not to self-incriminate (Carloway, 2011).

In terms of moving forwards, there is little doubt that The Carloway Review has the potential to bring about striking changes in Scots criminal law and practice. At the time of writing, the Scottish Government has opened a public consultation seeking a range of views on how best to reform Scottish criminal law and practice based on the findings of Lord Carloway's Report. The consultation, which closes on October 5th 2012, seeks views on all aspects of the Review and this is seen as a first step towards implementing the proposals therein, including those detailed above and elsewhere in this thematic section(Scottish Government, 2012b). It will be useful to note, in the fullness of time, what recommendations from Carloway are introduced and which ones are not taken forward.

Cost & Standing

Legal Aid

Access to Legal Aid

Article 6 of the ECHR does not expressly require that a system of legal aid be in place, nevertheless there is a general duty on states to ensure practical and effective access to justice. The means of achieving this are for the state to determine, with legal aid being one such method.[42] In criminal cases, article 6(3)(c) provides that everyone should have access to legal representation and that if they cannot afford representation it should be given free where required by the interests of justice. In civil cases, *Airey v Ireland*[43]found that the lack of provision of legal aid for a woman who was seeking a judicial separation from her husband meant that her right to a

hearing was ineffective. The *Airey* case suggests that legal aid might be required in civil matters when the case is particularly complex or when legal assistance is compulsory under domestic law in order to ensure effective access to a fair trial.

The ECtHR has made clear[44] that the decision as to whether legal aid should be made available will depend on the individual facts of each particular case. Considerations to be taken into account include the complexity of the law and procedure, public interest and the applicant's ability to represent him or herself effectively.[45]Domestically, it has been found[46] that as Article 6 requires that a person has access to legal representation in cases involving deprivation of liberty, they should also have access to legal aid in such cases where needed. Further, the requirement to provide access to legal aid has been extended to situations such as Children's Hearings and tribunals.[47]

In Scotland, legal aid is administered by the Scottish Legal Aid Board (SLAB).[48]Eligibility criteria have been summarised as follows:

> *"Civil legal aid has two broad tests: financial eligibility and in respect of the merits of the application. The financial test for criminal legal aid is exceptional hardship, whereas for civil legal aid there are more detailed rules regarding financial eligibility"(McCartney, 2010b).*

Criminal legal aid is granted without the recipient being required to make any financial contributions. Civil legal aid is more complicated in which contributions can be required independent of the particular circumstances of the recipient, whilst having disposable income of £25,000 or more will render an applicant ineligible. In determining particular cases the Board must be satisfied that there are reasonable grounds of success in the case and that it is reasonable to make an award.[49]

Questions of the availability of legal aid also arise in the juvenile justice context, dealt with in the relevant section below.

The majority of participants in SHRC focus groups understood and appreciated the rights principle behind the provision of legal aid to all those accused of a crime who require it. However, most felt that the system as it currently stands is unfair and unequally balanced in favour of those accused of crime. Some participants felt that it was currently too easy for the legal aid system to be abused:

> *One thing about legal aid is that if you have been charged with a crime you have access to legal aid no matter how spurious the defence is and that was one of my big bug bears ... with legal aid for all criminal cases it denies legal aid for civil cases because if you try and take a civil case the criteria for access to legal aid is very tight. Most often people are denied justice because they just can't afford to take civil cases and that's something that is not quite right. I don't know what the solution is but there is an imbalance again.*
> **Trevor, Member of mental health carer support group.**

Financial Contributions in Criminal Legal Aid

The Scottish Government recently opened a consultation on the question of introducing financial contributions in criminal legal aid. The stated rationale was to ensure that *"existing levels of access to justice can be maintained"* yet the consultation report repeatedly notes concerns at the cost of legal aid:

> *"Costs for this provision are continuing to rise; in 2010-11 there were 153,962 grants of criminal legal assistance. The total cost to the taxpayer in 2010-11 for criminal legal assistance was £104 million"* (Scottish Government, 2012a).

The consultation proposal considered whether an applicant's financial eligibility should be based not only on available income but also on available capital.

Some, including the Scottish Independent Advocacy Alliance (SIAA) have argued against financial contributions, expressing concern that this would increase the number of people who choose to represent themselves and create and un-wanted market in legal advice where applicants feel forced into choosing the cheapest option available(SIAA, 2011). The consultation report responded that:

> *"many respondents thought that a person who claims to be innocent should be able to have high quality legal representation throughout the legal process and that fear of cost should not influence how they choose to plead or whom they choose to represent them" (Scottish Government, 2012a)*.

Despite such concerns the consultation report recommended that the Government implement the changes. In so recommending, the report emphasises the current economic crisis:

> *"[d]oing nothing in this respect would also fail deliver the savings required in the current economic climate. The aim of the Scottish Government is to maintain the current broad scope of the legal of the legal aid system in Scotland"(Scottish Government, 2012a)*.

It can be predicted that such changes will have an impact on the right to a fair trial and SHRC considers that this should be monitored with mitigation measures adopted where necessary.

In response to the proposed Criminal Legal Assistance Bill at the time of writing the justice committee of the Scottish Parliament was receiving evidence from SHRC and others (see: (SHRC, 2012b).

The Effects of Cost Cutting

In the 2010 report *Transforming Legal Aid (Kemp, 2010)* the effects of cost-cutting in the provision of legal aid are considered in depth. Solicitors were asked to share their experiences of how the system works in practice in order to demonstrate where the problems lie. In general, most respondents echoed the sentiments of one solicitor who said that:

> *"I accept completely that there was a need for reform but the cutbacks have gone too far" (Kemp, 2010).*

The report found that the impact of cost-cutting includes many criminal defence practices either downsizing or folding, and large firms cutting back on their criminal law departments (Kemp, 2010).

The Kemp report also expressed concern at the reduction in time solicitors spent with clients. Particularly in Scotland, with the introduction of fixed fees, many solicitors reported a sizeable reduction in the time they could spend with clients and were concerned about the impact this has on client care and support. One solicitor demonstrated this in stark terms by saying that:

> *"If somebody who may get the jail, whose life may be ruined deserves half an hour of my time, they're going to get 3 minutes of my time"*(Kemp, 2010).

Whilst underlining that a reduction in client contact is not always detrimental, the report made clear the dangers in involved:

> *"The likelihood is that because corners are being cut, because the defence do not have the funding available to carry out full and thorough investigation, there may be a greater number of cases in which points are missed which result in advice being given to plead guilty where perhaps the better advice might have been to proceed to trial or that perhaps witnesses are not brought to trial and there is likely to be a number of people convicted who would not otherwise have been convicted"* (Kemp, 2010).

The importance of having both the time and the necessary funding is particularly strong in cases involving 'vulnerable' clients. The report identifies something of a dilemma for solicitors as whilst 'vulnerable' witnesses require more time and attention a fixed fee system will not pay them any more for the extra time and effort that has been shown.

Participants involved in this scoping project who had experienced attempting to seek legal advice and access legal aid, were also less than positive about their experiences. Those living in rural areas highlighted the difficulty in accessing lawyers who would agree to take on human rights cases on legal aid. Most participants felt that access to quality legal advice depended on being able to afford to pay for it. Members of more marginalised communities such as Scottish Gypsy/Travellers also highlighted difficulty in accessing legal advice or lawyers to take their cases:

> *I actually had an executive director saying to me you can't get a solicitor, when they were putting my rent up £34, to £46 to £58, to £62 to £76 and then up to £84 before they even let us into the chalets and I said no I cannae, but do you see this file here, it is all in order and I am just on my way to put the writ in the Court myself in the next 10 minutes unless I see A. the director of housing, B. the head of housing and C. the convener. I saw all three within ten minutes. You see that's how sure they are – you can't get a solicitor and if not how many people will take them on? Because if you do take a case and you lose it you are liable for all the costs because you cannot apply for legal aid, so that system in itself is a breach of Article 6.1.3 of the ECHR, because you should have access to the legal aid system ... You cannot get access to justice and that is a huge thing because it means they can discriminate against you any way they want.*
>
> **Kathleen, Scottish Gypsy/ Traveller.**

In this scoping project, participants described many issues within the area of Access to Justice with which they held concerns. The one with which the majority were least satisfied, was the cost often associated with accessing justice, which many found excessive. For example, the following extract is typical of the views of a number of female participants who were survivors of domestic abuse or stalking:

> *…[it is] a disgrace that any one should have to pay for protection. Women have to pay for civil protection orders. Many victims are on low or moderate incomes and with the low legal aid threshold they have to meet the heavy costs themselves. Many cannot afford civil protection orders, which cost approximately three thousand pounds. Lawyer's fees are usually in the region*

of £220-350+ an hour. Low or moderate-income earners below the legal aid threshold limit are denied protection where there is no prosecution. I have spoken to many women who have left abusive relationships with little evidence to build a case but nonetheless the abuse continues and they cannot afford the heavy cost of civil protection orders.[50]
Emma, Victim/Survivor of crime.

Public Interest & Legal Aid

Public interest litigation concerns an issue that affects not only the individual or organisation involved, but also the wider public. A common example is in relation to environmental matters. Issues related to standing to bring public interest cases before a Court and the costs of bringing such litigation have emerged from the scoping project.

Standing in Public Interest Litigation

Traditionally, in order to bring a case before a Court in Scotland one must have 'title and interest'[51] to do so. As one leading QC has explained:

> *"If the question involves the rights or the status of the petitioner, there is interest to sue; but if not, not".*[52]

Concerns have been raised that this standard appears to provide limited grounds for acting in the public interest. As the same QC noted,

> *"Law here has indeed retreated since the nineteenth century, when the Scottish Rights of Way Society established the public right to litigate public rights of way."*[53]

The recent case of *Forbes v Aberdeenshire*[54] was raised by a resident in the area of Aberdeenshire in which Donald Trump wished to develop a golf course. It was claimed that the development would have a significant impact on an area of Special Scientific Interest. However, Mrs Forbes' claim was denied as she lived a kilometre away from the proposed site.

The UK Supreme Court decision on the legality of the Damages (Asbestos-related Conditions) (Scotland) Act 2009 passed by the Scottish Parliament also addressed the issue of standing in public interest cases. The approach taken by the Supreme Court in the *Axa* [55]case appears to move Scots law closer to the English model of public standing rules.

In reaching its decision, the Supreme Court had to consider whether the Scottish system of 'title and interest' allowed proper access to justice and concluded that:

> *"A personal interest need not be shown if the individual is acting in the public interest and can genuinely say that the issue directly affects the section of the public that he seeks to represent."*[56]

It has been suggested[57] that this decision will enable civil society organisations, individuals and public interest groups much greater access to Court in order to argue cases in the public interest.

Access to environmental justice was considered in the Gill Review (Donnelley, 2009a) which found that the rules on standing and funding for such matters should be examined carefully. It concluded that the current system is "*too restrictive*", lacking in clarity and has the effect of hindering access to justice in such cases.[58]

Furthermore, the Gill Review acknowledges that the threat of having to pay the opposing party's costs can present a major hurdle to litigants in public interest cases, acting as a deterrent to accessing legal remedies to environmental problems (Donnelley, 2009b). In response the Review called for a clearer system of operation for Protective Expenses Orders in Scotland (limiting the financial liability of claimants) (McCartney, 2010a).

The Aarhus Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters [59]provides in Article 9 (4) thatprocedures in environmental cases must be "*fair, equitable, timely, and not prohibitively expensive*".A series of findings on the UK by the Aarhus Convention Compliance Committee have found that the allocation of costs is unfair and renders the system as a whole prohibitively expensive. Communications considered by the Compliance Committee related to cost orders which have resulted in claimants being responsible for the full costs of litigation (in at least one case amounting to nearly £40,000).[60]

Although the cases involved procedures in England, similar issues have been raised in Scotland, including in a petition to the Scottish Parliament by Friends of the Earth Scotland and others.[61]

The European Union partly incorporated the Aarhus Convention via the Public Participation Directive. Similarly finding the UK not in compliance in respect of the prohibitive costs of litigation, the European Commission referred the UK to the European Court of Justice in April 2011.

These developments have led to consultations in all UK jurisdictions on the issue of costs in environmental matters. In Scotland the consultation was limited to matters within the ambit of the European Public Participation Directive (in England and Wales and Northern Ireland the consultations extended to any case falling under the Aarhus Convention). The Scottish Government proposed to introduce specific rules of the Court of Session on Protective Expenses (Costs) Orders, limiting cost orders to £5,000. Some from the Coalition for Access to Justice for the Environment continue to consider that this amount, combined with litigants own fees (which are estimated by the UK Ministry of Justice to be in the region of £30,000) remains prohibitive.[62]

SHRC has similarly expressed concern at the limited nature of the Scottish Government's proposals. In particular it has noted that:

> *"…environmental inequality is often* [linked] *with social inequality.[63] There is evidence of a* [disproportionate] *distribution of industrial pollution sites in deprived areas and near to deprived populations. In particular, waste sites are disproportionately located within deprived communities. So, people in the most deprived areas are far more likely to be living near to pollution sources than people in more affluent areas.[64] As a consequence, the suggested limit of PEOs (£5,000)* [may] *still be too high, and* [may] *remain prohibitively expensive for people living in the most deprived areas of the country"* (SHRC, 2012a).

