



University
of Glasgow

Leverick, F. (2011) *The right to legal assistance during detention.* Edinburgh Law Review, 15 (3). pp. 352-380. ISSN 1364-9809

<http://eprints.gla.ac.uk/54994/>

Deposited on: 01 May 2012

The Right to Legal Assistance During Detention

Fiona Leverick^{*}

- A. INTRODUCTION
- B. THE DEVELOPMENT OF THE RIGHT TO LEGAL ASSISTANCE
IN SCOTLAND
 - (1) The development of the pre-*Cadder* statutory position
 - (2) The pre-*Cadder* ECHR challenges
- C. *CADDER v HM ADVOCATE* AND THE SCOTTISH GOVERNMENT'S
RESPONSE
 - (1) *Cadder v HM Advocate*
 - (2) The Criminal Procedure (Legal Assistance, Detention and Appeals)
(Scotland) Act 2010
 - (3) The Carloway Review
- D. JUSTIFICATION OF THE RIGHT TO LEGAL ASSISTANCE
 - (1) Legal assistance is necessary to provide emotional support
 - (2) Legal assistance is necessary to protect suspects from ill-treatment
 - (3) Legal assistance is necessary to help suspects to understand or enforce the
right to silence
 - (a) Legal assistance is necessary to assist suspects in *understanding* the
right to silence
 - (b) Legal assistance is necessary to help suspects make informed
choices
 - (c) Legal assistance is necessary to help suspects *enforce* their rights
 - (4) Legal assistance is necessary to prevent wrongful conviction
- E. DISCUSSION

^{*} Senior Lecturer in Law, University of Glasgow. The author would like to thank Peter Duff, Lindsay Farmer and Findlay Stark for helpful comments on an earlier draft of this article.

A. INTRODUCTION

The right to legal assistance during police detention (subsequently the RLA) has been described as “one of the most important and fundamental rights of a citizen”¹ and has existed in common law jurisdictions such as the US,² Canada³ and England and Wales⁴ for some time. It may, therefore, have come as a surprise to those outside Scotland that it was not recognised here until very recently, in the now notorious case of *Cadder v HM Advocate*.⁵ In *Cadder*, the Supreme Court over-turned the ruling of the High Court of Justiciary in *HM Advocate v McLean*⁶ and held that it would breach Article 6 to admit in evidence admissions made during detention where a suspect had not been offered legal assistance. The Supreme Court concluded that UK courts were required to follow the unanimous decision to that effect of the Grand Chamber of the European Court of Human Rights in *Salduz v Turkey*.⁷ The Crown stated that, as a direct result of *Cadder*, it had been forced to abandon 867 prosecutions.⁸

In response to *Cadder*, the Scottish Government passed emergency legislation, the Criminal Procedure (Legal Assistance, Detention and Appeals) (Scotland) Act 2010, in which detained suspects were given the right to a private consultation with a solicitor before and at any time during questioning.⁹ The legislation has been criticised, as much for its rushed emergence as for the substantive content¹⁰ and may be amended following the Carloway Review, set up by the Government in the wake of *Cadder* to review the 2010 Act and the law of evidence more generally.¹¹ Alongside this, a body of case law is developing on the precise scope of *Cadder*, as the High Court deals with appeals brought on *Cadder* grounds.¹²

1 *R v Samuel* [1988] QB 615 at 630.

2 See the US Supreme Court’s decision in *Miranda v Arizona* 384 US 436 (1966).

3 Canadian Charter of Rights and Freedoms (1982) s 10.

4 Police and Criminal Evidence Act 1984 s 58(1).

5 [2010] UKSC 43, 2010 SLT 1125.

6 [2009] HCJAC 97, 2010 SLT 73.

7 (2009) 49 EHRR 19.

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

9 Criminal Procedure (Scotland) Act 1995 s 15A(3), as inserted by the Criminal Procedure (Legal Assistance, Detention and Appeals) (Scotland) Act 2010.

10 See e.g. F Stark, “The consequences of *Cadder*” (2011) 15 EdinLR 293.

11 Carloway Review, *Consultation Document* (2011) para 5, available at <http://www.scotland.gov.uk/About/CarlowayReview>.

12 To date, most have concerned the issue of whether the appellant is time barred from raising a *Cadder* argument (see e.g. *Ahmad v HM Advocate* [2011] HCJAC 16, 2011 SCCR 148; *Mitchell v HM Advocate* [2011] HCJAC 35). However, see also *Mullen v HM Advocate* [2011] HCJAC 55 (on admissions made prior to the start of formal questioning) and *Jude v HM Advocate* [2011] HCJAC 46 (on waiver).

At the time of writing, a number of issues are also awaiting determination by the Supreme Court, such as whether *Cadder* extends beyond detentions under section 14 of the Criminal Procedure (Scotland) Act 1995 and whether it extends to “fruits of the poisoned tree”, incriminating real evidence recovered as a result of information given by a detained suspect.¹³

The aim of this paper is not to engage in a detailed analysis of *Cadder* or of the 2010 Act, as this has been done elsewhere.¹⁴ Rather it attempts to engage with the wider issue of why a RLA might be justified. It will argue that there are four possible justifications: provision of emotional support; protection from ill-treatment; assistance in understanding or enforcing the right to silence (RTS), in relation to which there are a number of sub-justifications; and preventing wrongful conviction. Each of these has different implications for the nature and scope of the RLA that should be recognised. In legislating for a RLA, therefore, it is important to be clear about why it is being provided if the resulting legal provisions are to address the harm(s) that the legislative drafters wish to prevent. It will also be argued that the differing justifications of the RLA might explain why the Supreme Court and the High Court reached such different conclusions in *Cadder* and *McLean* respectively. In *McLean*, the High Court concluded that a RLA was not required because other protections – such as the corroboration requirement and the inadmissibility of admissions made as a result of coercion – made it unnecessary.¹⁵ In *Cadder*, Lord Rodger described such protections as “beside the point”.¹⁶ But if the purpose of a RLA was seen by the High Court as preventing wrongful conviction and by the Supreme Court as assisting the suspect in understanding or enforcing his RTS, then their radically differing conclusions may be more understandable.¹⁷

At the outset something needs to be said about terminology. A distinction can be made between a right to legal *advice* and a right to legal *assistance*. The former is narrower than the latter as a solicitor could play a wider role during detention than advising the suspect. He could, for example, act as a check on the accuracy of any information recorded by the police or a source of emotional support. For this reason, the latter term is preferred here. A distinction might also be made between a right to *legal assistance* and a right to the *assistance of*

13 Carloway Review, *Consultation Document* (n 11) para 20.

14 See the symposium on *Cadder* in a previous issue of this journal: (2011) 15 EdinLR 275.

15 See text accompanying nn 59-64.

16 See text accompanying nn 69-73.

17 Although as one of the possible rationales for the RTS is also the prevention of wrongful conviction (see text accompanying n 118), this is not a straightforward conclusion and will be discussed in due course (see text accompanying n 208).

a lawyer. The former could be provided by anyone, whereas the latter requires legal qualifications.¹⁸ Again, the wider definition will be adopted here.

B. THE DEVELOPMENT OF THE RIGHT TO LEGAL ASSISTANCE IN SCOTLAND

(1) The development of the pre-*Cadder* statutory position

As Lord Rodger provides a detailed historical account in *Cadder*,¹⁹ the history of the pre-*Cadder* legislative position will be traced only briefly here. In the early 19th century, detention for police questioning as we now know it played no role in the Scottish criminal justice system. The professional police force was in its infancy and the investigation of crime was the responsibility of the local sheriff who had the power to bring suspects to court for judicial examination.²⁰ This took place in private without legal representation.²¹ Around the mid 19th century, the responsibility for examining suspects passed to the procurator fiscal and the sheriff's role shifted to ensuring that procedure was followed and suspects were informed of their RTS.²² Towards the end of the century, section 17 of the Criminal Procedure (Scotland) Act 1887 introduced the right to consult with a "law agent" and to have that agent present during judicial examination.²³

By the turn of the century the emergence of an organised national police force meant that the police could play a greater role in questioning suspects. Once a suspect had been arrested and charged, any formal questioning had to take place at judicial examination,²⁴ although this began to be used less once the Criminal Evidence Act 1898 gave the accused the right to give evidence at trial.²⁵ Statements made in answer to the charge itself were generally admissible,²⁶ as were statements offered voluntarily, if a test of fairness to the accused was satisfied.²⁷ Access to legal advice was one factor taken into account in determining

18 R Pattenden and L Skynns, "Choice, privacy and publicly funded advice at police stations" (2010) 73 MLR 349 at 357.

19 *Cadder* at paras 74-92.

20 Para 74.

21 G Gordon, "The admissibility of answers to police questioning in Scotland", in P R Glazebrook (ed), *Reshaping the Criminal Law: Essays in Honour of Glanville Williams* (1978) 317 at 319.

22 Gordon (n 21) at 318.

23 The right was not in the original text of the Bill, but was inserted by the House of Lords. The rationale for doing so seemed to relate both to providing emotional support and to ensuring that suspects understood the RTS and made choices accordingly (see HL Deb 12 Jul 1887, cols 593-610).

24 *HM Advocate v Aitken* 1926 JC 83 at 86.

25 Gordon (n 21) at 420.

26 *HM Advocate v Aitken* 1926 JC 83 at 86.

27 *HM Advocate v Cunningham* 1939 JC 61 at 66.

fairness.²⁸ Police questioning prior to charge was not forbidden, but there was no legal basis for detaining people who had not been arrested.²⁹ However, as non-arrested persons had no right to legal advice,³⁰ most were unaware of this and submitted to questioning voluntarily.³¹ Admissions made in these circumstances were admissible provided they were fairly obtained.³²

It was against this background that the Thomson Committee was established, the remit of which was to examine the law on pre-trial and trial procedures in Scotland.³³ The Committee recommended the introduction of a power to detain and question suspects for up to six hours³⁴ and that detainees should be able to inform a solicitor of their detention.³⁵ A right to an interview with a solicitor was canvassed³⁶ but rejected because “[t]he purpose of the interrogation is to obtain from the suspect such information as he may possess regarding the offence, and this purpose might be defeated by the participation of his solicitor”.³⁷ The Committee’s proposals were enacted in sections 2 and 3 of the Criminal Justice (Scotland) Act 1980 and later consolidated as sections 14 and 15 of the Criminal Procedure (Scotland) Act 1995. This left suspects with “noticeably weaker”³⁸ protection than they had under the 1887 Act and, shortly after the 1980 Act came into force, a Royal Commission was critical of similar provisions in England and Wales,³⁹ leading to a RLA being introduced there over 25 years ago.⁴⁰

The statutory position immediately prior to *Cadder*, then, was that suspects could be detained for police questioning for up to six hours.⁴¹ They had no RLA, but could inform a solicitor of their detention.⁴² Other than being obliged to give their name and address,⁴³ suspects had (and still have) the right to remain silent. No adverse inferences could permissibly be drawn from silence⁴⁴ but any answers given could be used in evidence provided they were fairly obtained.

28 *Law v McNicol* 1965 JC 32 at 39.

29 Thomson Committee, *Criminal Procedure in Scotland: Second Report* (Cmnd 6218: 1975) para 3.10.

30 *Thompson v HM Advocate* 1968 JC 61 at 65.

31 *Cadder* at para 83 per Lord Rodger.

32 *Hartley v HM Advocate* 1979 SLT 26 at 28 per Lord Avonside.

33 Thomson Committee (n 29) para 1.01.

34 Para 3.25.

35 Para 5.08.

36 See paras 5.08 and 7.16.

37 Para 7.16.

38 *Cadder* at para 88 per Lord Rodger.

39 Royal Commission on Criminal Procedure, *The Investigation and Prosecution of Criminal Offences in England and Wales: The Law and Procedure* (Cmnd 8092: 1981) para 4.89.

40 Police and Criminal Evidence Act 1984 s 58(1).

41 Criminal Procedure (Scotland) Act 1995 s 14(2).

42 s 15(1).

43 And certain other information which might be necessary to establish identity: s 14(9).

44 *Larkin v HM Advocate* 2005 SLT 1087 at para 10.

Once suspects were arrested and charged, their statements were (and still are) inadmissible, unless made in reply to the charge itself or made entirely voluntarily, and they gained the right to a private interview with a solicitor prior to first court appearance.⁴⁵

(2) The pre-*Cadder* ECHR challenges

Prior to *Cadder*, the compatibility of sections 14 and 15 with the ECHR had been challenged in a number of cases. At this point it is necessary to say something about the relationship between the RLA and remedies for its breach. There are several ways in which breaches could be remedied,⁴⁶ but in practice the remedy sought has been one of seeking to exclude from trial any admissions made. Thus the route to challenging the ECHR compatibility of sections 14 and 15 has been to argue that evidence obtained from a suspect who has not been offered access to legal advice should be inadmissible and to lead such evidence at trial would breach article 6.⁴⁷

The incorporation of the ECHR into Scots law via the Scotland Act 1998 and the Human Rights Act 1998 brought a rush of challenges of this nature, the first being *HM Advocate v Robb*.⁴⁸ In *Robb*, a devolution minute was raised on the basis that the use of admissions made without legal assistance (the minuter had repeatedly asked to consult a solicitor) would violate article 6. Lord Penrose declined to hold that the use of evidence obtained in this way would automatically breach article 6, stating that the issue should be determined in the context of the fairness of proceedings as a whole, which cannot be determined until the trial is underway.⁴⁹

At around the same time came *Paton v Ritchie*.⁵⁰ Unlike in *Robb*, the minuter had not asked for a solicitor but nonetheless raised a devolution minute claiming that article 6 had been infringed because he was not offered one.⁵¹ Once again, the High Court stated that the question was whether it would be possible for a fair trial to take place if a statement made in these circumstances was admitted. They concluded that it would, pointing to a number of other protections,⁵²

⁴⁵ Criminal Procedure (Scotland) Act 1995 s 17(2).

⁴⁶ Outlined in A Sanders, "Rights, remedies, and the Police and Criminal Evidence Act" [1988] Crim LR 802.

⁴⁷ Specifically article 6(3)(c) (the right to legal assistance when charged with a criminal offence) read in conjunction with article 6(1) (the right to a fair hearing).

⁴⁸ 2000 JC 127.

⁴⁹ At 132.

⁵⁰ 2000 JC 271.

⁵¹ At 274.

⁵² At 275-276.

including the fact that no adverse inferences could be drawn from silence during questioning and the fact that statements made without a caution are usually inadmissible.⁵³

Paton v Ritchie was endorsed by a Full Bench in *Dickson v HM Advocate*.⁵⁴ *Dickson* was an appeal against conviction on the basis that admissions made to customs officers without a solicitor present – the appellant had repeatedly asked for one – should not have been admitted. The appeal was refused. Lord Cameron pointed to the “precise and impeccable”⁵⁵ directions given to the jury that they should disregard admissions that had been unfairly obtained. It was therefore impossible to conclude that the appellant had been denied a fair trial.⁵⁶

The issue thus seemed relatively settled. The next significant development occurred eight years later in *Salduz v Turkey*,⁵⁷ a unanimous decision of the Grand Chamber of the European Court of Human Rights. In *Salduz*, the applicant had been convicted on the basis of statements he made in custody without legal assistance. The Grand Chamber held that Article 6(1) had been violated. The most significant passage of the judgment was the following, where it was stated that Article 6(1) requires that:⁵⁸

... 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 the case that there are compelling reasons to restrict this right. Even where compelling reasons may exceptionally justify denial of access to a lawyer, such restriction . . . must not unduly prejudice the rights of the accused under Article 6. The rights of the defence will in principle be irretrievably prejudiced when incriminating statements made during police interrogation without access to a lawyer are used for a conviction.