A range of sources have pointed to problems in securing funding to raise public interest litigation. For example, it has been said that regulation 15 of the Civil Legal Aid (Scotland) Regulations 2002 makes it extremely difficult for persons who have a joint interest with others to successfully claim legal aid (Adebowale, 2004). To do so, it must be shown that the person making the application would be seriously prejudiced in their own right if legal aid were not granted.[65]

This requirement may create barriers to accessing legal aid in public interest cases. Further, the guidance notes on this regulation are no more encouraging;

> *"It may be unreasonable to make legal aid available to a person to litigate, as a private citizen, at public expense, about something that is obviously not exclusive to him or her. Examples could be fluoridation of public water supplies, noise generated by a large social or cultural event, closure of public leisure facilities."* [66]

As such, McCartney (2010b) concludes that satisfying all the criteria for legal aid in this area is *"virtually impossible*".

Equality of Arms

Equality of arms is an important aspect of a fair trial, as protected by Article 6 of the ECHR the essence of which the ECtHR has described as being that one party should not be placed *"at a substantial disadvantage vis-à-vis his opponent."*[67] It aims to ensure that both parties in a case are given the same opportunity to present their arguments and thus, for example, can both call witnesses, cross-examine witnesses and have equal access to evidence.

Equality of arms can require that one party in a case discloses information to the other. For example in the case of *Kerojarvi v Finland*[68] a lack of disclosure of information including a legal opinion on an important aspect of the case to an unrepresented applicant was seen to render the proceedings unfair.

The duty to disclose information can become problematic when information is held back on the grounds of public interest. Thus disclosure of relevant information is not an absolute right and matters such as national security, protection of witnesses and jeopardising on-going police investigations can restrict disclosure.[69] In such cases "*only such measures restricting the rights of the defence which are strictly necessary"* are competent (Reed and Murdoch, 2011).

The Criminal Justice and Licensing (Scotland) Act 2010 contains the current disclosure regime for Scotland. The Crown must disclose all material information which would materially weaken the Crown's case, materially strengthen the accused's case or would form part of the evidence led by the Crown[70]. Constant review of disclosure must be made as the case proceeds and new information may come to light. An exception exists for "*sensitive information*"[71] which is defined as information which might cause serious injury or death to a person, interfere with on-going criminal investigations or information which it is not in the public interest to disclose.

In *Holland v HM Advocate*[72] it was considered that allowing the Crown alone to decide whether or not to disclose previous convictions and outstanding charges of witnesses was not compatible with Article 6, and that the defence is entitled to such

information which is material to the proper preparation and presentation of the defence. It remains open to the defence to request disclosure of other material it considers relevant to the proper preparation and presentation of the case and such disclosure will be determined by the Court. Further, in *Sinclair v HM Advocate*[73] it was shown that police statements made by witnesses to be called at trial will always be material evidence and should be disclosed.

Outstanding issues remain on the issue of disclosure. First, the disclosure of previous convictions impacts not only on Article 6 rights to a fair trial but also on Article 8 rights regarding privacy. It has thus been noted that,

> *"A deeper analysis will now be necessary to establish how the Art 8 privacy rights of witnesses are to be reconciled with the new disclosure regime… It seems unavoidable that detailed guidelines… will need to be negotiated by the Crown Office and the various agencies in the criminal justice system, in particular with the Law Society of Scotland and the Faculty of Advocates"* (Raitt and Ferguson, 2006).

The Crown Office guidelines on disclosure attempt to address these concerns. On deciding whether to disclose aspects of previous criminal convictions the Crown must consider if the information is material to the case; any aspects of the criminal history are sensitive; and any public interest reasons for non-disclosure.[74]

Secondly, the definition of relevant material which has to be disclosed requires consideration. Statements from witnesses may be deemed required whilst the question of disclosure of medical or mental health records in sexual assault cases might be problematic. The process of precognition may result in the Crown becoming aware of further material which it is obliged to disclose. The rule that precognitions are not considered to be statements of the witness means that the information will be disclosed by the Crown in a form which the defence cannot readily utilise in cross-examination. Effective access to justice and the right to a fair trial, demand that the rules on disclosure are carefully drafted and applied.

Access to Justice for Particular Groups[75]

It is of fundamental importance to access to justice generally, and the requirements of Article 6 in providing a fair trial, that the individual needs of witnesses, suspects and accused persons are taken into account. This is particularly significant where people might be considered 'vulnerable', in the strictly legal definition of the word,[76] for example, due to mental or physical disability, age or the nature of case they are involved in. Ensuring access to justice for these particular groups is something that needs to be monitored closely.

Disabled People

The UN Convention on Rights of Persons with Disabilities (Disability Convention)[77] exists to promote, protect and ensure the equal enjoyment of human rights by all persons with disabilities and to *"promote respect for their inherent dignity".*[78] Effective access to justice is guaranteed in Article 13 which provides, amongst other things, that States Parties:

> *"…shall ensure effective access to justice for persons with disabilities on an equal basis with others, including through the provision of procedural and age-appropriate accommodations, in order to facilitate their effective role as*

direct and indirect participants, including as witnesses, in all legal proceedings, including at investigative and other preliminary stages".[79]

In order to do this training should be provided to those working in the justice system, including police and prison staff.

Capability Scotland and the Justice Disability Steering Group raised a number of concerns in relation to access to justice for disabled people (Justice Disability Steering Group, 2009b). Described below are the five key areas which were discussed by the steering group and consultations across Scotland.

Physical Access

The report noted that people with physical disabilities continue to face real and substantial barriers to access to the premises used by the justice sector. The report further notes that organisations within the justice sector also need to move away from a presumption that people with physical disabilities only equates to people in wheelchairs.

Access to legal advice

Particular concern was raised as to the availability of legal aid for disabled people in cases under the Disability Discrimination Act.[80] It was recommended that the Government considers *"reviewing Small Claims procedures and the provision of legal aid for Small Claims cases taken under the Disability Discrimination Act".*

Information barriers

The accessibility of information regarding legal advice and the legal process was questioned. The provision of proper advice is important to anyone dealing with the police or the Courts and particularly so if understanding this information may be more difficult. The report gives the following example:

"A woman who had experienced mental ill-health for the first time after the death of a close relative described how a sheriff referred her for the professional mental health support that she needed after she committed a shoplifting offence whilst in mental crisis".

However, despite this it underlined the need for advice to be given in plain language which avoids jargon and complicated legal language insofar as this is possible. Whilst information currently exists from the Government[81] and independent organisations,[82] there is always more that can be done to improve this area of access.

Communication barriers

Communication from all aspects of the justice system needs to be clear and readily understandable. The report recommends the involvement of family members in communication in order to aid comprehension. It also shows the need for sign language users and interpreters to be utilised so that people can properly understand legal advice, correspondence and any other communications within the justice system. A positive example of this is provided in the report whereby:

"A woman with a learning difficulty was also full of praise for a solicitor who had supported her to understand Court proceedings having liaised appropriately with her advocacy worker to make sure all her communication needs were met."

Further recommendations highlighted the need for disability equality training which would include training on avoiding assumptions based on the way that people might look or sound. Participation in a jury was also seen as a difficulty and improvements in communication to aid this were sought.

Attitudinal barriers and rights

In demonstrating the importance of attitudinal changes the report gives the example of a woman who was arrested due to apparent violent behaviour while under the influence of alcohol. In fact she had been trying to communicate using sign language. Assumptions about individuals are at issue here and the report recommends training to ensure improvement in this area, alongside more funding for advocacy services.
(Justice Disability Steering Group, 2009a)

The Disability Convention extends to persons with mental disorders and intellectual disabilities. The Mental Welfare Commission report into the treatment of Ms A (Mental Welfare Commission for Scotland, 2008) provides a strong picture of some of the problems faced in ensuring access to justice for people with intellectual disabilities. Ms A was a 67 year old woman with a learning disability who had been in local authority care since she was eight years old. An MWC investigation began in 2006 after Ms A reported being raped and that a number of similar incidents may have taken place. The initial investigation found that the various services involved in looking after Ms A "*had been unable to protect her from a series of serious sexual assaults*" (Mental Welfare Commission for Scotland, 2008)and that this failure to prevent and to respond to these incidents amounted to a denial of access to justice.

The problem was exacerbated by the fact that no-one was prosecuted for the offences and Ms A was placed in a protective regime that restricted her movements and, according to the MWC, "*effectively deprive[d] her of much of her liberty"*(Mental Welfare Commission for Scotland, 2008). Restrictions meant that Ms A could barely leave home without an escort and had implications regarding Article 5 of the ECHR which protects the right to liberty and security of persons. The MWC noted that one of the reasons for its investigation was the belief that cases such as this are not uncommon.

Many of the issues raised in the Justice Disability Steering Group are relevant here. The MWC found that staff in agencies concerned with care were not sufficiently aware of their responsibilities in reporting crimes and had "*varying degrees*" of knowledge of the required law and procedure. Communication between agencies was found to be lacking and attitudes towards those with learning difficulties were questioned with the report claiming that negative attitudes compromised both the quality of care provided and access to equal protection under the law (Mental Welfare Commission for Scotland, 2008).

Professional advice given in the course of Ms A's case found that she would not be able to act as a competent and reliable witness, resulting in the Procurator Fiscal deciding not to bring the case to trial. MWC expressed concern with the manner in which prosecution authorities may determine that people with learning disabilities who are victims of crime may not be competent or reliable witnesses(Mental Welfare Commission for Scotland, 2008). The result:

> *"can be failed prosecutions (frustrating the positive duties to investigate and prosecute sexual offences) and the subjection of the victim to restrictive protection regimes (significantly limiting her ability to live independently)" (SHRC, 2011a).*

The previous competence test for witnesses had been abolished prior to the MWC report. It is now for a judge or jury to determine the reliability and credibility of a witness based on the case as a whole.[83] Despite this legislative change MWC argued that more could be done through proper training and support so that witnesses in the situation of Ms A could competently act as a witness and that the current system continues to deny access to justice to those in Ms A's position (Mental Welfare Commission for Scotland, 2008). It recommended that the justice system examine its findings and consider additional guidance and amendments to legislation to enhance access to justice for those with learning disabilities. In particular, it asks that the Procurator Fiscal service assesses capacity very carefully and takes steps to try and encourage participation in Court proceedings.

Survivors of Domestic Abuse

One area of access to justice for particular groups in Scotland which has been positively received has been the introduction of pilot dedicated domestic abuse Courts. This scheme began in Glasgow with a Courtroom set aside each day for such cases and officiated by experienced staff with knowledge of domestic abuse cases. Some of the key aims of the scheme are to:

- Increase survivors' and witnesses' satisfaction with the criminal justice system.
- Improve the co-ordination of information across the criminal justice system.
- Reduce attrition rates.
- Reduce repeat victimisation and recidivism (Reid Howie Associates, 2007).

The research reinforced the benefits of the specialised Court noting that 95 per cent of the accused were male and 85 per cent of the survivors were female and that children were present during 24 per cent of incidents of abuse (Reid Howie Associates, 2007).

The domestic abuse Court makes extensive use of support agencies both as cases are being brought to Court and during the hearings themselves. Support and advocacy groups provide help to survivors of abuse, ensure children are safe and help to ensure that the survivor's evidence and opinion on the way forward can be properly presented in Court. The report found that:

> *"The speed of processing cases was much faster in the domestic abuse Court than the comparison Courts, with an intermediate diet held within 29 days in 76 per cent of cases (compared to 20 per cent), and nearly three quarters of cases calling reaching a trial diet in 6 weeks, compared to only 13 per cent in the comparison Courts"(Reid Howie Associates, 2007).*

The use of specialised staff and support agencies were seen as significant factors in this.

Asylum Seekers and immigrants

In relation to immigrants and asylum seekers, the Scottish Government had through its *Access to Justice Agenda*, been committed to providing access to legal advice and representation (PA Consulting 2006) and, through SLAB, provided legal aid to

eligible immigrants and asylum seekers needing legal advice and representation. It provided free advice and representation to those individuals not eligible for legal aid, primarily through the Immigration Advisory Service in Glasgow.

Asylum seekers and those who support them who took part in this scoping project reported significant problems in gaining access to legal representation:

> *Anna has had the other problem of having been here long enough for solicitors to drop her case, they like the quick easy cases. So Anna has been dropped by four solicitors since she's been* [here]*, with big big terrifying gaps in-between. So often they would say oh sure I'll take a case and they [asylum seeker] would go and present their case and they [lawyer] would say no, I'm not taking it. Or worse, I remember a case, where the solicitor took the case and then a month passed and when they heard nothing they called back because the solicitor had taken some of the paperwork, they were told, no sorry I decided not to take the case, and so they had not even informed them. For my women most of them have spent 25-50 per cent of the time they have been in the UK after they had officially claimed asylum without representation. For Anna, if someone had owned her case, they would have done what you or I would do and think outside the box but no one has owned her case she has just been moved on.*
> **Claire, Support worker for asylum seeking women.**

In response to concerns raised about the availability of and access to legal representation to asylum-seeking children, a new service supported by funds from the Paul Hamlyn Foundation, was established in 2012. This service (The Young Persons' project) provides legal advice to asylum seekers, refugee and migrant children and young people up to the age of 25. This service has been welcomed by children's organisation and has reportedly made a notable impact in terms of capacity and representation for this group of young people (Together, 2012). Together have recommended that the Scottish Government that the Scottish Government:

> *"take steps to ensure that sufficient high quality specialised legal representation is in place for children seeking asylum and for protecting and representing the victims of child trafficking" (Together, 2012).*

Questioning 'Vulnerable' Suspects

Anyone charged with a criminal offence or detained by the police for questioning must be able to effectively understand and exercise their rights. The police must, therefore, be aware of how to identify people who will require extra support in order to do this and be aware of how support needs will differ widely in some cases. These issues were considered in the Carloway Review as advised by consultation submissions from a number of organisations (Carloway, 2011).