In the first case to come before the HCJ following *Salduz*, however, the court preserved the status quo. That was *HM Advocate v McLean*,⁵⁹ where the issue was considered by a Full Bench of seven judges.⁶⁰ The court held once again that reliance on statements obtained in the absence of legal assistance would not automatically render a trial unfair. It offered two alternative lines of argument.⁶¹

53 But not always: see e.g. *Pennyquick v Lees* 1992 SLT 763.

54 2001 JC 203.

55 Para 24.

56 Para 25.

57 (2009) 49 EHRR 19.

58 Para 55.

59 [2009] HCJAC 97, 2010 SLT 73.

60 Given that the court might have had to overrule *Dickson v HM Advocate* 2001 JC 203.

61 Set out more fully in F Leverick, “The right to legal advice during detention: *HM Advocate v McLean*” (2010) 14 EdinLR 300.

First, the passage from *Salduz* above could be interpreted to mean that, if sufficient alternative protections were present, as they were in Scots law, a RLA was not an absolute requirement of article 6.⁶² Such protections included the recording of interviews; the inadmissibility of statements obtained through coercion; the corroboration requirement; the fact that adverse inferences cannot be drawn from silence; and the limited duration of detention.⁶³ Secondly, even if even if this interpretation was incorrect, the court was not required to follow *Salduz*.⁶⁴

C. *CADDER v HM ADVOCATE* AND THE SCOTTISH GOVERNMENT'S RESPONSE

(1) *Cadder v HM Advocate*

McLean represented the high watermark of the High Court's resistance to recognising a RLA and its effect was short-lived. In *Cadder*, which was in effect an appeal against *McLean*,⁶⁵ seven justices of the Supreme Court unanimously held that *McLean* was not good law in the light of *Salduz*.⁶⁶

Lords Hope and Rodger, the two Scottish justices, delivered the leading speeches. Both were dismissive of the High Court's reasoning in *McLean*.⁶⁷ Lord Hope described the High Court's interpretation of *Salduz* as untenable.⁶⁸ Lord Rodger, as noted earlier, described the protections listed in *McLean* as "beside the point".⁶⁹ The main purpose of legal advice, he stated, is to assist the suspect in protecting his right against self-incrimination.⁷⁰ The provisions in sections 14 and 15 were deliberately designed to deny access to a lawyer in the hope that suspects would be more likely to incriminate themselves⁷¹ and thus there was "not the remotest chance"⁷² that the European Court would find Scots law compatible with Article 6.⁷³

62 *McLean* at para 24.

63 Para 27.

64 Para 31. For discussion of the court's reasoning, see Leverick (n 61) at 303.

65 *Cadder* at para 1.

66 Para 64.

67 For a defence of *McLean*, written in the wake of *Cadder*, see J McCluskey, "Supreme error" (2011) 15 EdinLR 276.

68 Para 40.

69 Para 66.

70 Para 70.

71 See Thomson Committee, *Criminal Procedure in Scotland* (n 29) para 7.16.

72 Para 93.

73 For discussion of *Cadder*, see F Leverick, "The Supreme Court strikes back" (2011) 15 EdinLR 287.

(2) The Criminal Procedure (Legal Assistance, Detention and Appeals) (Scotland) Act 2010

Within a day of the judgment in *Cadder* being handed down, the Scottish Parliament had, using the Emergency Bill procedure,⁷⁴ passed the Criminal Procedure (Legal Assistance, Detention and Appeals) (Scotland) Act 2010, an Act intended to bring Scots law in line with the ECHR. Discussion of the legislative process lies outwith the scope of this article: suffice to say the Scottish Government has been extensively criticised for reacting so hastily when the “emergency”⁷⁵ created by *Cadder* did not exist.⁷⁶

The 2010 Act inserted a new section 15A into the Criminal Procedure (Scotland) Act 1995 which gives suspects “the right to have a private consultation with a solicitor (a) before any questioning... begins, and (b) at any other time during such questioning”.⁷⁷ Consultation may be by “such means as may be appropriate in the circumstances, and includes, for example, consultation by means of telephone”.⁷⁸ Suspects must be informed of this right upon arrival in the police station.⁷⁹ Where a suspect requests legal assistance, questioning must be delayed until he receives it, except in “exceptional circumstances”.⁸⁰ The maximum period for which suspects can be detained was increased from six to twelve hours⁸¹ and can be extended to 24 hours by a custody review officer if certain conditions are satisfied.⁸²

Various other changes to the law were made in the 2010 Act which, while controversial, lie outwith the scope of this article.⁸³ Here it is sufficient to note that, at the time of writing, suspects are entitled to consult with a solicitor prior to and during questioning (save in exceptional circumstances), but this does not have to occur face to face. The right is merely to *a consultation*. It does not extend to the *presence* of a solicitor during questioning,⁸⁴ although it may be that in practice it is treated as such.

74 Standing Orders of the Scottish Parliament, 4th edn (2011) rule 9.21.

75 Scottish Parliament, Official Report col 29553 (27 Oct 2010).

76 See Stark (n 10) at 294.

77 s 15A(3).

78 s 15A(5).

79 s 15A(6).

80 s 15A(8).

81 s 14(2), as amended.

82 Set out in ss 14A(4)(a)-(c).

83 See Stark (n 10) for discussion.

84 Despite the Justice Secretary giving the impression that it did: Scottish Parliament, Official Report col 29673 (27 Oct 2010).

(3) The Carloway Review

The 2010 Act does not represent the end of the story. On the day the judgment in *Cadder* was delivered, the Scottish Government announced that Lord Carloway would undertake a review of the 2010 Act and “wider issues regarding criminal law and practice”.⁸⁵ These include “the requirement for corroboration and the suspect’s right to silence”.⁸⁶ At the time of writing, a consultation document had been issued, with a closing date for responses of June 2011.

D. JUSTIFICATION OF THE RIGHT TO LEGAL ASSISTANCE

It is surprising how little discussion there has been of the justifications that can be put forward for a RLA.⁸⁷ As such, this section considers the various justifications that might be offered. A number of alternative, but often inter-related, rationales exist: the provision of emotional support; protection from ill-treatment; assistance in understanding or enforcing the RTS; and preventing wrongful conviction.

Before considering these in detail, three preliminary points can be made. First, each justification has different implications for the nature of the RLA that should be provided. The RLA potentially has many different dimensions. It can differ in terms of the timing of the assistance, which might be required from the first moment the suspect is taken into custody,⁸⁸ and might extend throughout the interview. It can differ in terms of whether the physical presence of a legal adviser is necessary or whether advice could be satisfactorily provided by, for example, telephone (or some other non-face to face means such as video link).⁸⁹ A further dimension is whether advice must be provided by a legally qualified adviser or whether a paralegal or other non-legally qualified person might suffice.⁹⁰

Secondly, it is argued here that the main justifications for the RLA are instrumental ones. Any element of the criminal process can be justified in either

85 Carloway Review, *Consultation Document* (n 11) para 5.

86 Para 7.

87 Some are touched on in P Roberts and A Zuckerman, *Criminal Evidence*, 2nd edn (2010) 519; I Dennis, *The Law of Evidence*, 4th edn (2010) 243-244; L Skinns, “The right to legal advice in the police station: past, present and future” [2011] Crim LR 19 at 35-36.

88 Or even prior to that: Carloway Review, *Consultation Document* (n 11) para 7.

89 It has been estimated that, in England and Wales, where a statutory RLA exists, advice is provided over the telephone in one fifth of cases: Pattenden and Skinns (n 18) at 352. In Scotland, Lord Carloway (n 11) estimates that “the vast majority (in excess of three quarters) of consultations with solicitors are by way of short telephone conversations” (para 3).

90 Carloway Review, *Consultation Document* (n 11) para 5. In England and Wales advice can be provided by non-solicitors provided they are accredited or in training; see E Cape, *Defending Suspects at Police Stations*, 5th edn (2006) ch 1.

instrumental or intrinsic terms.⁹¹ Intrinsic justifications of the RLA would focus on its value in, for example, giving respect to a suspect's autonomy and dignity. Instrumental justifications relate to securing other outcomes, such as the factual accuracy of the verdict. It is not impossible to make a case for the RLA in intrinsic terms. It could be argued, for example, that providing legal assistance to a suspect who desires it is important because it treats him with dignity and recognises that he is an important participant in the criminal process whose choices deserve to be accorded respect. However, the most convincing arguments for its recognition are found in its instrumental significance, as will be demonstrated below. This also means that in terms of assessing the persuasiveness of each justification, regard must be had to the extent to which the RLA is likely to be effective in securing these secondary outcomes.

Thirdly, it is not suggested here that there is a single "correct" justification for the RLA. In *Cadder*, Lords Rodger and Hope each relied upon a single justification of the RLA⁹² but, as the following discussion will show, there are several ways in which it could be justified and, while some are more convincing than others, none is entirely without merit. Although the persuasiveness of the various justifications will be assessed, the primary aim of this paper is not to identify the "best" justification; it is to show that different justifications have different implications for the RLA's scope. If the RLA is justified on more than one basis, this is not problematic; it simply means that there is a need to ensure that the assistance provided meets all of the concerns identified.

The following sections, then, describe each of the justifications, discuss their implications for the scope of the RLA and assess whether they are convincing or whether there might be more effective ways of meeting the relevant concern.

(1) Legal assistance is necessary to provide emotional support

One possible justification of the RLA is that it is necessary to provide emotional support and reassurance to suspects who find themselves in the potentially frightening atmosphere of police custody.⁹³ As Skynns puts it, "police custody areas are pressured environments and detainees, who often have complex needs, bear the brunt of long periods in stark conditions (e.g. in solitary confinement)

91 See how Ian Dennis classifies the justifications for the right to confront witnesses in "The right to confront witnesses: meanings, myths and human rights" [2010] Crim LR 255. He uses the term "non-consequentialist" instead of intrinsic but intrinsic is preferred here.

92 Albeit a slightly different one. The Scottish Government, in introducing the post-*Cadder* legislation, said nothing about the RLA's underlying purpose: see text accompanying n 205.

93 Roberts and Zuckerman, *Criminal Evidence* (n 87) 519; Sanders (n 46) at 807.

contemplating the uncertainties of what lies ahead. Undoubtedly, this must be frightening, especially for the inexperienced or the vulnerable".⁹⁴ In this context, the solicitor may be a reassuring presence. A solicitor may also be able to provide reassurance to a suspect's family about his wellbeing.⁹⁵

If this is the primary justification of the RLA then in terms of timing it suggests that a solicitor should become involved at the earliest possible opportunity as this is when a suspect is likely to be at his most frightened and disoriented.⁹⁶ It also suggests, however, that the right may be a continuing one especially if a suspect is held in isolation as his fears are likely to grow the longer this continues. In terms of nature, the implications are less clear. Does a justification based on emotional reassurance imply a need for face to face contact,⁹⁷ or would it be possible to provide reassurance over the telephone? Certainly the physical presence of a solicitor is likely to be more effective than telephone contact or video link, although that is not to say the latter could not go some way to reassuring frightened suspects. If the rationale includes the wider concern of reassuring a suspect's family of his wellbeing, then physical presence (or at the very least a video link by which the condition of the suspect can be assessed) is probably required.⁹⁸

Does the need to provide emotional support to suspects constitute a convincing justification for the RLA? One might take the view that this is not the concern of the legal system. Even under the 2010 Act, detention for questioning can only last for a maximum of 24 hours and while a suspect might feel distressed during this time, it will not last for long and—in the absence of ill-treatment⁹⁹—is unlikely to have any lasting psychological effects. Even if one accepts that preventing psychological distress is a relevant concern, it does not ground a right to *legal* assistance. There appears no good reason why emotional support needs to be provided by a lawyer—it could be provided by a supporter independent of the police with some legal knowledge about police powers. There might be an argument to say that a suspect will feel better if he reassured by a lawyer, as a lawyer's reassurances may carry more weight in his eyes. But as a justification for a right to *legal* assistance it is peripheral at best.

94 L Skinns, " 'I'm a detainee get me out of here': predictors of access to custodial legal advice in public and privatized police custody areas" (2009) 49 BJ Crim 399 at 412.

95 Sanders (n 46) at 807.

96 As Lord Rodger points out in *Cadder* at para 70.

97 As suggested by Skinns (n 87) at 36.

98 Although here this justification starts to overlap with that of providing protection against police brutality or ill-treatment discussed below.

99 Which is considered in the next section.

(2) Legal assistance is necessary to protect suspects from ill-treatment

A second possible justification of the RLA is that it is necessary to protect against police brutality or other types of malpractice during detention.¹⁰⁰ The concern ranges from, at one extreme, physical brutality (whether inside or outside the interview room) to, more subtly, coercive tactics used to obtain incriminating evidence, such as the offering of incentives in exchange for an admission.¹⁰¹ The role of the solicitor here is two-fold: first, his presence may deter the police from meting out ill-treatment in the first place¹⁰² and, secondly, if ill-treatment does nonetheless occur, a solicitor can act as an independent witness.¹⁰³ A solicitor can also check whether a suspect is medically fit to be interviewed.¹⁰⁴

In terms of timing, this justification implies that legal assistance should commence upon first admission into custody¹⁰⁵ (or even before – the potential for ill-treatment exists in the journey to the police station for example) and lasts for the duration of detention. In terms of scope, this is one occasion where physical presence is required. Protection from ill-treatment cannot be secured by telephone.¹⁰⁶

Is this a convincing justification? It might be questioned whether it has any relevance in modern times, when police interviews are routinely recorded. Certainly the tape recording of interviews makes ill-treatment less of a concern.¹⁰⁷ It might also be said that whereas a culture of police brutality towards suspects once existed, this is not the case today.¹⁰⁸ On the other hand, this still leaves the possibility of other coercive pressures being applied. Tape recording is an ineffective means of guarding against this as it does not capture facial or bodily gestures¹⁰⁹ and only captures events that occur while the recorder is running.

100 Dennis (n 87) 244; P Pleasance et al, “The justice lottery? Police station advice 25 years on from PACE” [2011] Crim LR 3 at 5.

101 Warren CJ in *Miranda v Arizona* 384 US 436, 470 (1966). At this latter end of the scale this justification starts to overlap with the prevention of wrongful conviction but the concern here is with protecting the physical and mental integrity of suspects rather than the more instrumental concern of preventing false confessions.

102 C Brants, “The reluctant Dutch response to *Salduz*” (2011) 15 EdinLR 298 at 305.

103 D Dixon, “Common sense, legal advice and the right of silence” [1991] PL 233 at 239.

104 *Skinns* (n 87) at 36.

105 See Lord Rodger in *Cadder* at para 70.

106 *Skinns* (n 87) at 36.

107 Warren CJ in *Miranda* at 470.

108 S Soukara et al, “What really happens in police interviews of suspects? Tactics and confessions” (2009) 15 *Psychology, Crime and Law* 493; P Softley, *Police Interrogation: An Observational Study in Four Police Stations* (Royal Commission on Criminal Procedure Research Study No 4, 1980).

109 Roberts and Zuckerman, *Criminal Evidence* (n 87) 519.

Does this concern effectively ground a RLA though? It may be that it can better be met by video recording interviews,¹¹⁰ something that is done in the vast majority of serious cases in Scotland.¹¹¹ The Council of Europe considered video recording to have significantly reduced the amount of ill-treatment alleged by suspects in the Republic of Ireland.¹¹² Ill-treatment outside the interview room may be more effectively prevented by CCTV cameras in police stations.¹¹³ It must be said though that recording is not foolproof: tapes can be lost or cameras can malfunction and thus the argument that a solicitor can act as an independent witness to ill-treatment has at least some force. However, even if the presence of an observer is thought necessary, there is no obvious need for legal qualification and thus the prevention of ill treatment is not the most convincing justification of a right to *legal* assistance, other than in the sense that, if a lawyer is attending anyway, it makes economic sense for him to fulfil this function as well as any legal one.