At present there is no definition of a ''vulnerable' suspect' although such provision does exist for 'vulnerable' witnesses (see below in the next section). In order to ensure Article 6 rights to a fair trial are not compromised Carloway (2011) identified three requirements as regards suspects:

1. Prompt of identification of 'vulnerable' suspects
2. That 'vulnerable' suspects fully understand their rights

3. That ‘vulnerable’ suspects are able to make informed decisions

This is particularly important during questioning, both in understanding the questions being posed and the implications of the answers which are given. Advice to police in identifying vulnerability is currently given by ACPOS, with a focus on physical and mental impairments (ACPOS, 2011).

In situations where a suspect is defined as ‘vulnerable’ the current system reacts by providing an appropriate adult to support the suspect. Scottish Government guidance describes the role of an appropriate adult as being

> *“…to facilitate communication between a mentally disordered person and the police and, as far as is possible, ensure understanding by both parties”.*[84]

This is achieved by speaking with the suspect and communicating with the police and solicitor in order to ensure the needs of the suspect are met and evidence can be effectively given. An appropriate adult does not provide legal advice but helps ensure the suspect understands advice given by lawyers (Carloway, 2011).

Carloway (2011) does not believe that an exhaustive rule that must be followed by the police in determining vulnerability is required but it is enough that discretion is used. The review recommended that a statutory definition of ‘‘vulnerable’ suspect’ is created along the lines of;

> *“a person who, in the view of the police officer authorising the suspect’s detention, is not able to understand fully the significance of what is said to him/her, of questions posed or of his/her replies because of an apparent (a) mental illness; (b) personality disorder; or (c) learning disability” (Carloway, 2011).*

It is thus hoped that with training, a statutory definition and the continued provision of appropriate adults as support the rights of ‘vulnerable’ witnesses during questioning can be assured.

A final aspect regarding questioning is whether an accused is capable of standing trial at all. The Criminal Justice and Licensing Act 2010[85] will amend the current law[86] in relation to pleas which would prevent an accused standing trial. Currently the grounds of ‘insanity’ are used. The amendment will change this to a test of unfitness for trial based on the physical or mental condition of the accused. Unfitness must be shown on the balance of probabilities. Broadening the scope from insanity to incapacity appears to be more in line with the requirements of a fair trial under Article 6.

‘Vulnerable’ Witnesses

ECtHR case law has demonstrated the importance of effective participation in trials. This goes further than mere presence at proceedings but requires that participation in proceedings is provided for insofar as is possible.[87] In contrast to the situation with ‘vulnerable’ suspects, ‘vulnerable’ witnesses are considered under legislation and a definition exists in Scots Law.[88] This identifies ‘vulnerable’ witnesses through consideration of whether the quality of evidence a person could provide would be diminished by either ‘mental disorder’ or ‘fear or distress in connection with giving evidence at the trial’.

Mental disorder is assessed with reference to mental health legislation[89] and includes mental illness, personality disorder and learning disability. It does not include:

> *"sexual deviancy, dependence on alcohol or drugs or behaviour that causes, or is likely to cause, harassment, alarm or distress to any other person" (Carloway, 2011).*

Fear or distress in giving evidence is more discretionary and could include survivors of particular crimes, such as sexual offence or domestic abuse, or witnesses who feel intimidated.

The legislation provides for a number of measures which can be utilised in Court in order to support the witness in giving evidence. Examples include the use of screens or video links to prevent witnesses appearing in Court, the use of prior statements rather than physical appearance in Court and the provision of supporters during the trial.[90] In relation to children these measures can allow the Court to sit in a less intimidating setting so as to lessen the feeling of intimidation.

Beyond legal measures, all Courts in Scotland have a Witness Service staffed by specially trained volunteers. Based in the Court building, they can give guidance and support, specific details of the process and procedure of Court and arrange Court visits to reduce apprehension prior to trial. Guidance provided by the Procurator Fiscal services highlights the need to identify 'vulnerable' witnesses and take measures to ensure they are adequately supported. This extends to the type of questioning which is used and encourages participation through ensuring supporters are provided to help people give evidence. There is great stress on not assuming that someone will be incapable of giving evidence but rather doing all that is possible to ensure the evidence can be heard.[91]

Appeals

Effective access to justice not only requires that an individual has the ability to begin proceedings but also that they have the right to appeal the outcome of proceedings. In international law, the right to appeal is enshrined in the International Covenant on Civil and Political Rights which provides that:

> *"Everyone convicted of a crime shall have the right to have his conviction and sentence reviewed by a higher tribunal according to law"[92].*

In terms of the ECHR, the right to a fair trial under Article 6 applies equally to appeals and trials and one of the key aims of this right is the prevention of miscarriages of justice (SHRC, 2011b).The right to an effective remedy under Article 13 of ECHR also requires the right of appeal.[93]

Current Law

Under current Scots law a person convicted of an offence can appeal against the conviction itself or the sentence imposed as a result on the grounds that there has been a miscarriage of justice.[94] Examples of miscarriage of justice include: insufficient evidence, misdirection of the jury and the emergence of new evidence. Sentences can be appealed on the grounds of competence or on the grounds that the terms of sentence are excessive.[95]

A limitation on the right to appeal is the time limit with which an applicant must comply. In cases involving the most serious crimes (solemn cases),[96] an appeal is

started by lodging a Notice of Intention to Appeal within two weeks of the final determination of the case.[97] Thereafter, there is a period of eight weeks within which to lodge the final grounds of appeal.[98] Procedure for appeals in summary cases[99] are more complex, however, similar time limits apply. An applicant can apply for an extension to the time limits at any stage[100] (even years later) and must specify why they have failed to comply with time limits and state the grounds for the appeal.[101]

Further avenues of appeal also exist. The *nobile officium* is a general provision which provides the High Court or the Court of Session with an equitable jurisdiction to reconsider its own decision in circumstances which are *"extraordinary or unforeseen and where no other remedy is provided for by law".*'[102] This is an old legal remedy which is still sometimes utilised in relation to both solemn[103] and summary cases.[104]

More frequently used is the Scottish Criminal Cases Review Commission (SCCRC). The SCCRC reviews and investigates cases where it is alleged that a miscarriage of justice has occurred. This can be in relation to a conviction, the length of a sentence or any situation which it is in interest of justice to consider.[105] The test is thus twofold: that there is an arguable miscarriage of justice and that it is in the public interest for the case to be re-considered. The SCCRC only has the power to investigate cases decided by Scottish Courts. If it is found that there is merit in an allegation then the case will be referred to the High Court and reconsidered.[106] The SCCRC receives about 110 applications a year and refers around 8 of these to the appeal Court and around two thirds of references result in convictions being quashed (Smith et al., 2010).

Appeals were considered at length in the Carloway Review (2011) and recommendations made regarding the impact of Article 6. In the case of late appeals it was recognised that the system must strike the correct balance between sensible time periods and access to justice. As such, Carloway (2011) argues that if a Notice of Intention to Appeal is late it should be allowed if specific cause is shown and the appeal has a likelihood of success. In essence, in order to be satisfied that a miscarriage of justice had occurred, the Court must apply a test similar to that employed by the SCCRC.

Carloway recommended that whilst a greater emphasis should be placed on bodies such as the SCCRC the *nobile officium* should also be retained:

> *"…to deal with circumstances which are truly extraordinary or unforeseen and where there is no other remedy available"* (Carloway, 2011).

The test that the SCCRC currently use to decide on the merit of cases was seen as appropriate and useful by the review.

Another issue regarding appeals is the 'gate-keeping' role of the High Court which was introduced by the 2010 emergency legislation. Fearing a flood of applications on *Cadder* points to the SCCRC, and therefore subsequent referrals to Court, the High Court was given the power to reject referrals from the SCCRC where it was not in the interest of justice to consider them.[107] This power has not yet been exercised.

The emergency legislation also required that the SCCRC take finality and certainty into account when determining whether to refer cases to the High Court.[108] These

concerns are important to survivors' rights (see below) and to what Carloway described as the "public perception" of an efficient justice system. However, SHRC raised concerns during the passage of the emergency legislation that the combination of these provisions aimed at the SCCRC and the High Court may have a "chilling effect" on the review of potential miscarriages of justice.[109]

The Carloway Review found that the SCCRC has a very strong record in only referring appropriate cases and avoiding frivolous or spurious complaints, with no indication from any source that suggested otherwise (Carloway, 2011). In addition, the flood of cases which was predicted post-*Cadder* did not materialise with only 52 being referred to the SCCRC of which none have progressed to Court (Carloway, 2011). As such the Review recommends the repeal of the gate-keeping role of the High Court enacted in the emergency legislation.

Role of the UK Supreme Court on review of human rights issues in Scots criminal cases

There has recently been criticism of the role of the UK Supreme Court in reviewing human rights issues arising from Scottish High Court cases. An example of this is the case of *Fraser v Her Majesty's Advocate.*[110]On first consideration at the High Court it was found that his [Mr Fraser's] trial had not been unfair as regards Article 6. The Supreme Court on the contrary found that failure to disclose evidence to the defence was a violation of Article 6 constituting a miscarriage of justice. The result was that the Supreme Court called on the Court of Appeal in Edinburgh to consider a new prosecution, which it subsequently did.[111]

The case provoked heated debate[112]as to whether this judgment represented the Supreme Court interfering with Scotland's criminal justice system. The Scottish Government launched a review of appeals to the Supreme Court.[113] The review concluded that whilst the Supreme Court should continue to have jurisdiction to hear appeals from the High Court in issues pertaining to Convention rights, its role should be clearly defined and limited. Thus the power of the Supreme Court should be limited to declaring whether or not there has been a breach of Convention rights and why. If a breach is found the case should be referred back to the High Court to decide on which course of action to take.

Overall, the SHRC would argue that the Supreme Court is perhaps best placed to provide authoritative interpretation of Convention rights and that its current role as final court of appeal should be maintained. There is a concern that if this situation was to change then constituent parts of the UK would interpret human rights issues in different ways leading to varying levels across the UK regarding human rights protection. A further concern raised by the SHRC is that that the proposed solution (that certification be required for a criminal case to be appealed to the Supreme Court on human rights grounds, and that the Supreme Court be limited to remitting the case to the High Court to determine remedies) would act as a limitation on access to justice and lead to inequality in remedies for human rights violations across the UK. [114]

Investigations & Corroboration

Investigations

The duty on States to investigate alleged human rights abuses takes different forms depending on which human rights are at stake.

In terms of Article 2 (the right to life) and Article 3 (prevention of torture, inhuman and degrading treatment) of the ECHR, as the ECtHR stated in the *Asenov*[115] case:

> *"Where an individual raises an arguable claim that he has been seriously ill-treated by the police or other such agents of the State unlawfully and in breach of Article 3, that provision… requires by implication that there should be an effective official investigation. This obligation, as with that under Article 2, should be capable of leading to the identification and punishment of those responsible".*[116]

The nature of what is required to constitute an effective official investigation varies depending on the gravity of the harm and the identity of the perpetrator. The key requirements however are that: an effective investigation is sufficient to identify any failure of the State to prevent risk to life or of serious ill-treatment, or to protect an individual from a real and immediate threat of which it was or ought to have been aware, to attribute blame and distribute an appropriate punishment.

Criminal investigation is generally thought to satisfy this obligation, but it may not always be required.[117]An effective investigation must be:[118]

- Prompt: The investigation must be carried out within a reasonable timescale.[119]
- Carried out at the initiative of the State.[120]
- Independent: the persons who are responsible for the investigation and to carry it out must be independent from the institutions and persons implicated.[121] This means not only hierarchical but also practical independence.[122]
- Capable of leading to a determination of the identity of those responsible and to punishment of those persons. As mentioned above, the standard for the State in this regard is "due diligence" i.e. it must take reasonable steps as available to it to secure evidence concerning the incident and determine any pattern of practice which may have brought about the violation.
- Open to public scrutiny: There should be a sufficient element of public scrutiny of the investigation or its results so as to secure accountability in practice as well as in theory. The survivor or next of kin must be involved in the procedure to the extent necessary to safeguard his or his legitimate interests.[123]
- Accessible to the survivor: the complainant must have effective access to the investigatory procedure.[124]

In Scotland Fatal Accident Inquiries (FAIs) are a primary method of investigation in cases of sudden, suspicious or unexplained death, or death in circumstances that give rise to serious public concern.[125] Decisions on whether these discretionary inquiries are held are made by the Lord Advocate.[126]

Lord Cullen (2009) has questioned:

FAIs are held in public, use inquisitorial proceedings take place before a sheriff in the sheriff Court and result in a public hearing of the evidence discovered in prior investigation. An FAI does not, however, result in binding findings and it is debatable whether FAIs therefore, meet the requirements of an effective investigation. Lord Cullen, however, in his review in 2009, declared that FAIs are compatible with the requirements of an effective investigation under Article 2 of the ECHR (Cullen, 2009).

Corroboration

To gain a conviction at present there must be one source of evidence, whether direct or circumstantial, and that evidence must be confirmed, or corroborated, by a second piece of evidence. Therefore,

"each "essential" or "crucial" fact, requiring to be proved, must be corroborated by other direct or circumstantial evidence" (Carloway, 2011).