(3) Legal assistance is necessary to help suspects to understand or enforce the right to silence

A third possible justification for the RLA is that it is necessary in assisting suspects to understand the RTS (in a jurisdiction that still recognises an unqualified right) or, in a jurisdiction that has placed qualifications on the right, understanding the nature of these and their implications.¹¹⁴ In the US and Canada, the RTS and the RLA are seen as inextricably linked: “in the context of custodial interrogations, *you can't have one without the other*”.¹¹⁵

The RTS justification of the RLA can be split into three separate sub-justifications: (a) assisting suspects in *understanding* the RTS (whether full or

110 S J Schulhofer, “Miranda’s practical effect: substantial benefits and vanishingly small social costs” (1996) 90 *Northwestern University LR* 500 at 556. This is assuming that the camera focuses on the interview room as a whole and not just the suspect: S M Kassin et al, “Police-induced confessions: risk factors and recommendations” (2010) 34 *Law and Human Behavior* 3 at 27.

111 Information obtained from serving police officers at Carloway Review (n 11) seminars, 3 May 2011 (Aberdeen) and 10 May 2011 (Glasgow).

112 Council of Europe, *Report to the Government of Ireland on the visit to Ireland carried out by the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT)* (2007) para 19.

113 Another aspect of the criminal justice system in the Republic of Ireland commented upon favourably by the Council of Europe (n 112) para 20. Although as Pattenden and Skinnis point out (n 18), care must be taken not to intrude on the privacy of conversations between suspects and legal advisers (at 370).

114 A similar but slightly broader argument might be that legal assistance is important to facilitate participation (by facilitating comprehension of language and processes and ensuring suspects are not held to decisions made on the basis of misunderstandings).

115 *R v Sinclair* [2010] 2 SCR 310 at para 124 per Fish, Abella and LeBel JJ (minority judgment, emphasis in original). See also *Miranda* at 469 per Warren CJ.

qualified); (b) assisting suspects in reaching a conclusion about their best interests (given the jurisdiction's RTS provisions and the circumstances of the case); and (c) helping suspects to *enforce* their rights in the conditions of the interview room.¹¹⁶ Each of these has different implications for the nature of the RLA that should be recognised, as is clear from *R v Sinclair*,¹¹⁷ where the majority and minority of the Canadian Supreme Court reached different conclusions about the proper scope of the RLA as a result of their different rationales. All three versions of the justification are premised on the notion that there is something valuable about the RTS. Various rationales have been proposed for why a RTS should be recognised. Roberts and Zuckerman divide these into three categories: intrinsic rationales (such as the protection of privacy and the prevention of cruel choices); conceptualist rationales (such as adversary procedure and the presumption of innocence), and instrumental rationales (essentially the prevention of wrongful conviction).¹¹⁸ The instrumental rationale is considered in the next section,¹¹⁹ but if neither of the other two rationales is persuasive¹²⁰ then the RTS justification itself becomes less convincing.

(a) Legal assistance is necessary to assist suspects in understanding the right to silence

The first version of the RTS justification is that a RLA is necessary to promote understanding of the RTS¹²¹ or, in a jurisdiction that has qualified the RTS,¹²² understanding of the nature of the qualification by, for example, explaining adverse inferences in terms that an ordinary person can understand. In *Sinclair*, the Canadian Supreme Court referred to this as the “informational component”¹²³ of the RLA.

A RLA based on this justification would not necessarily require face to face contact between suspect and legal adviser, it would be perfectly possible to achieve by telephone. In terms of timing, it would not ground a RLA immediately

116 These distinctions are partially recognised in R Pattenden, “Right to counsel at the police station: United Kingdom and Canada” (2011) 15 *International Journal of Evidence and Proof* 70 but she distinguishes only between ensuring informed choice and supporting the suspect in exercising the right (at 70).

117 n 113.

118 Roberts and Zuckerman, *Criminal Evidence* (n 87) 549-563.

119 Which discusses justification of the RLA on the basis that it prevents wrongful conviction.

120 It is not within the scope of this paper to reach a view on this. There is an excellent discussion in Roberts and Zuckerman, *Criminal Evidence* (n 87) at 549-563.

121 See e.g. *R v Hebert* [1990] 2 SCR 151 at 176.

122 Such as England and Wales: see the Criminal Justice and Public Order Act 1994 ss 34-35.

123 See the majority judgment delivered by McLachlin CJ and Charron J in *R v Sinclair* [2010] 2 SCR 310 at para 27.

upon entering custody, but would require contact between suspect and legal adviser prior to interview. It would not support a RLA during questioning (as long as it can be assumed that once the suspect understands his rights he will retain this understanding). This justification is not about assisting suspects with enforcement, merely with understanding.

How convincing is this justification? It might be considered weak, as ensuring suspects understand their rights is something the police should be doing when the caution is read out. There is, however, evidence to suggest that the caution is ineffective in securing understanding. There is no research in the Scottish context, but in the US, where the caution is similar, Weisselberg concluded that understanding of the RTS component of the “*Miranda* warning” demands a greater educational background than most suspects possess.¹²⁴ Studies have produced similar findings in Canada.¹²⁵ Other research has shown that significant numbers of juveniles and people with disabilities do not understand the warnings¹²⁶ and that this is not a problem confined to an easily identifiable population,¹²⁷ so is not easily rectified by special procedures for those with recognised disabilities.¹²⁸ The problem is even greater in jurisdictions such as England and Wales where the right to silence has been qualified and where the legal position is complex.¹²⁹

This would seem to suggest that assisting suspects in understanding their RTS is a convincing justification for a RLA. How effective the provision of a RLA would be in ensuring understanding, however, has to be considered in the context of the proportion of suspects who take up the right. Various attempts have been made in England and Wales to estimate this, with rates of request¹³⁰ varying from 25 per cent¹³¹ to 60 per cent.¹³² The most comprehensive study is that of

124 C D Weisselberg, “Mourning *Miranda*” (2008) 96 Cal LR 1521 at 1564-1569.

125 J Eastwood et al, “Measuring reading complexity and listening comprehension of Canadian police cautions” (2010) 37 Criminal Justice and Behavior 453.

126 M Cloud et al, “Words without meaning: the constitution, confessions and mentally retarded suspects” (2002) 69 University of Chicago Law Review 495.

127 As Lord Carloway recognised in his consultation document (n 11) at para 18.

128 Weisselberg (n 124) at 1577.

129 S Fenner et al, “Understanding of the current police caution (England and Wales) among suspects in police detention” (2002) 12 Journal of Community and Applied Social Psychology 83.

130 Studies measuring the uptake of the RLA usually distinguish between rates of request and rates of consultation. The latter are lower because not all suspects who request legal advice will receive it—suspects sometimes change their mind or are released before a legal adviser arrives: Pleasence et al (n 100) at 9.

131 A Sanders et al, *Advice and Assistance at Police Stations and the 24 Hour Duty Solicitor Scheme* (1989).

132 Skinns (n 94) at 407.

Pleasance et al,¹³³ who concluded after an examination of records in 44 police stations covering four police areas that 45 per cent of detainees requested advice and 77.5 per cent of those requests were met.¹³⁴ Young detainees were least likely to request legal advice, a worrying finding given that juvenile suspects are among those who have the greatest difficulty in understanding the police caution.¹³⁵ In the US the proportion of detainees who request legal advice is even lower.¹³⁶

This would be of little concern if those who do not request legal advice already understand the RTS. The reasons why suspects decline legal assistance in England and Wales have been explored by Skinns,¹³⁷ who found a number of explanations including fears that it would prolong detention;¹³⁸ a perception that it was not needed; prior experience of the (un)helpfulness of legal advisers; and ploys used by the police aimed at deterring requests. Such tactics included informing the suspect of his right incomprehensibly or misinforming the suspect about how long a solicitor would take to arrive,¹³⁹ but Skinns did conclude that the use of ploys is decreasing, especially with the more widespread use of CCTV. Nonetheless, it is clearly not only suspects who have no need for legal assistance who are declining it. Questions can therefore be raised about the effectiveness of a RLA in ensuring that suspects understand the nature of the RTS if those who are in need of explanation are likely to waive it. It may be that greater understanding of the RTS could be achieved by ensuring that the *police* adequately explain it to suspects or that the caution needs elaboration or explanation in more human terms, perhaps with the use of examples.¹⁴⁰

While the evidence does point to possible problems with suspects understanding the RTS, then, promoting understanding alone does not, perhaps, provide the most convincing justification for a RLA. More convincing is the need to help suspects make an informed choice about whether to exercise it.

133 n 100.

134 At 10.

135 See text accompanying n 126.

136 P G Cassell and B S Hayman, "Police interrogation in the 1990s: an empirical study of the effects of *Miranda*" (1995-1996) 43 UCLA LR 839.

137 n 87, n 94.

138 Skinns (n 94) found that the day of the week on which suspects were detained was significantly related to whether or not they requested legal advice, with most requests occurring on weekdays. She concluded that this was because of concerns that awaiting legal advice would prolong detention on the weekend (at 412).

139 See also A Sanders and L Bridges, "Access to legal advice and police malpractice" [1990] Crim LR 494 at 498.

140 M A Godsey, "Reformulating the *Miranda* warnings in light of contemporary law and understandings" (2005-2006) 90 Minnesota LR 781 at 784.

(b) *Legal assistance is necessary to help suspects make informed choices*

An advance on the informational justification is that a RLA is required to assist suspects in making an informed choice about their best interests on the basis of the RTS and the nature of the evidence against them. As the Royal Commission noted when recommending the introduction of a RLA in England and Wales, suspects who understand the concept of a RTS may be unaware of the “full implications or the desirability of exercising [it]”.¹⁴¹ This was the justification favoured by the majority of the Canadian Supreme Court in *Sinclair*.¹⁴² As well as assisting the suspect in making choices, a solicitor may be better able to obtain information on the nature of the police evidence, allowing decisions about co-operation to be made on a more informed basis.¹⁴³

What sort of RLA does this justification support? The majority in *Sinclair* concluded that it did not support the presence of a solicitor in the interview room (or an automatic right to stop and consult a solicitor during questioning).¹⁴⁴ This was criticised by the minority on the basis that a legal adviser is likely to have limited information about the nature of the evidence against the suspect prior to questioning and his best interests may only emerge as questioning develops.¹⁴⁵ It may, however, depend on the complexity of the case. A single telephone call prior to questioning may be sufficient to assist a suspect facing, say, a drink driving charge, but at the more complex end of the scale presence during questioning may be necessary.¹⁴⁶ Likewise, the complexity of the case will affect whether this justification grounds a right to assistance from someone who is legally qualified. At the complex end it may not be clear, for example, whether the suspect’s conduct fits the offence definition and legal knowledge would be required to identify the suspect’s best interests.¹⁴⁷ If not a qualified solicitor, this justification would certainly support the need for an adviser with legal knowledge, as decisions about

141 Royal Commission, *Investigation and Prosecution of Criminal Offences* (n 39) para 4.89.

142 [2010] 2 SCR 310 at para 32.

143 There is no legal obligation on police to disclose evidence to suspects in either Scotland or England and Wales at present. ACPOS guidance states that the police must “carefully consider any requests for further information that solicitors may make” (Association of Chief Police Officers in Scotland, *Manual of Guidance on Solicitor Access*, version 1 (2011) para 6.4) and disclosure is under discussion as part of the Carloway review (n 11) paras 8-12. This does not detract from the point that a solicitor may be better placed to request such information than the suspect.

144 They did provide some exceptions to this (para 2), mostly relating to circumstances where the situation facing the suspect changes significantly.

145 [2010] 2 SCR 310 at para 87 per Binnie J.

146 Pattenden and Skinns (n 18) at 356.

147 Roberts and Zuckerman, *Criminal Evidence* (n 87) 520.

whether to co-operate with the authorities are complex and involve consideration of, for example, the sentence discounting provisions for guilty pleas.¹⁴⁸

At the more complex end of the scale, then, the need to assist suspects in making decisions about whether to enforce their RTS would seem to justify a RLA. As in relation to understanding, however, providing a RLA does not ensure that suspects will take advantage of it and thus its effectiveness in assisting suspects in practice may be more limited.

(c) Legal assistance is necessary to help suspects enforce their rights

A final variant is that the RLA is necessary to help suspects enforce their RTS during police questioning.¹⁴⁹ Even if a suspect has fully understood the RTS and decided that it is in his best interests to remain silent, he may find this difficult to sustain in the coercive atmosphere of the interview room. The argument has particular force in the context of children and vulnerable adults and who are “more susceptible to waiving their rights as a matter of mere compliance with authority”.¹⁵⁰

The type of RLA that this justification would ground is one of presence in the interview room. Whether it requires a legally qualified adviser is less clear but it is likely that a qualified and experienced solicitor would be of most assistance in acting as a counter to any police pressure brought to bear on a suspect.

Is the RLA likely to be effective in assisting suspects to enforce their rights? Sanders and Bridges found that suspects advised on the phone to stay silent rarely did,¹⁵¹ underlining the need for a solicitor to be present to assist in this. On the other hand, we have already seen that a significant proportion of suspects in other jurisdictions waive the RLA.¹⁵² In addition, research conducted in the English context has concluded that even qualified solicitors can be passive and compliant during police questioning and that, far from assisting suspects to enforce their rights, can be complicit in police persuasion to forego them. In a study undertaken for the Royal Commission, Baldwin concluded that:¹⁵³

148 Criminal Procedure (Scotland) Act 1995 s 196. See McCluskey (n 65) at 283.

149 The argument made by the minority in *Sinclair* at para 159 and by Warren CJ in *Miranda v Arizona* 384 US 436, 469 (1966).

150 Kassin et al (n 110) at 9.

151 A Sanders and L Bridges, “The right to legal advice”, in C Walker and K Starmer (eds), *Miscarriages of Justice: A Review of Justice in Error* (1999) 83 at 95.

152 Although Godsey (n 140) has suggested that even if it is not enforced, knowing that they have the RLA might give suspects more confidence to enforce their RTS (at 804).

153 J Baldwin, “Legal advice in the police station” [1993] Crim LR 371 at 372.

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

Baldwin is not the only researcher to conclude that lawyers are prepared to sit through hostile or aggressive questioning without intervening.¹⁵⁴ Now, as Roberts has pointed out, being actively combative might not always be in a client's best interest.¹⁵⁵ For one thing, in England and Wales a solicitor can be asked to leave the interview if his "conduct is such that the interviewer is unable properly to put questions to the suspect",¹⁵⁶ although this is a "serious step" to be used only in exceptional circumstances.¹⁵⁷ More generally, Dixon has pointed to a culture of co-operation between police officers and legal advisers in England and Wales, suggesting that the need to develop "a reasonably comfortable, unstressful relationship with officers"¹⁵⁸ may be as important as the formal duties. Roberts and Zuckerman¹⁵⁹ point to *R v Paris, Miller and Abdullahi*,¹⁶⁰ where Lord Taylor CJ said of one appellant's interrogation (which was attended by his solicitor) that "[s]hort of physical violence, it is hard to conceive of a more hostile and intimidating approach by officers to a suspect" and concluded that "the solicitor appears to have been at fault for sitting through this travesty of an interview".¹⁶¹

All of this evidence is, however, from some time ago and it has been suggested more recently that the quality of support provided by legal advisers in England and Wales has improved.¹⁶² Even if this is not true, it does not necessarily translate to the Scottish context and it does not affect the underlying argument, which is that a RLA *can* assist suspects to enforce their RTS in the context of the interview room.