The Carloway Review recommends abolishing corroboration finding that it is preventing cases from coming to Court due to lack of sufficient evidence. Carloway (2011) states that he is "…in no doubt that the requirement of corroboration should be entirely abolished for all categories of crime" and that it be replaced with a test of sufficiency of evidence.[127]

Reaction to this recommendation has been particularly divided. For example SCOLAG (2011b) expressed concern that the review does not suggest any additional safeguards to counteract the abolition of corroboration:

"In England these include pre-trial committal proceedings, the close regulation of police investigations by PACE, the ability of judges to exclude prejudicial or unreliable evidence in some circumstances and the size of majority required for conviction" (SCOLAG, 2011b)

In general, SCOLAG echoed the concerns of JUSTICE (2011) that the Carloway Review was insufficient and too limited in its research and scope to recommend such a fundamental change to Scots law. In turn SHRC noted that:

"The recommendation to abolish corroboration for all crimes would be a radical change in Scots Law and therefore it is important to take time properly to consider the implications for those accused of crime, victims and witnesses, the police, and the Courts."[128]

Particular concern exists around the prosecution of sexual offences, as noted previously by:

"…further exploration and research may conclude that the requirement of corroboration also acts as a protection to the complainer – in that it provides an independent check on credibility and reliability which would otherwise be absent. Thought should be given as to whether abolishing corroboration may result in a complainer who was the only source of evidence being subject to far greater scrutiny in terms of quality than would otherwise be necessary"(SHRC, 2011b).

Rape Crisis Scotland welcomed Carloway's recommendation to abolish corroboration, expressing concern at prosecution rates for sexual offences, citing Scottish Government statistics which show that the number of people with a charge proven for rape or attempted rape fell by over 30 per cent in 2010/11.[129]

The Scottish Government has opened a consultation[130] with the aim of further exploring any change to corroboration with Justice Minister Kenny MacAskill describing potential changes as 'monumental'.[131]

Juvenile Justice

Child Suspects

The ECtHR has found that children who have been charged with criminal offences must be dealt with in a manner which takes full account of their age, level of maturity and intellectual and emotional capacity.[132] Steps must be also taken to ensure that children are able to understand and participate in proceedings (SHRC, 2011b). This follows the principles of the United Nations Convention on the Rights of the Child (CRC),[133] which also stresses that children should be given the opportunity to express their views and that detention of children should be seen as a last resort.

The Scottish Government has produced guidelines on dealing with children taken into custody[134] which state that:

> *"A child who has been taken into custody should not be questioned in respect of criminal behaviour, or asked to make or sign a statement concerning such involvement, except in the presence of a lawyer or one of the child's parents or, if no parent is available, another person whom the child trusts. The parent or this person may be excluded if suspected of involvement in the criminal behaviour or if engaging in conduct which amounts to an obstruction of justice" (Scottish Executive, 2003).*

Under the CRC a child is defined as anyone below the age of 18, *"unless under the law applicable to the child, majority is attained earlier."* In Scottish criminal law a child is defined as a person under 16 or a person aged 16 to 17 who are subject to a supervision requirement.[135] However, in situations where a child is placed in detention the definition is a person under 16 years of age.[136]

As with all cases involving detention, Article 6 of the ECHR requires the right to a fair trial and therefore fair proceedings as a whole. In ensuring fairness, the child must be properly provided with legal assistance[137] and must not be intimidated during questioning.[138] In *T v UK*[139] it was found that the child involved in the case was 'vulnerable' and intimidated by procedure, therefore, no matter how much skilled legal advice was provided to the child in subsequent proceedings the trial remained fundamentally unfair. Although possibly difficult to achieve, the whether FAIs meet the requirements of an effective investigation Commission argues that:

> *"the priority must be providing a system that maximises the opportunity for the child to understand and effectively exercise his rights on his own behalf" (SHRC, 2011b).*

The age and vulnerability of a child requires that the issue of waiver of rights must be handled very carefully. The ECtHR has found that;

> *"a waiver by [a child on] behalf of an important right under A6 can only be accepted where it is expressed in an unequivocal manner after the authorities have taken all reasonable steps to ensure that he or she is fully aware of his rights of defence and can appreciate, as far as possible, the consequences of his conduct".*[140]

Whilst this does not differ a great deal from the aforementioned requirements for an adult witness to waive his or her rights, the case suggests that particular scrutiny will be placed on the decision of a child to waive his or her rights.

The Carloway Review (2011) considered the issue of child suspects directly and has developed recommendations. It was underlined that whilst not ideal, a police station is probably the best place to interview children due to convenience, the importance of supervision and ability to record an interview. The current system requires the police to let the child's parent or guardian know of the detention.[141]Carloway (2011) further noted that under Article 6 it would be unlikely that any police interview with a child without the presence of a parent or responsible person would be considered fair.

The Review recommends an extension of the definition of child in cases involving detention. Carloway (2011) considers that any person under the age of 18 should be considered a child and the rules of notifying parents and providing support should be extended accordingly. Finally, and in line with the general principles mentioned above, the

> *"decision to arrest and detain a child suspect should only be taken where there is no reasonable alternative*[and]*there should be firmer guidance on how to accommodate the needs of child suspects who are to be interviewed" (Carloway, 2011).*

Age of Criminal Responsibility

Setting the age of criminal responsibility has important implications regarding how early a child can come into contact with the justice system. In Scotland the age at which a child can be held criminally responsible and prosecuted in adult criminal courts is 12.[142] However children can still be referred to the Children's Hearing system on offence grounds below that age.[143] When a child is under the age of 16 they will be dealt with by the Children's Hearing system, as discussed below, and can only be prosecuted at the decision of the Lord Advocate.[144]

The Crown Office and Prosecution Service issued guidelines in 2001 which underlined that discretion remains to refer cases to children's hearings if it is in the public interest to do so. In addition, guidance as to whether a person under 16 should be prosecuted offered examples on where this would be appropriate. These include very serious offences which would normally require a jury trial and serious road traffic offences when committed by children aged 15 (McCallum, 2011).

SHRC, and JUSTICE have expressed concern about the age of criminal responsibility in their submissions to Carloway (SHRC, 2011b, JUSTICE, 2011). It was argued that the new provision preventing prosecution of children under 12 do not prevent children becoming involved in the children's hearing system (SHRC, 2011b). JUSTICE (2011b) suggests that all persons under the age of eighteen should be considered to be children and that twelve was still a low age at which responsibility should be attached to children. This issue has also repeatedly been raised by Together (formerly the Scottish Alliance for Children's Rights) (Together, 2011, Together, 2012).

The Beijing Rules[145] ask states to ensure that the age of criminal responsibility is not set too low and that emotional, mental and intellectual maturity are taken into account.[146] The United Nations (UN) Committee on the Rights of the Child, in its authoritative interpretation of Article 40 of the CRC recommends that States:

> *"increase their lower minimum age of criminal responsibility to the age of 12 years as the absolute minimum age and to continue to increase it to a higher age level" .*

(UNCRC, 2007, UNCRC, 2008)
The Committee reiterated this in relation to Scotland in its Concluding Observations on the United Kingdom (UNCRC, 2008).

This issue was also highlighted during the recent review of all the UK's human rights obligations at the Universal Periodic Review (UPR) in 2012 (UN Human Rights Council, 2012). These UPR recommendations were as follows:

- Consider the possibility of the raising the minimum criminal age (Belarus)
- Consider the possibility if raising the age of criminal responsibility for minors (Chile)

(UN Human Rights Council, 2012).
Children's organisation in Scotland are encouraged by the commitment of the Scottish Government in its Progress Report *Do the Right Thing* (2012), to give "*fresh consideration to raising the age of criminal responsibility from 8 to 12" (Donnelly, 2009).*

Children's Hearings

The Children's Hearing system has been operating in Scotland since 1971 and currently deals with the majority of offenders under the age of 16 and some cases involving 16 and 17 year olds. The system began on the approach articulated in the Kilbrandon Report (1964) which sought:

- a focus on the needs of the child
- the adoption of a preventative and educational approach to children's problems
- an emphasis on the importance of the family in tackling children's problems
- separating the establishment of disputed facts (through the Court system) from decisions on the treatment of children (through a new system of lay panels)

Source: (Kidner, 2010)
The system is now provided for under the Children's Hearings (Scotland) Act 2011 and aims to continue to reflect these guiding principles (Kidner, 2010). This widely-praised system is welfare-based and focuses on the child's best interests (Allison, 2009).

Children are referred to the Children's Hearing system where they are in need or care and protection or they have committed an offence and may require compulsory measures of supervision. To be referred to the system on offence grounds a child must be at least eight at the time of the offence. This age of criminal responsibility is one of the lowest in the world, although recent changes have raise the age at which a child can be prosecuted in the criminal courts to 12.[147] During 2009-2010 a total of 10,012 children were referred on the grounds of committing an offence, with 90 per cent referred being over the age of 12. Of that number, 1,397 cases proceeded to a

hearing and 104 children under the age of 16 were prosecuted in the criminal Courts (Kidner, 2010).

Since the introduction of Anti-Social Behaviour Orders (ASBOs)[148] Children's Hearings now have the power to implement measures which restrict the movement of a child through electronic tagging. This can be to restrict movement from a particular place or prevent movement to a particular place and can only be utilised as part of a wider package of measures to prevent the child from re-offending. If the conditions of an ASBO are breached then this is treated as a criminal offence. Whilst adults can face prison for breaching an ASBO, children are reported to the procurator fiscal and a decision is made on the appropriate action.

Regarding ASBOs, the UK Parliament's Joint Committee on Human Rights questioned in 2009:

> *"the degree to which ASBOs hasten children's entry into the criminal justice system, before other strategies have been tried" (Joint Committee on Human Rights, 2009).*

The Joint Committee expressed further concern at:

> *"… the high number of children from especially 'vulnerable' and marginalised groups within the criminal justice system. The Government should review and explain why such a disproportionate number of children who are looked-after, Gypsies and Travellers or have autism, are present within the criminal justice system, and why existing strategies appear to be failing. Such children, who are already likely to have experienced significant disadvantage and even discrimination in their early lives, require specific and targeted measures and support, outside of the criminal justice system" (Joint Committee on Human Rights, 2009).*

The Joint Committee's report was based on a review of the UN Committee on the Rights of the Child concluding observations on the UK which had recommended an independent review of ASBOs, with a view to abolishing their application to children(DTZ and Heriot-Watt University, 2007).

Carefully monitoring the use of ASBOs is important to ensure that they are not unduly restricting the Article 5 right to liberty and security of person and Article 8 right to private and family life.

Legal Aid

The granting of legal aid to participants in cases before the Children's Hearing system is important in ensuring effective access to justice and a fair trial under Article 6. The Children's Hearings (Scotland) Act 2011 makes provision for legal aid and states that it shall be available in three circumstances:

1. Hearings after the making of a child protection order
2. Hearings at which secure accommodation is to be discussed
3. Hearings held because a child is apprehended by police.[149]

These provisions came as a result of the *SK v Paterson*[150] case in which it was made clear that to have effective participation in proceedings the awarding of legal aid is required. In cases involving children before the criminal Courts SLAB will decide on eligibility based on reasonableness, undue hardship requirements and the best interest of the child (Kidner, 2010).

Legal aid is awarded in respect of the child or a 'relevant person', or guardian. The test for being a relevant person can prove problematic. The test applied is whether a person has parental responsibilities and parental rights or, more generally, whether a person ordinarily had charge or control over the child.[151] Difficulties were found in interpreting the general test, particularly with regard to unmarried fathers with contact orders allowing access to their children. Article 8 protects private and family life and domestic cases interpreting the relevant person rules conflicted on how to approach this issue.[152]

The 2011 Act has removed the general test and replaced it with an appealable process whereby people who are not parents can gain relevant person status by proving to the Children's Hearing Panel that they have "*significant involvement in the upbringing of the child".*[153] Questions remain as to whether, for example, unmarried fathers, grandparents or foster carers are given sufficient opportunity to take part in proceedings and claim legal aid under these rules.

There have also been concerns about the access that children and relevant persons are given to documents concerning their cases before the children's hearing system. The right of parents to receive all relevant reports was clearly shown in the case of *McMichael v UK.*[154] For children, the question arose in *S v Miller*[155]wherein it was found that effective participation required that the child and relevant person be sent the same documents regarding the case as everyone else, i.e. the panel and any lawyers involved in the case. The 2011 Act follows this judgment and provides for this, with the proviso that anything that might cause distress to the child is redacted in the copy presented to them. Children under 12 are only sent documents at the request of their representatives (McCartney, 2010b).

Victims/Survivors' Rights & the Right to Remedy

Victims/Survivor's Rights

The human rights of everyone involved in the criminal justice system, survivors and witnesses as well as suspects, must be respected, protected and fulfilled. Nevertheless, there is a common perception that human rights law has failed to adequately protect survivors and has placed more emphasis on the rights of the offender. A 2006 report found that:

> *"three quarters of the public believed that the criminal justice system respected the rights of defendants, whereas only one third believed it met victims' needs"(Reid Howie Associates, 2006).*

Views of participants in this scoping project who had themselves been victims/survivors of crime underlined this perception. For example:

> *My expectations were that I would be treated fairly and that my rights as a human being would be respected. I would have access to information, the same range of resources and the same standards afforded to that of the man accused of stalking me… My experience of the criminal justice system was one of dismay and horror. If ever a system abused victims and denied 'vulnerable' people of their very basic human rights, this was it. The focus of the Criminal Justice System is purely on the accused or offender and the system has been structured for this specific purpose. It had provided a*

pathway for these people and none for the victims… My stalker's rights were catered for at all levels. His right to a fair trial, his treatment within the system, his access to services, his human rights being respected and fairness surrounding his sentencing… My experience highlighted that offenders have rights and victims have policies and guidelines.
Emma, Victim/Survivor of crime.