154 See M McConville et al, *Standing Accused: The Organization and Practices of Criminal Defence Lawyers* (1994) 113; J Hodgson, "Adding injury to injustice: the suspect at the police station" (1994) 21 *Journal of Law and Society* 85 at 94.

155 D Roberts, "Questioning the suspect: the solicitor's role" [1993] *Crim LR* 368 at 370.

156 Police and Criminal Evidence Act 1984 Code C (Code of Practice for the Detention, Treatment and Questioning of Persons by Police Officers) para 6.9.

157 Para 6.10.

158 Dixon (n 103) at 236.

159 *Criminal Evidence* (n 87) 521.

160 (1993) 97 Cr App R 99.

161 At 103.

162 A Sanders, R Young and M Burton, *Criminal Justice*, 4th edn (2010) 240.

(4) Legal assistance is necessary to prevent wrongful conviction

The final justification that might be proffered for the RLA is a purely instrumental one: suspects have a right to be protected from the moral harm involved in wrongful conviction and the RLA is justified in terms of its instrumental value in preventing this from occurring.¹⁶³ As such, the RLA has been described by Brookman and Pierpoint as “a fundamental safeguard against wrongful conviction”¹⁶⁴ on the basis that the presence of a legal adviser during police questioning will guard against false confessions (it can be said at the outset that this justification supports the physical presence of the legal adviser).

The justification is potentially a powerful one, given that, historically, most miscarriages of justice in England and Wales have been in cases where a confession was virtually the only evidence.¹⁶⁵ This might be thought less of an issue in Scotland due to the corroboration requirement but the watering down of this rule means that very little is required to corroborate a confession.¹⁶⁶ In the US it has been suggested that once a suspect confesses, the police often “close their investigation, deem the case solved, and overlook exculpatory evidence or other possible leads – even if the confession is internally inconsistent, contradicted by external evidence, or the product of coercive interrogation”¹⁶⁷ and that this misplaced trust in confessions also extends to prosecutors.¹⁶⁸ Confessions are a particularly potent source of evidence at trial and are likely to be treated by the jury as “damning evidence of guilt”.¹⁶⁹ Research with mock juries has shown that confessions have more impact than other forms of evidence¹⁷⁰ and that jurors doubt that coercive techniques would ever cause an innocent suspect to confess.¹⁷¹

There are a number of ways in which a RLA *might* prevent wrongful conviction. First, the presence of a legal adviser could discourage the police from using coercive interviewing tactics, a point that has already been discussed.¹⁷² Secondly, legal advisers may lessen the risk of false confessions by assisting suspects in enforcing their RTS (assuming, that is, that the RTS is effective in

163 Borrowing terminology from Dennis (n 91) at 259.

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

165 Sanders and Bridges (n 151) at 98.

166 F Davidson, *Evidence* (2007) paras 15.64-15.71.

167 Kassin et al (n 110) at 23.

168 Ibid.

169 Roberts and Zuckerman, *Criminal Evidence* (n 87) 511.

170 S M Kassin and K Neumann, “On the power of confession evidence: an experimental test of the ‘fundamental difference’ hypothesis” (1997) 21 *Law and Human Behavior* 469.

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

172 See text accompanying n 102.

preventing false confessions).¹⁷³ Thirdly, a legal adviser can act as an independent observer of what the suspect actually said, guarding against the risk that his words are recorded inaccurately to give the impression that he had made an incriminating admission when in fact he had not. This is different from the first and second points, which both involve suspects actually admitting to things they have not done, whereas in the third scenario the suspect has not made a false admission at all. It will therefore be considered separately.

To assess whether the RLA is an effective safeguard against actual false confessions, it is necessary to consider the extent to which these occur. There are certainly well documented examples, such as the so-called Central Park Jogger case, where police took false confessions from five teenagers during a lengthy interrogation. All retracted their statements on arrest, claiming they only confessed because they thought they could then go home. All five were convicted and were only exonerated when the real perpetrator was identified over ten years later.¹⁷⁴ Similar examples in the UK have been noted.¹⁷⁵ It is extremely difficult to obtain an accurate incidence rate for false confessions. Some light is shed on the matter by self-report studies, in which rates of between three and twelve per cent have been reported,¹⁷⁶ but self-report studies have obvious limitations. Perhaps the most reliable evidence that a significant number of suspects do, in fact, confess falsely are cases of DNA exonerations and it has been suggested that between 15 and 25 per cent of these involve false confessions or admissions.¹⁷⁷ It is also known that young people are particularly prone to providing information which may be unreliable, misleading or self-incriminatory.¹⁷⁸

If it is accepted that false confessions are a danger, the question remains whether a RLA would prevent them. Kassim et al distinguish between three types of false confession: voluntary, coerced-compliant and coerced-internalised.¹⁷⁹ Voluntary false confessions are made spontaneously, with no

173 As some do (see e.g. S Greer, "The right to silence: a review of the current debate" (1990) 53 MLR 709), but this has been questioned (see e.g. Roberts and Zuckerman, *Criminal Evidence* (n 85) at 560).

174 Kassim et al (n 110) at 4 and see also *People v Wise* 752 NYS.2d 837 (2002).

175 See the cases cited in Part 3 of G H Gudjonsson, *The Psychology of Interrogations and Confessions: A Handbook* (2003).

176 J F Sigurdsson and G H Gudjonsson, "False confessions: the relative importance of psychological, criminological and substance abuse variables" (2001) 7 *Psychology, Crime and Law* 275.

177 B Garrett, "Judging innocence" (2008) 108 *Col LR* 55; Innocence Project case profiles, available at <http://www.innocenceproject.org>.

178 Kassim et al (n 110) at 19-20. This is recognized explicitly in PACE Code C (n 156) note 11B.

179 Kassim et al (n 110) at 14. The classification scheme was originally proposed by S M Kassim and L S Wrightsman, "Confession evidence", in Kassim and Wrightsman (eds) *The Psychology of Evidence and Trial Procedure* (1985) 67 and has since come to be widely accepted by psychologists, either in its original or in a refined form.

prompting whatsoever from the police. These may occur for a variety of reasons, including a desire for notoriety, mental illness, or protection of the real perpetrator.¹⁸⁰ Coerced-compliant false confessions are induced by police questioning and may arise because, for example, the suspect wishes to end the relentless questioning or believes a confession will lead to release.¹⁸¹ Coerced-internalised confessions also arise from police questioning but are different in that the suspect genuinely comes to believe the admission as a result of, for example, being told there is incontrovertible evidence.¹⁸²

The RLA will be more effective in preventing some forms of false confession than others. As discussed previously,¹⁸³ those who are most in need of protection may waive their right—it is not difficult to envisage, for example, that those who make voluntary false confessions are unlikely to request a legal adviser or that, if they do, his presence would make little difference to a determined suspect who wishes (falsely) to confess. Assuming the right has not been waived, however, a legal adviser could be an effective guard against coerced-compliant confessions and possibly coerced-internalised ones too for the reasons identified above—he may be able to prevent coercive questioning and he may be able to help the suspect resist the temptation to give in to it. Other than ensuring the police do not use tactics likely to elicit these types of confession it is difficult to think of alternative protections, except perhaps video recording interviews. But Sanders et al suggest that video recording may actually be harmful to suspects because video evidence is so compelling it can lead to amateurish assessments of demeanor by prosecutors, judges and jurors who over-estimate their ability to detect deception.¹⁸⁴ They point to the research of Lassiter et al who, in a number of experimental scenarios conducted over several years,¹⁸⁵ found that confessions made on suspect focused videotapes were significantly more likely to be judged “voluntary” and the suspect guilty than tapes, transcripts and interviewer focused videos. Now if this is the case, and it applies only to suspect focused video recordings, the obvious answer is to ensure that video recording of police interviews focuses on all of those present. But this may not be possible if the interviewers are facing the suspect (a camera cannot focus in two directions