A 2006 report considered some of the concerns around survivor's rights (Reid Howie Associates, 2006). A common complaint, and one which is also considered in the more recent Procurator Fiscal commitments, is that of the time taken for proceedings.[156] Delays, especially delays which were not adequately (if at all) explained were seen to be a frequent frustration. Moreover, the funding and training of support agencies was stressed as particularly important (Reid Howie Associates, 2006). Support in difficult cases such as rape or child abuse is often the most difficult to provide and properly funded and skilled organisations are an absolute must in providing effective access to justice.

The ECHR and the Human Rights Act 1998, while establishing standards which seek to prevent human rights violations, also provide a strong framework for the rights of survivors of human rights violations which in some circumstances may be crimes. In combination with UN standards on the rights of survivors of crime,[157] human rights law and standards provides a strong framework of rights and obligations related to survivors.

The human rights of survivors of crime can help frame the design and implementation of the criminal justice system from the moment of reporting to the prosecution and sentencing, as well as the consideration of effective remedies. Among the relevant Convention rights, in this context, are Articles 2 (right to life) and 3 (right not to be subject to torture, inhuman and degrading treatment) of the European Convention of Human Rights (ECHR) which point to the positive obligation of the State to both prevent violations and carry out an effective investigation of situations involving these rights. Articles 6 (fair trial), 8 (respect for private and family life) and13 (right to an effective remedy) of the ECHR are also relevant.

Article 34 of the ECHR provides the right for any person who has 'victim status' to bring a claim to the ECtHR. The definition of 'victim' is wider under Convention law than under national law and extends beyond the person directly affected, including where appropriate, the immediate family or dependants of the direct survivor.[158] Article 13 provides the right to an effective remedy for violations of human rights.

In domestic legislation there is a range of protections which exist to safeguard survivors' interests. The Vulnerable Witnesses (Scotland) Act 2004 provides for special procedures to be used when dealing with witnesses who are 'vulnerable' in a number of ways including age, nature of offence and personal characteristics such as disability. A change was enacted to prevent the accused in a sexual offence case from causing distress to the witness by personally cross-examining him or her in Court. In addition, restrictions on the extent to which the sexual history of the survivor can be used in Court were strengthened.[159]

The ‘victim information scheme’ provided for by the Criminal Justice (Scotland) Act 2003 allows survivors to opt-in to a system whereby they can receive information about the release or escape of offenders and also be granted the opportunity to make submissions to the parole board regarding the potential parole of individuals. More generally, the Procurator Fiscal has issued guidelines as well as a statement of commitment to survivors and witnesses.[160]This includes commitments to provide information regarding the procedure of a trial and on financial support available, support for special needs or language barriers and work with support organisations to provide as much help as possible throughout the process. Support organisations, such as Victim Support Scotland, Rape Crisis Scotland, Victim Information and Advice, Scottish Women‘s Aid, PETAL and the Trafficking Awareness Raising Alliance are hugely influential in affording protection to survivors in Scotland.

In May 2010 David Stewart MSP proposed a Bill to create a Commissioner for Victims and Witnesses in Scotland.[161] The purpose was to “*to promote and safeguard the interests of victims and witnesses*” (Ross, 2011). At the heart of this proposal was the hope that a dedicated person “*focussed solely on championing victims‘ rights*” (Ross, 2011) would promote good practice and reform amongst all parties who deal with survivors in Scotland. Concerns were raised regarding cost and potential overlap with remit of other Commissions, although the need to place increased emphasis on survivors’ rights was broadly welcomed. The Bill was not adopted.

More recently the Scottish Government has opened a consultation on Victims and Witnesses Bill.[162] The Bill aims to improve public confidence in the justice system and place a real focus on the needs of survivors. Proposals include a ‘victim’s surcharge’ which would require offenders to pay towards the cost of supporting survivors, a duty on public agencies to have clear standards of service for survivors and great opportunities for the views of survivors to be taken into account in matters such as parole decisions. In its response to the consultation SHRC drew on a range of international human rights law and standards to make recommendations related to information, participation, assistance, privacy and process.[163]

Survivors’ rights also include the right to an effective remedy. A number of participants in this scoping project spoke of the need for improved remedies and reparation for survivors, as this testimony illustrates:

> *He was held accountable for his crime against the state and he had access to a range of services to rehabilitate and help him ‘get back on his feet’. I was left to try to find a way to deal with the compromised situation I was left in. There was no support offered and no help available. He had lost his job because of his conviction, but he received help and support to find new employment. I, too, lost my job but no-one offered to help me find employment. During my experience, I was offered help from victim support services. The people I dealt with had no training, knowledge, and understanding of supporting me through this type of crime … he had access to highly qualified mental health professionals, psychologists, psychiatrists, probation officers, social work departments and other services which were not available to me… The offender receives the message: what you did was wrong. You will be held accountable, you might be locked away, given community service, but you will have access to the services you need to help*

rehabilitate you and integrate you back into the community. No one said to me what happened to you was wrong and we will help you build your life. I was left to pick up the pieces on my own… I was forced to relocate to gain a sense of safety. My right to living a life without fear or threat was not respected. No one offered to support me, help me relocate, find new accommodation or offered me any financial support. No one helped me change my identity or followed up on my health and well-being. In special cases, some of the most violent offenders are offered new identities and offered relocations to allow them the opportunity to rebuild their lives… Victims should be entitled to the same range and quality of services afforded to the accused or the offender. Services should be provided beyond crisis intervention to address on-going needs. A crime may last only moments, but its impact can be felt for a lifetime.
Emma, Victim/Survivor of crime.

Right to Remedy

The realisation of the right to an effective remedy can take a number of forms from investigation and access to justice, to reparation which includes satisfaction, restitution and rehabilitation, adequate compensation and guarantees of non-repetition. The form in which a remedy should take place will differ from case to case and should be guided by the principles of participation (the wishes of the survivor) and proportionality (to the gravity of the violation). SHRC expands on many of these factors in its legal paper to guide the development of a Human Rights Framework on historic child abuse (SHRC, 2010).

Effective Apologies

One form of reparation is satisfaction which can include important symbolic measures such as an effective apology. According to the Scottish Public Services Ombudsman (SPSO) an effective apology must acknowledge the wrong done, name the offence and name those guilty of that offence. It must also explain why the offence happened and why it was not prevented whilst expressing sincere regret. Finally, an assurance that the offence will not happen again is welcomed (SPSO, 2011).

The situation regarding apologies is complicated where organisations fear the possibility of civil litigation or risk conflicts with insurance companies.[164] In response, to promote effective apologies and reduce recourse to litigation the Scottish Government commissioned a review of no-fault compensation in the health sector.

This Review by the Scottish Government[165] recommended a change in the system which would allow for no-fault compensation. This means that patients could be compensated without going to Court and that apologies could be given without the current legal ramifications. The review identified the benefits of this providing:

- Fair and adequate compensation for harm suffered
- Quicker rehabilitation, which would no longer need to wait until legal action has been completed
- Broader eligibility criteria than the current system
- Greater scope for the NHS to learn from mistakes so that care can be improved
- More efficient use of public time and money

- Wider access to justice for patients, with the removal of the need to pay legal fees.[166]

A patient would still have to prove that the suffering caused was caused by the public body however no claim of negligence would be required. Moreover, no-fault systems such as that suggested is already applied in countries such as Sweden, New Zealand, Finland, Denmark and Norway, and parts of the United States.[167]

has promoted consideration of a so-called Apology Law, as introduced in Canada and Australia. Such legislation can provide that an apology cannot be used as a basis for civil litigation nor to void an insurance contract.[168] Margaret Mitchell MSP has proposed an Apology Bill before the Scottish Parliament saying she hopes that this change in the law would mean survivors "*could achieve the closure they have been seeking*".[169]

Time Limits

Prescription & Limitation

The right to an effective remedy is not absolute and time limits on raising human rights claims are not prohibited. As the ECtHR has found, time limits serve:

> *"several important purposes, namely to ensure legal certainty and finality, protect potential defendants from stale claims which might be difficult to counter and prevent the injustice which might arise if Courts were required to decide upon events which took place in the distant past on the basis of evidence which might have become unreliable and incomplete because of the passage of time".*[170]

Nevertheless, limitations should not be "*unduly restrictive*".[171] The passage of time will inevitably means that a Court cannot always consider the merits of a particular case, but it should still be able to consider violations of procedural obligations of prevention, protection and investigation.[172]

In Scotland various time limits exist as to when it is possible to bring a civil suit to Court.[173]Under the Prescription and Limitation (Scotland) Act 1973 the general rule is that the claim must be brought within three years of the injury suffered, however the Act provides that Courts may override some time limits *"if it seems equitable"* to do so.[174] This allows for some discretion based on the particular circumstances of each case. However, some have questioned whether in practice this discretion has been exercised in a manner which secures a proper balance between access to justice and the principles of finality and legal certainty.[175] A series of cases culminating in a decision of the House of Lords has not exercised this exemption to enable hearings on claims for historic child abuse on the basis of the prejudice to the respondent and loss of evidence.[176] This issue was addressed by the European Commission on Human Rights in a case from the UK in 1996. Although it was considered then that such limits were not in breach of the ECHR, it was noted that there could be a need to revisit the proportionality of the limitation on the right to access a remedy as the understanding of the enduring impacts of child abuse on victims' mental integrity develops.[177]

In 2009 the Scottish Government passed the Damages (Asbestos-related Conditions) (Scotland) Act 2009 restoring the right of people with pleural plaques to claim damages for personal injury.[178] In essence this brought an exception to the

usual time limits in relation to these specific conditions. The Act was challenged by several insurance firms however the challenge failed at the level of the UK Supreme Court which found that the Scottish Parliament acted within its powers in passing the Act.[179]

Remedies for Historic Child Abuse

In the case of *E and others v UK* the ECtHR found in 2002 that that remedies for historic child abuse in Scotland were inadequate.[180]

In February 2013 SHRC hopes to host a first InterAction with survivors of historic child abuse, institutions, Government and others with an interest or responsibilities to remedy historic child abuse.[181] The InterAction will be an independently facilitated negotiation to take a negotiate an Action Plan to advance the recommendations in the Human Rights Framework published by in 2010 (SHRC, 2010).

In that Framework SHRC recommended that the Scottish Government:

- Ensure full and effective participation of survivors and others whose rights are affected in all decisions on the means of realising the rights of effective access to justice, effective remedies and reparation;
- Ensure accountability for human rights violations including through effective official investigations, or a mechanism capable of determining State liability, and prosecutions where appropriate;
- Consider further the role for accountability in the successor(s) to the Pilot Forum, in particular considering the inclusion of investigatory powers sufficient at least to establish a record of the truth, and to identify where reasonable grounds exist for effective official investigations, as well as supporting survivors to identify and access effective remedies and proportionate reparation according to their needs and wishes;
- Ensure effective access to justice through identifying and addressing barriers which survivors of childhood abuse face in practice in exercising this right, making necessary adjustments or developing new mechanisms as required;
- Develop as effective as possible a reparations programme for survivors of historic childhood abuse. This should include restitution, adequate compensation, rehabilitation, satisfaction and guarantees of non-repetition. The reparations for individuals should be appropriate for each individual, and based on the principles of proportionality (according to the nature of the violation and the harm done) and participation (of survivors to identify their needs and wishes);
- Consider the development of legislation to facilitate apologies by institutions;
- Make available each of the elements of effective access to justice, effective remedies and reparation to all survivors of childhood abuse without discrimination;
- Develop a comprehensive communications and outreach strategy to raise awareness of past and present childhood abuse, the human rights of all of those affected and the remedies available;
- Explore with survivors and others, support which would enable them to participate effectively in the Pilot Forum and its successor(s), including advocacy and psychological support, protection and alternative means of testifying, taking reasonable steps to provide necessary support to participation.

Moving Forward

This section, alongside the other thematic sections and the overarching contextual chapter, has highlighted gaps, and inconsistencies, as well as good practices in the realisation of human rights in practice in Scotland. Addressing these shortfalls should be a concern of all bodies with responsibilities, including Government, local authorities, other public authorities and private providers of public services.

Identifying the shared framework of responsibilities and agreeing steps to address gaps requires an inclusive process of engagement. It should result in clarity on what action such bodies will take and when concrete improvements can be expected – it should result in specific, measurable, achievable, relevant and time-bound objectives. An independent system for monitoring progress should also be agreed. In short, the report supports the conclusion that Scotland needs a National Action Plan for Human Rights. To develop this SHRC will host human rights InterActions involving a broad range of public and private bodies, civil society and individuals. These InterActions will follow a FAIR approach:

> **F***acts*: What are the key gaps and the good practices in the realisation of human rights in Scotland?
> **A***nalysis of rights at stake*: Which human rights are at stake? Is any restriction on the rights justified? Is the extent of realisation of the right reasonable?
> **I***dentify responsibilities*: What changes are necessary? Who has responsibilities for helping to make the necessary changes?
> **R***ecall and review progress*: Independent monitoring according to agreed indicators and periodic review of progress.

This process will allow for constructive dialogue between those with responsibilities and those whose rights are affected. Further, it will clarify the steps that are required to improve human rights practice in Scotland taking a pragmatic approach to understanding financial and other constraints. It is hoped that Scotland's National Action Plan for Human Rights will launch in summer 2013.
To inform the process of developing Scotland's National Action Plan for Human Rights responses are requested to the following questions:

> **1. Based on the evidence presented in this report, or your own experience, what do you consider to be the most urgent human rights issues which should be addressed in Scotland's National Action Plan for Human Rights?**
>
> **2. What specific and achievable actions do you consider would best address the concerns you identify in terms of question 1?**

Please use the form at the end of this section and send your responses to actionplan@scottishhumanrights.com or post it to us at Scottish Human Rights Commission, 4 Melville Street, Edinburgh, EH3 7NS

Table 1: Key Dates

Date	Action
May 2012	The UK Universal Periodic Review at the United Nations begins.
September 2012	The final report and recommendations of the UK's Universal Periodic Review is anticipated
October 2012	Publication of SHRC's Report and launch of a process of participation to shape Scotland's National Action Plan for Human Rights
December 2012	SHRC hosts a National InterAction to address the findings of the scoping exercise and facilitate negotiation of commitments to address them
Aiming for Spring 2013	A draft of Scotland's first National Action Plan for Human Rights is published for comment
Aiming for Summer 2013	Scotland's National Action Plan for Human Rights will be launched
June 2014	UK's progress on Universal Periodic Review recommendations is considered in a mid-point review. Progress on Scotland's National Action Plan for Human Rights to feed into this process.

PARTICIPATION FORM
SCOTLAND'S NATIONAL ACTION PLAN FOR HUMAN RIGHTS

Views are sought from all individuals and organisations who have experience or expertise which can help to shape Scotland's National Action Plan for Human Rights.

The Scottish Human Rights Commission will be collecting and analysing all responses receive before the **29 March 2013**. Early responses are encouraged.

Unless respondents request that their views remain confidential or anonymous all responses will appear online with the organisation or individual named as the respondent. Contact details for the respondent will not appear online.

- Please tick this box if you do not wish your response to appear online:
- Please tick this box if you are happy for your response to appear online but not your name or organisation's name to appear:
- Please tick this box if you would prefer we did not link to your website:

Name: _____
Organisation: (where appropriate) _____
Website: _____
Email address: _____
Contact telephone number: _____

This form can be returned by post to: Dr Alison Hosie, Scottish Human Rights Commission, 4 Melville Street, Edinburgh, EH3 7NS, or sent as an electronic or scanned document to actionplan@scottishhumanrights.com

You can also fill out this form online at www.scottishhumanrights.com/actionplan

---

1. Based on the evidence presented in the report *Getting it right? Human rights in Scotland*, or your own experience, what do you consider to be the most urgent human rights issues which should be addressed in Scotland's National Action Plan for Human Rights?

2. What specific and achievable actions do you consider would best address the concerns you identify in your response to question 1?

Thank you for sharing you experience or expertise and helping to shape Scotland's National Action Plan for Human Rights.

Contact point: Dr Alison Hosie / actionplan@scottishhumanrights.com / 0131 240 2989 / www.scottishhumanrights.com/actionplan / @scothumanrights

Bibliography

ACPOS 2011. Solicitor Access Data Report: See http://www.acpos.police.uk/Documents/News%20Releases/SolicitorAccessDataReport.pdf.

ADEBOWALE, M. 2004. Using the Law: Access to Environmental Justice: Barriers and Opportunities. London: Capacity Global Ltd.

ALLISON, E. 2009. Prison is no place for children. *The Guardian*.

BARNSDALE, L., MACRAE, R., MCIVOR, G., BROWN, A., ELEY, S., MALLOCH, M., MURRAY, C., POPHAM, F., PIACENTINI, L. & WALTERS, R. 2006. Evaluation of the Airdrie Sheriff Youth Court Pilot. Department of Applied Social Science, University of Stirling.

CARLOWAY, L. 2011. The Carloway Review Report and Recommendations. Edinburgh: Scottish Government.

CRAIG, G. 2011. Mapping human rights organisations in Scotland. Durham: University of Durham, School of Applied Social Sciences.

CULLEN, L. 2009. Review of Fatal Accident Inquiry Legislation: The Report. Edinburgh: Scottish Government.

DONNELLEY, R. R. 2009a. Report of the Scottish Civil Courts Review Vol 1. The Scottish Civil Courts Review: Edinburgh.

DONNELLEY, R. R. 2009b. Report of the Scottish Civil Courts Review Vol 2. The Scottish Civil Courts Review: Edinburgh.

DONNELLY, R. 2009. Do the Right Thing: A report for under 18s on Scottish Government priorities in response to the UK Concluding Observations 2008. The Scottish Government.

DRIVER, S., LAMB, M. & WILSON, C. 2010. Annotated Bibliography of Published and Grey Non-Legal Literature on Human Rights in Scotland since 2006. London: The Crucible Centre and Social Research Centre, ROEHAMPTON UNIVERSITY.

DTZ AND HERIOT-WATT UNIVERSITY 2007. Use of Antisocial Behaviour Orders in Scotland. DTZ and Heriot-Watt University.

FLANIGAN, D. 2011. Mapping the Law of Scotland in Relation to Economic, Social & Cultural Rights. Glasgow: Scottish Human Rights Commission.

GOODING, C. 2000. Disability Discrimination Act: from statute to practice. *Critical Social Policy* 20**,** 533-549.

JOINT COMMITTEE ON HUMAN RIGHTS 2009. Twenty-Fifth Report, Children's Rights. London: UK Parliament.

JUSTICE 2011. Response to the Carloway Review Consultation. London: JUSTICE.

JUSTICE DISABILITY STEERING GROUP 2009a. Final Report of Access to Justice Project. Edinburgh.

JUSTICE DISABILITY STEERING GROUP 2009b. Scottish Prison Service Involvement Event – HMP Cornton Vale. Edinburgh.

KEMP, V. 2010. Transforming legal aid: Access to criminal defence services. London: Legal Aervices Commission.

KIDNER, C. 2010. SPICe Briefing Children's Hearings (Scotland) Bill. Edinburgh: SPICe.

LAW SOCIETY OF SCOTLAND 2011. The Carloway Review Consultation, The Law Society of Scotland's Response. Edinburgh.

MCCALLUM, F. 2011. SPICeBriefing: Children and the Scottish Criminal Justice System. Edinburgh: Scottish Parliament.
MCCARTNEY, F. 2010a. Funding public law cases: problems and developments *Scottish Public Law Group Summer Conference.* Edinburgh.
MCCARTNEY, F. 2010b. Public Interest and Legal Aid. *Scots Law Times,* 32**,** 10.
MENTAL WELFARE COMMISSION FOR SCOTLAND 2008. Justice Denied: A summary of our investigation into the care and treatment of Ms A, . Edinburgh: Mental Welfare Commission for Scotland.
NORMAND, A. & WEBSTER, E. 2010. Mapping the Law of Scotland in relation to International Human Rights Treaties – Civil and Political Rights. Glasgow: University of Strathclyde.
RAITT, F. & FERGUSON, P. 2006. Re-configuring Scots criminal procedure – seismic shifts? *Edinburgh Law Review***,** 102-112.
REED, R. & MURDOCH, J. 2011. *Human Rights Law in Scotland,* Edinburgh, Bloomsbury Professional.
REID HOWIE ASSOCIATES 2006. Provision of Support to Victims and Witnesses of Crime in Scotland. Reid Howie Associates.
REID HOWIE ASSOCIATES 2007. Evaluation of The Pilot Domestic Abuse Court. Edinburgh: Reid Howie Associates.
ROSS, G. 2011. SPICe Briefing: Commissioner for Victims and Witnesses (Scotland) Bill. Edinburgh: Scottish Parliament.
ROULSTONE, A. 2003. The Legal Road to Rights? Disabling Premises, Obiter Dicta and the Disability Discrimination Act 1995. *Disability & Society,* 18**,** 117-131.
SCOLAG 2011a. Comments on Carloway: The interim response of the Scottish Legal Action Group on the recent Carloway Review. Glasgow: Scottish Legal Action Group.
SCOLAG 2011b. Response to the Carloway Review Consultation. Glasgow: Scottish Legal Action Group.
SCOTTISH EXECUTIVE 2003. Guidance On Interviewing Child Witnesses in Scotland. Edinburgh: Scottish Executive.
SCOTTISH GOVERNMENT 2012a. Consultation Report on the introduction of Financial Contributions in Criminal Legal Aid and Changes to Financial Eligibility. Edinburgh: Scottish Government.
SCOTTISH GOVERNMENT 2012b. Reforming Scots Criminal Law and Practice: The Carloway Report. Edinburgh: Scottish Government.
SHRC 2010. A human rights framework for the design and implementation of the proposed “Acknowledgement and Accountability Forum” and other remedies for historic child abuse in Scotland. Glasgow: SHRC.
SHRC 2011a. Response to Joint Committee on Human Rights Inquiry on Independent Living. Edinburgh.
SHRC 2011b. Submission to The Carloway Review Consultation Document. Edinburgh: SHRC.
SHRC 2012a. Scottish Human Rights Commission Submission to Scottish Government consultation on Legal Challenges to Decisions by Public Authorities Under the Public Participation Directive 2003/35/EC. Edinburgh: Scottish Human Rights Commission.
SHRC 2012b. Submission to the Justice Committee on the Scottish Justice Council and Criminal Legal Assistance Bill. Edinburgh: Scottish Human Rights Commission.

SIAA 2011. Response to: The Introduction of Financial Contributions in Criminal Legal Aid and Changes to Financial Eligibility Consultation. EdinburghLEGAL SERVICES COMMISSION 2010, Transforming legal aid: Access to criminal defence services: Scottish Independent Advocacy Alliance.
SMITH, R., TAIT, L., BALES, K., MCCONNELL, L. & RABAN-WILLIAMS, R. 2010. Mapping the Law of Scotland in Relation to International Human Rights Treaties: CAT & CPT. Newcastle: Northumbria Law School.
SPSO 2011. Ombudsman's Commentary: November 2011. Edinburgh: Scottish Public Services Ombudsman.
THE JOURNAL 2010. Committee calls for priority Access to Justice Bill: http://www.journalonline.co.uk/News/1008611.aspx#.UFD9j41lSvY. Edinburgh: The Law Society of Scotland.
TOGETHER 2011. Submission to the United Nations Universal Periodic Review, Thirteenth Session of the Working Group on the UPR Human Rights Council 2012. Edinburgh: Together - Scottish Alliance for Children's Rights.
TOGETHER 2012. State of Children's Rights in Scotland, 2012. Edinburgh: Together - Scottish Alliance for Children's Rights.
UN HUMAN RIGHTS COUNCIL 2012. Report of the Working Group on the Universal Periodic Review United Kingdom of Great Britain and Northern Ireland. Geneva: UN Human Rights Council.
UNCRC 2007. General Comment no. 10, children's rights in juvenile justice, UN Doc. CRC/C/GC/10, 25 April 2007. Geneva: UNCRC.
UNCRC 2008. Committee on the Rights of the Child, Concluding Observations: United Kingdom, 20 October 2008, CRC/C/GBR/CO/4,. Geneva: UNCRC.

Appendix 1: Prioritisation criteria to select Phase 2 issues for further study

Occurrence: Number of Phase 1 sources commenting on a particular issue in relation to the Right being examined.

Devolved competence: Allows scoring according to whether an issue is reserved and wholly beyond the powers of devolved government, partly within the powers of devolved government, or fully within the powers of devolved government to address.

Gravity: Score reflects the nature of the rights at stake:

Category 1.Qualified & limited Rights, Economic, Social & Cultural Rights, the Right to an Effective Remedy, Non-discrimination in the Exercise of Rights

Category 2.The Right to Life, Retrospective Criminal Law and Absolute Rights (Right to be Free from Torture& Inhumane and Degrading Treatment and Prohibition of Slavery).

Imprint: Score reflects the extent to which the issues raised in a particular category would affect a large number of people

Vulnerability/ Marginalisation: Score reflects the extent to which the issues raised affect vulnerable or marginalised groups/communities.

Added value: Scores reflect whether the issue contributes to the human rights culture of Scotland without duplicating research work already being done by other bodies (or within the clear remit of other organisations)?

Opportunity: Scores reflect whether the issue creates/ensures the establishment of positive, supportive interaction and understanding between the SHRC and institutions or individuals where previously this did not exist?

Endnotes

1 Further details on the methods and methodology of this scoping project can be found in the main report which can be accessed at: http://www.scottishhumanrights.com/actionplan

[2] The data sources collated and analysed in the first phase included:

An annotated bibliography of published and "grey" social scoping project. DRIVER, S., LAMB, M. & WILSON, C. 2010. Annotated Bibliography of Published and Grey Non-Legal Literature on Human Rights in Scotland since 2006. London: The Crucible Centre and Social Research Centre, ROEHAMPTON UNIVERSITY. See also Hosie & Lamb (2013 forthcoming) for further information on the methodology of this aspect of the research **http://journals.cambridge.org/action/displayAbstract?fromPage=online&aid=8685263**

Three legal literature reviews exploring specific Conventions/Acts in relation to the law in Scotland. (Convention against Torture, Inhumane and Degrading Treatment, International [CAT] SMITH, R., TAIT, L., BALES, K., MCCONNELL, L. & RABAN-WILLIAMS, R. 2010. Mapping the Law of Scotland in Relation to International Human Rights Treaties: CAT & CPT. Newcastle: Northumbria Law School, ibid., International Convention of Economic, Social & Cultural Rights [ICESCR] FLANIGAN, D. 2011. Mapping the Law of Scotland in Relation to Economic, Social & Cultural Rights. Glasgow: Scottish Human Rights Commission, ibid. and Human Rights Act/ European Convention of Human Rights] NORMAND, A. & WEBSTER, E. 2010. Mapping the Law of Scotland in relation to International Human Rights Treaties – Civil and Political Rights. Glasgow: University of Strathclyde.

An analysis of all individual enquiries received by SHRC and all general intelligence on systemic human rights issues in Scotland collated by SHRC (2008-2010). Whilst only those inquiries received between 2008 and 2010 were analysed as part of Phase one of this scoping project, the mapping project continued to collate and review inquiries during 2011 as part of Phase two. All responses to SHRC's 2009 national consultation. The original consultation document can be accessed at **http://www.scottishhumanrights.com/ourwork/publications/article/reportofthenationalconsultation** Initial Scottish data from the development of a "Human Rights Measurement Framework". The HRMF is a new tool for evaluating the human rights position of individuals and groups in England, Scotland and Wales. It was developed by the London School of Economics and Political Science, CASE and the British Institute for Human Rights within a partnership project of EHRC and SHRC. More information can be found here: **http://personal.lse.ac.uk/prechr/**

3 During this process SHRC also developed a Stakeholder Database of third Sector organisations involved to some degree in the promotion of human rights in Scotland. This database provides SHRC with a greater understanding of the range of groups and organisations which view part of their work to be promoting human rights in Scotland and provided a sampling framework for groups to approach to participate in the primary data collection of this scoping project. This database is available to the public [http://maps.scottishhumanrights.com/] For further information on this project see: CRAIG, G. 2011. Mapping human rights organisations in Scotland. Durham: University of Durham, School of Applied Social Sciences.

4Not all of the many issues identified within this framework could, however, be explored further in Phase 2. Accordingly, a prioritisation criteria filter was applied (see Appendix 1) in order to determine which would be explored in the focus groups. One other issues that arose from the scoping project that did not reach the threshold for prioritisation were:

Child Justice issues: pilot youth Courts, The Council of Europe Commissioner for Human Rights has also expressed concerns about the prosecution of children in adult Courts, and the need for the creation of designated youth Courts. See also BARNSDALE, L., MACRAE, R., MCIVOR, G., BROWN, A., ELEY, S., MALLOCH, M., MURRAY, C., POPHAM, F., PIACENTINI, L. & WALTERS, R. 2006. Evaluation of the Airdrie Sheriff Youth Court Pilot. Department of Applied Social Science, University of Stirling.

5Domestic Case Law

Allan, Petnr (1993) SCCR 686

Ambrose v Harris [2011] UKSC 43

Anderson v HM Advocate (1974) SLT 239

Authority Reporter v. S (2010) SLT 765

AXA General Insurance Limited and others v The Lord Advocate and others [2011] UKSC 46

Bowden and Whitton v Poor Sisters of Nazareth and Others (Scotland) [2008] UKHL 32

Cadder v HMA [2010] UKSC 43 (4326 October 2010)

Campbell v Vannet (1998) SCCR 207
Clark v McLean (1995) SLT 235
D & J Nicol v Dundee Harbour Trustees (1915) SC (HL) 7
Donaldson v HM Advocate (1983) SCCR 216
Forbes v Aberdeenshire 2010 CSOH 1
Fraser v Her Majesty's Advocate [2011] UKSC 24
Hoekstra v HM Advocate (No 2) (2000) JC 387
Holland v HMA UKPC D1: 2005 S.L.T. 563
Jude, Hodgson& Birnie v HMA (2011) SCCR 300
McGinty v Scottish Ministers [2010] CSOH5
Principal Reporter v. K (2010) UKSC 56
R (On the Application Of) v Secretary of State for Environment, Food And Rural Affairs [2003] EWCA Civ 1546
S v Millier 2001 SLT 531
Sinclair v HM Advocate [2005] SLT 552
SK v Paterson [2009] CSIH 76
Wilson v IBA (1979) SC 351

ECHR Case Law
Adetoro v UK (2010) Application No. 46834/06
Airey v Ireland (1979) Application No. 6289/73
Aksoy v Turkey (1996)Application No. 21987/93
Andronicou and Constantinou v Cyprus (1997) Application No. 25052/94
Asenov v Bulgaria (1998) Application No. 24760/94
BarbuAnghelescu v Romania (2004)Application No. 46430/99
Belgian Linguistics Case (No 2) (1968) 1 EHRR 252
Bonisch v Austria (1985) Application No. 8658/79
Brogan & Others v UK Application No. 11209/84
E & Others v UK (2002) Application No. 33218/96
Funke v France (1993) 16 ECHR 297
John Murray v UK 1996 Application No. 18731/91
Kerojarvi v Finland (1995) Application No.17506/90
Kelly and Others v UK (2001) Application No. 30054/96
Kopecký v Slovakia (2008) Application No. 44912/98
Ismail Abdurahman v UK Application No 40351/09
Martinez Sala and Others v Spain (2004) Application No. 58438/00
McCann v United Kingdom (A/324) (1996) 21EHRR97
McMichael v UK (1995) 20 EHRR 205
Munro v UK (1987) Application No. 10594/83
Osman v UK (1999) Application No. 23452/94
Panovits v Cyprus (2008) Application No. 4268/04
Pishchalnikov v Russia (2009) Application No. 7025/04
Rowe & Davis v UK (2000) Application No. 28901/95
Salduz v Turkey 2007 Application No. 36391/02
Salman v Turkey (2011) App. No. 35292/05
Scoppola v Italy (No.2) (2010) 51 EHRR 12
Shanaghan v UK (2001) Application No. 37715/97
Stanford v UK (1994) Application No. 16757/90
Steel and Morris v UK (1998) Application No. 68416/01
Stubbings and others v United Kingdom (1996) Application No. 22083/93
T v UK (1999) Application No. 24724/94
TalatTunç v. Turkey, no. 32432/96
Tas v Turkey (2001) 33 EHRR 15
Z and others v UK (2001) Application No. 29392/95
Zaichenko v Russia (2010) Application No. 39660/02

[66]Since 1999 the way the United Kingdom is run has been transformed by devolution - a process designed to decentralise government. Devolution essentially means the transfer of powers from the UK parliament in London to the Scottish Parliament and the Scottish Executive (officially referred to

as the Scottish Government since August 2007) in Edinburgh. The Scottish Parliament is a legislation-making body, passing bills in various areas of its many devolved responsibilities. The Scottish Parliament also has the power to raise or lower income tax (as changed by the Scotland Act 2012). Devolved areas of legislative competence to the Scottish Parliament include agriculture, forestry & fishing, education, environment, health, housing, justice, policing and courts, local government, fire service, economic development, some transport responsibilities and human rights. The UK government is responsible for national policy on other powers which have not been devolved - these are known as "reserved powers". These include the constitution, defence and national security, foreign policy, energy, immigration and nationality, social security and some transport responsibilities. Many themes in this scoping project engage equality legislation in relation to combating discrimination. Equal opportunities is a reserved matter (under Schedule 5 of the Scotland Act 1998 (Reservation - L2)), however, the reservation incorporates an exception in so far as the Scottish Government and the Scottish Parliament can impose certain duties which allows for scope for positive steps to be taken in relation to equality despite limitations on the powers available to the devolved administration.

7Section 149 of the Act.

8 *"The public sector equality duty requires equality to be considered in all the functions of public authorities, including decision-making, in the design of internal and external policies and in the delivery of services, and for these issues to be kept under review. The public sector equality duty is set out in sections 149-157 and schedules 18 and 19 of the Equality Act. The general equality duty covers all public authorities named or described in Schedule 19 – Part 3 of the Equality Act 2010 together with those listed in the Equality Act 2010 (Specification of Public Authorities) (Scotland) Order 2010. The specific duties were created by secondary legislation in the Equality Act 2010 (Specific Duties) (Scotland) Regulations 2012. These specific duties came into force on 27 May 2012. Under the specific duties each listed authority is required to assess and review policies and practices i.e. impact assess*". See http://www.equalityhumanrights.com/scotland/public-sector-equality-duty/non-statutory-guidance-for-scottish-public-authorities/ for further details.

[9] Lloyd and others v United Kingdom, 1 March 2005, para 134, "where deprivation of liberty is at stake, the interests of justice in principle call for legal representation."

[10] Benham v United Kingdom, (19380/92) 23 January 1995

11Mr Cadder was arrested by the police in connection with a serious assault and declined to have a solicitor present at his interview. After a tape recorded interview lasting thirty minutes Mr Cadder was charged with assault. Despite having no complaints of unfair treatment Mr Cadder argued that the lack of access to a lawyer was a violation of his right to a fair trial guaranteed in article 6 of the ECHR.

12[2010] UKSC 43 (4326 October 2010)

13Lord Hope stated that; "as a rule, access to a lawyer should be provided as from the first interrogation of a suspect by the police, unless it is demonstrated in the light of the particular circumstances of each case that there are compelling reasons to restrict this right". (para 35)

14http://www.legislation.gov.uk/uksi/2011/1739/contents/made

[15] Also: HMA v M [2011] UKSC 43 (SC) – questioning in the accused home.
HMA v G [2011] UKSC 43 (SC) – questioning while handcuffed in the home.
HM Advocate v P [2011] UKSC 44 (SC) – evidence discovered following questioning.
Jude (Raymond) v HM Advocate [2011] UKSC 55 (SC); McGowan (Procurator Fiscal) v B [2011] UKSC 54 (SC) – waiver of right to a lawyer.

16[2011] UKSC 43

17(2010) Application no. 39660/02

18Ambrose paragraph 64

19The case of Ismail Abdurahman v UK(Application no 40351/09) currently pending before the European Court is likely to further clarify the reach of article 6(1).

20http://www.copfs.gov.uk/News/Releases/2011/02/Crown-review-cases-after-Cadder-V-HMA

21The Carloway Review 2012, available at
http://www.scotland.gov.uk/About/Review/CarlowayReview

[22] SHRC is aware that this term has been controversially discussed in Scotland. For example during the passing of the Adult Support and Protection Act 2007. However, it is used for the sake of convenience. Elsewhere, SHRC has suggested that consideration be given as to whether this term should be used in Scots law and policy.

23Belgian Linguistics Case (No 2) (1968) 1 EHRR 252

24Criminal Legal Assistance (Duty Solicitors) (Scotland) Regulations 2011 reg 3, see generally Croissant v Germany (1993) 16 EHRR 135, at para 29 – From Carloway p155
25Under Article 5, paragraph 3 of the Convention:
"Everyone arrested or detained in accordance with the provisions of paragraph 1 (c) of this Article (art. 5-1-c) shall be brought promptly before a judge or other officer authorised by law to exercise judicial power and shall be entitled to trial within a reasonable time or to release pending trial. Release may be conditioned by guarantees to appear for trial."
26Brogan & Others v UK Application no. 11209/84, Tas v Turkey (2001) 33 EHRR 15 at para 86
27ACPOS Solicitor Access Data Report, 23 June 2011 cited in CARLOWAY, L. 2011. The Carloway Review Report and Recommendations. Edinburgh: Scottish Government.
28The Commission point to the example of a police officer at the roadside offering a suspect the opportunity to phone his lawyer (and even offering him a mobile phone to do so) before starting questioning. A similar practice is identified in New Zealand (s 23(1)(b) New Zealand Bill of Rights Act 1990; MOT v Noort, Police v Curran [1992] 3 NZLR 260).
29Scoppola v Italy (No.2) (2010) 51 EHRR 12 at para 135
30Pishchalnikov v Russia Application No, 7025/04 at para 77
31See TalatTunç v. Turkey, no. 32432/96
322011 SCCR 300
33Jude, Hodgson& Birnie v HMA [2010] UKSC 43 para 28
34ACPOS Solicitor Access Data Report at p 7, from Carloway
35To illustrate this, the Commission submission gives an example where “the ECtHR has held that where the detainee was illiterate and a non-native speaker of the Turkish language, the right to legal assistance was not sufficiently safeguarded by accepting a pro-forma waiver in Turkish marked by the accused’s fingerprint in signature”.(Salman v Turkey App. No. 35292/05, Judgement 5 April 2011)
36This should be in the form suggested by the ACPOS Manual of Guidance on Solicitor Access and provided both orally and in hard copy
37John Murray v UK 1996 Application no. 18731/91
38Ibid.
3920 April 2010 (no 46834/06) at para 47 - 49
40(ibid).
41Ibid
42Andronicou and Constantinou v Cyprus (1997) Application No. 25052/94
43Application No. 6289/73)
44In Steel and Morris v UK ((1998) Application No. 68416/01, from Reed & Murdoch p448
45A good example of this principle was seen in the case of Munro v UK (1987) Application No. 10594/83 where it was decided that a case of defamation did not require legal aid as the matter of reputation was not sufficiently serious. This contrasts to the situation in Steel and Morris v UK where the litigation was extremely complicated and lengthy and the applicants were in an unequal position as regards the opponents, a multi-national corporation (Reed & Murdoch p448). As such, the state need not ‘ensure total equality of arms... as long as each side is afforded a reasonable opportunity to present his or her case’ (Steel and Morris v UK).
46S v Miller (No 1) (2001 SC 977)
47The Convention Rights (Compliance) (Scotland) Act 2001
48Set up under the Legal Aid (Scotland) Act 1986
49s 14 of the Legal Aid (Scotland) Act 1986
50 As with all quotes in this scoping project, this reflects the views and perceptions of those with whom SHRC spoke, however, SHRC takes no responsibility for the content or views express.
51Concept expressed in D & J Nicol v Dundee Harbour Trustees (1915) SC (HL) 7
52http://www.jonathanmitchell.info/2010/06/13/standing-in-public-law-cases/#footnote_1_9328
53http://www.jonathanmitchell.info/2010/06/13/standing-in-public-law-cases/#footnote_1_9328
542010 CSOH 1
55Axa General Insurance v Lord Advocate [2011] UKSC 46
56Ibid para 63
[57] http://www.foe-scotland.org.uk/news121011
58See AXA General Insurance Limited and others v The Lord Advocate and others [2011] UKSC 46
59The UK has been a party to the Aarhus Convention since 1998.
60See in general UN Economic Commissin for Europe, Decision IV/9i on compliance by the United Kingdom of Great Britain and Northern Ireland with its obligations under the Convention, UN Doc.

ECE/MP.PP/2011/2/Add.1. Relevant communications include: ACCC/C/2008/27, UN. Doc. ECE/MP .PP/C.1/2010/6/Add.2, and ACCC/C/2008/33.
61Scottish Parliament, Petition PE1372, Access to Justice in Environmental Matters, http://www.scottish.parliament.uk/parliamentarybusiness/CurrentCommittees/40063.aspx
62See letter from the Coalition for Access to Justice for the Environment to the Compliance Committee, 19 June 2012, http://www.unece.org/fileadmin/DAM/env/pp/compliance/MoP4decisions/United_Kingdom/frCAJE_Response_19062012.pdf
63Fairburn J, Walker G, Mitchell G & Smith G (2005) Investigating Environmental Justice In Scotland: Links Between Measures Of Environmental Quality And Social Deprivation.Scottish and Northern Ireland Forum for Environmental Research (Scottish Executive, Scottish Environmental Protection Agency, Forestry Commission and Scottish Natural Heritage).
64Walker et al (2005) Industrial pollution and social deprivation: Evidence and complexity in evaluating and responding to environmental inequality. The International Journal of Justice and Sustainability (10)4; See also, Szasz, A. and Meuser, M. (1997) Environmental inequalities: literature review and proposals for new directions in research and theory, Current Sociology, 45(3) pp.100-120.
65Regulation 15 of the Civil Legal Aid (Scotland) Regulations 2002
66Civil Legal Aid (Scotland) Regulations 2002 Guidance Notes
67Bonisch v Austria (1985) Application No. 8658/79 paras 29-35
681995 Application no.17506/90
69Rowe & Davis v UK (2000) Application no. 28901/95 para 62
70The Criminal Justice and Licensing (Scotland) Act 2010 s.121(3) 2010 Act
71Ibid s.122(4)
72UKPC D1: 2005 S.L.T. 563
73Sinclair v HM Advocate [2005] SLT 552
74Crown Office Disclosure Manual para 19.1.10
[75]This section is heavily weighted towards the rights of those with disabilities in comparison to other protected groups, as that is what came out of the various data sources utilised in this scoping project.
[76] Once again please note SHRC is aware that this term has been controversially discussed in Scotland. For example during the passing of the Adult Support and Protection Act 2007. However, it is used for the sake of convenience. Elsewhere, SHRC has suggested that consideration be given as to whether this term should be used in Scots law and policy.
77Ratified by the UK in 2009.
78UN Convention on Rights of People with a Disability Article 1
79Ibid 13(1)
[80] See also GOODING, C. 2000. Disability Discrimination Act: from statute to practice. *Critical Social Policy* 20**,** 533-549. and ROULSTONE, A. 2003. The Legal Road to Rights? Disabling Premises, Obiter Dicta and the Disability Discrimination Act 1995. *Disability & Society,* 18**,** 117-131.
81http://www.scotland.gov.uk/Publications/2006/04/26124648/0
82http://www.witnessesinscotland.com/wis/CCC_FirstPage.jsp
83Vulnerable Witnesses (Scotland) Act 2004 s.24
84http://www.scotland.gov.uk/Topics/Justice/law/victims-witnesses/Appropriate-Adult
85Criminal Justice and Licensing Act 2010 s.53F
86Criminal Procedure (S) Act 1995 s.54
87Stanford v UK (1994) Application no. 16757/90
88s.271 of the Criminal Procedure (Scotland) Act 1995 (inserted by the Vulnerable Witnesses (Scotland) Act 2004)
89Mental Health (Care and Treatment)(Scotland) Act 2003 s 328
90Vulnerable Witnesses (Scotland) Act 2004
91http://www.copfs.gov.uk/news/releases/2010/10/our-commitments-victims-and-prosecution-witnesses
92Covenant on Civil and Political Rights Article 14(5)
93See for example Silver & Others v UK (1983) and http://ijrl.oxfordjournals.org/content/2/3/361.short
94(1995 Act s 106(3) and s 175(5))
95Donaldson v HM Advocate (1983) SCCR 216, LJ-C (Wheatley) at 218.
96Solemn cases are those which must go before a jury.
971995 Act s 109
981995 Act s 110(1)

99Those which do not go before a jury
1001995 Act s.111
1012010 Act s 5 (2) inserting s 111(2A) into the 1995 Act, Carloway 8.1.14
102Anderson v HM Advocate (1974) SLT 239, LJG (Emslie) at 240, Carloway (8.1.20)
103Hoekstra v HM Advocate (No 2) (2000) JC 387
104Allan, Petnr (1993) SCCR 686, dealing with an admittedly incompetent sentence imposed by the High Court on appeal
1051995 Act s 194C
106www. sccrc.org.uk/
1072010 Act s 7(4) introducing 1995 Act s 194DA
108section 194 C(2) of the 1995 Act (as inserted by Section 7(3) of the 2010 Act)
109http://www.scottishhumanrights.com/news/latestnews/article/cadderlegislationcomment
110[2011] UKSC 24
111 http://www.supremecourt.gov.uk/decided-cases/docs/UKSC_2009_0192_Judgment.pdf
112http://www.cjscotland.co.uk/2012/04/devolution-issues-human-rights-and-criminal-appeals-to-the-uk-supreme-court/
113http://www.scotland.gov.uk/Resource/Doc/254431/0120938.pdf
114See among others, Submission to the Advocate General for Scotland, Devolution issues and acts of the Lord Advocate, http://www.scottishhumanrights.com/news/latestnews/article/AGnews; Open Letter to MSPs – integrity of Scots Law, 26 October 2011, http://www.scottishhumanrights.com/news/latestnews/article/oct11openlettermsps.
115(1998) 24760/94
116Ibid para 102
117McCann v United Kingdom (A/324) (1996) 21EHRR97
118Whilst the list is not exhaustive these criteria give a good impression of the factors to be considered when analysing effective investigations.
119Halimi-Nedzibi v Austria the Committee against Torture stated that a delay of 15 months before initiating an investigation of allegations of torture was unreasonably long. Communication No. 8/1991: Austria. 30/11/93. UN Doc. CAT/C/11/D/8/1991, para. 13.5.
120Shanaghan v UK, unreported, Application No. 37715/97 judgment of 4th May 2001, para 88.
121BarbuAnghelescu v Romania, no. 46430/99, judgement of 5 October 2004, para. 66.
122Kelly and Others v UK, no. 30054/96, ECHR 2001-III, judgement of 4 May 2001, para. 114.
123These requirements originated in the procedural obligation under the Right to Life in Article 2 of the ECHR but are now applied to Article 3 investigations (originating Article 2 Case Law, McCann v United Kingdom (A/324) (1996) 21 E.H.R.R.97)
124Aksoy v Turkey (1996) Application No. 21987/93 para 98
125Fatal Accidents and Sudden Deaths Inquiry (Scotland) Act 1976
126http://www.scotland.gov.uk/Topics/Justice/law/fatalaccidentinquiries
127In illustrating this point, the review considered a sample of cases which were abandoned due to lack of evidence in the 2009-2010 period. 458 cases were marked as 'no further proceedings due to insufficient evidence' whilst 141 cases of sexual offences were halted due to lack of evidence. The review analysed these cases by considering whether there would have been sufficient evidence without corroboration and whether the cases would have proceeded under the English system of 'reasonable prospect of conviction'. The results are described as 'striking' and show that in the first case 268 of the 458 cases considered (58.5 per cent) would have been prosecuted and in the second 95 of the 141 cases examined (67 per cent) would have been prosecuted. Added to these findings the review could find no evidence that the requirement of corroboration prevented miscarriages of justice. Indeed the opposite was argued in that miscarriages of justice may be creating in certain situations with one example is cases involving only one witness. In such cases Carloway considers that the single witness should be allowed to argue his case and be judged on the sufficiency of his testimony.
128SHRC, "Response to the Carloway Review", 17 November 2011, http://www.scottishhumanrights.com/news/latestnews/article/carlowaynewsnov11
129Written Submission from Rape Crisis Scotland, Justice Committee, The Carloway Review, http://www.scottish.parliament.uk/S4_JusticeCommittee/Inquiries/Rape_Crisis_Scotland_written_submission.pdf; citing Scottish Government, Statistical Bulletin: Crime and Justice Series, criminal proceedings in Scotland 2010-2011, http://www.scotland.gov.uk/Publications/2011/12/12131605/2
130http://www.scotland.gov.uk/Publications/2012/07/4794
131http://www.bbc.co.uk/news/uk-scotland-scotland-politics-18686886

[132]http://www.echr.coe.int/NR/rdonlyres/8987C3BA-4F29-4D62-9C01-29FCC45B5A63/0/FICHES_Protection_enfance_EN.pdf
133Articles 3, 12 and 37 See also the UN Standard Minimum Rules for the Administration of Juvenile Justice (the "Beijing Rules" 1985) and the UN Rules for the Protection of Juveniles Deprived of their Liberty (the "Havana Rules" 1990).
134Guidance On Interviewing Child Witnesses in Scotland, Scottish Executive (2003)
135Children (Scotland) Act 1995
136Children's Hearings (Scotland) Act 2011 (s 199) and the Vulnerable Witnesses (Scotland) Act 2004 (s 1 inserting s 27 in the 1995 Act)
137Salduz v Turkey (cited above)
138T v UK (1999) Application no. 24724/94
1391999 Application no. 24724/94
140Panovits v Cyprus (2008) Application No. 4268/04
141s.15(4) 95 act
1421995 Act s 41
143section 41A inserted by section 52 of the Criminal Justice and Licensing (Scotland) Act 2011
1441995 Act s.42)
145The Beijing Rules, adopted by the United Nations in 1985, provide guidance to States for the protection of children's rights and respect for their needs in the development of separate and specialised systems of juvenile justice. Limited provisions concerning juvenile justice may be located in regional human rights treaties and in the International Covenant on Civil and Political Rights 1966. Similarly, the United Nations Standard Minimum Rules for the Treatment of Prisoners, adopted in 1955, set out certain basic requirements for all prisoners but do not address specific issues in relation to young offenders.
146Beijing Rules, Beijing Rule 4
[147] Section 52 Criminal Justice and Licensing (Scotland) Act 2010
148via the Antisocial Behaviour etc (Scotland) Act 2004
149The Children's Hearings (Scotland) Act 2011 s.191
150[2009] CSIH 76
151Section 93(2) – 95 Act
152See Authority Reporter v. S (2010) SLT 765 and Principal Reporter v. K (2010) UKSC 56
153The Children's Hearings (Scotland) Act 2011 s.93(2)
154(1995) 20 EHRR 205
1552001 SLT 531
[156] http://www.scotcourts.gov.uk/opinions/BURTON.html
157UN Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power (1985), adopted by the General Assembly resolution 40/34
158Paragraph 1 of the UN Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power (1985). The Declaration defines the notion of victim of crime and abuse of power and specifies victims' rights of access to justice and fair treatment, restitution, compensation and assistance. See also, Brudnicka
and Others v Poland No 54723/00, paragraphs 26 and Nolkenbockhoff v Germany, Judgement of 25 August 1987, Series A No 123, paragraph 33, both related to breaches of Articles 6(1).
159The Sexual Offences (Procedure and Evidence) (Scotland) Act 2002
160http://www.copfs.gov.uk/news/releases/2010/10/our-commitments-victims-and-prosecution-witnesses
161The Commissioner for Victims and Witnesses (Scotland) Bill
162http://www.scotland.gov.uk/Publications/2012/05/8645
163SHRC, Consultation submission to Victims and Witnesses Bill, July 2012, http://www.scottishhumanrights.com/ourwork/publications/article/victimsbill2012
164See for example oral evidence provided by the Commission to the Public Petitions Committee of the Scottish Parliament, 29 November 2012, http://www.scottish.parliament.uk/parliamentarybusiness/28862.aspx?r=6659&mode=pdf
165No-Fault Compensation Review Group - headed by law and medical ethics expert Professor Sheila McLean. See http://www.scotland.gov.uk/News/Releases/2011/02/18132915 for further details.
166Ibid.
167Ibid

168See for example, SHRC and Susan Kemp, Review of International Human Rights Law Relevant to the Proposed Acknowledgment and Accountability Forum for Childhood Abuse, 2010, p105-108
169Ibid
170Stubbings and others v United Kingdom, (1996) Application No. 22083/93, para 51.
171UN Basic Guidelines on the Right to a Remedy and Reparation for
Victims of Gross Violations of International Human Rights Law and Serious
Violations of International Humanitarian Law (the Van Boven Principles), IV, para. 7.
172Martinez Sala and Others v Spain (2004) Application No. 58438/00
173Prescription and Limitation (Scotland) Act 1973
174Prescription and Limitation (Scotland) Act 1973 s.19A
175See for example ZachariDuncalf et al, Time for Justice, Care Leavers' Association and Scottish Institute for Residential Child Care, 2009.
176Bowden and Whitton v Poor Sisters of Nazareth and Others (Scotland) [2008] UKHL 32
177Stubbings and others v United Kingdom, (1996) Application No. 22083/93, para 52.
178http://www.journalonline.co.uk/Magazine/56-11/1010433.aspx
179AXA General Insurance Limited and others v The Lord Advocate and others [2011] UKSC 46
180(2002) Application No. 33218/96
181See www.shrcinteraction.org