180 Ibid.

181 Ibid.

182 Kassin et al (n 110) at 15.

183 See text accompanying n 135.

184 Sanders, Young and Burton, *Criminal Justice* (n 162) 279.

185 See e.g. G D Lassiter et al, “Evidence of the camera perspective bias in authentic videotaped interrogations: implications for emerging reform in the criminal justice system” (2009) 14 *Legal and Criminological Psychology* 157.

at once)¹⁸⁶ and thus there does seem to be a valuable role to be played here by legal advisers. This does, of course, assume that the legal adviser is willing to take a proactive role during the interview, which may not always be the case.¹⁸⁷

In terms of the RLA and the third scenario—where a legal adviser acts as a check that the suspect's answers are recorded accurately—it might be thought that this would be better addressed by tape or video recording.¹⁸⁸ This makes it difficult for police to report proceedings selectively and virtually impossible for them to fabricate admissions.¹⁸⁹ However, this solution is not unproblematic. As noted earlier, tapes can be lost or equipment can malfunction. Furthermore, tapes are rarely played in court.¹⁹⁰ Reliance is more usually placed on summaries or transcripts, but both can be of poor quality. Baldwin and Bedward found that, of 200 interview transcripts they studied, almost half of the summaries were unfair, distorted or misleading.¹⁹¹ Gudjonsson examined twenty transcripts of police interviews and found that all contained inaccuracies and some were “seriously misleading”.¹⁹² In one the suspect was recorded as replying “yes” to the question “did you touch their private parts?” but actually said no. Barnes found that, even when a video is played in court, the jury will only see edited highlights and while most jurors initially look at the screen, some are likely thereafter to revert to the written transcript they have been given.¹⁹³ This does return us to the point that there may well be some value in legal advisers attending police interviews in terms of their instrumental role in preventing wrongful conviction.

E. DISCUSSION

In the previous section, four possible justifications of the RLA were examined: (1) the provision of emotional support; (2) protection from ill-treatment; (3) assistance in understanding or enforcing the RTS; and (4) preventing wrongful conviction. The first supports a RLA from the first point at which a suspect is brought into custody (and would ideally require physical presence, as opposed to a telephone call), but is not a particularly convincing justification of a right

186 A dual camera system could perhaps overcome this problem but the resulting images would not be easy to transmit and other difficulties remain (see below).

187 See text accompanying nn 153-161.

188 An assumption that is made by Kassin et al (n 108) at 26.

189 Sanders et al (n 161) 279.

190 Gudjonsson, *Psychology of Interrogations and Confessions* (n 175) 112. This might, of course, be to the accused's advantage if he appeared evasive during questioning.

191 J Baldwin and J Bedward, “Summarising tape recordings of police interviews” [1991] Crim LR 671 at 674.

192 Gudjonsson, *Psychology of Interrogations and Confessions* (n 175) 114.

193 M S Barnes, “One experience of police recorded interviews” [1993] Crim LR 444 at 446.

to *legal* assistance as support could be provided by a non-lawyer. The second supports a RLA from the first moment of custody (and possibly beforehand) and again suggests the need for physical presence. It might be questioned though whether the RLA is the most cost-effective way of addressing this issue as video recording of interviews and CCTV cameras in police stations could serve a similar purpose.¹⁹⁴ The third justification is the most complex as it comprises three sub-justifications: the need to ensure suspects understand the RTS (3a), the need to assist them in identifying their best interests (3b) and the need to assist them in enforcing their choices (3c). If the RLA is premised upon 3a or 3b, the physical presence of a legal adviser is not necessarily required and neither is assistance during the interview.¹⁹⁵ If it is premised upon 3c, it extends to physical presence in the interview room. Given that at least some suspects may not understand the caution or its implications, justifications 3a and 3b are (in theory at least) persuasive ones, as is the case for a RLA based on justification 3c. The final justification – that the RLA has an instrumental value in helping to prevent wrongful conviction – is perhaps slightly less convincing, in that it is not always obvious that a solicitor will be effective in doing so. But there may be some types of false confession that can be prevented by a RLA and, if this is the case, it clearly grounds a need for the legal adviser to be physically present during questioning.

If, as argued above, the nature of the rationale for the RLA has implications for its scope, then it is important to be clear about this rationale. If not, there is a danger that the law is incoherent and that the resulting RLA does not address the relevant concern. In the Scottish context, there has been so little discussion of the rationale for the RLA at the political level that it is difficult to form any conclusion about why it is thought necessary. In *Cadder*, while recognising that other possible justifications are available,¹⁹⁶ Lord Rodger derives the RLA from “the need to protect the right against self-incrimination”.¹⁹⁷ Later in his speech, Lord Rodger refers to the “right to legal advice as to whether [a suspect] should say anything at all and, if so, how far he should go”¹⁹⁸ and refers to the “right to take legal advice *before* being questioned”.¹⁹⁹ That, and the fact

194 This may be more difficult in settings other than the police station, such as a search of a suspect's house under s 23(2)(a) of the Misuse of Drugs Act 1971, but the use of mobile recording devices could assist: H Fenwick, “Confessions, recording rules and miscarriages of justice” [1993] Crim LR 174 at 183.

195 Unless the nature of the situation facing the suspect changes significantly: see n 142.

196 Namely supporting the accused in distress or checking the conditions of his detention (para 70).

197 Para 70.

198 Para 92.

199 See e.g. para 91 (emphasis added).

that Lord Rodger refers specifically to a right to legal *advice* (as opposed to assistance) would suggest that he is proceeding on the basis that the RLA is justified by the need to ensure suspects understand their RTS and identify their best interests rather than it being necessary to assist suspects in enforcing these choices.

Lord Hope, however, uses slightly different language. He refers to the need “to protect a detainee against duress or pressure of any kind that might lead him to incriminate himself” and to the “presence of a lawyer whose task it is, among other things, to help ensure that the right of an accused not to incriminate himself is respected”.²⁰⁰ Lord Hope’s language derives from *Salduz*, where the European Court went on to warn against the use of “evidence obtained through methods of coercion or oppression”.²⁰¹ This would suggest a RLA based not on understanding and identifying best interests, but on helping the suspect to *enforce* his RTS during questioning.

As we have seen, these two rationales have differing implications for the scope of the RLA. Lord Rodger’s rationale would imply that effective assistance can – in most cases – be provided prior to the suspect being interviewed (assuming that the legal adviser is able to obtain sufficient information about the situation)²⁰² and a blanket right to assistance during the interview is not necessary.²⁰³ Lord Hope’s justification requires the solicitor to be present throughout the interview. The 2010 Act sits between these two extremes, providing for a private consultation with a solicitor at any time during questioning,²⁰⁴ which, without any accompanying statement about the underlying purpose(s) of the RLA, suggests a worrying lack of reflection by the drafters.²⁰⁵

This also means that Lord Rodger was absolutely right in his conclusion that none of the other protections referred to by the High Court in *McLean*²⁰⁶ can adequately compensate for the absence of a RLA. If the rationale for the RLA is

200 Para 33.

201 *Salduz* (n 7) para 54. The RLA was also seen in *Salduz* as “a fundamental safeguard against ill-treatment” (para 54). Later European Court decisions express similar sentiments: e.g. App No 7025/04 *Pishchalnikov v Russia*, 24 Sep 2009 at para 71.

202 In Scotland at present when a suspect exercises his RLA the police are not required to provide information on the evidence upon which he has been detained but this is one of the issues under consideration in the Carloway Review: n 11 at para 8.

203 Although it may be required if there is a significant change in the circumstances facing the suspect: see n 144.

204 Criminal Procedure (Scotland) Act 1995 s 15A(3)(b) as inserted by the 2010 Act.

205 Nothing was said during the Stage 1, 2 or 3 debates on the emergency legislation about its underlying purpose, other than the Justice Secretary’s statement that “it is necessary in order to bring statute into line with the Supreme Court judgment [in *Cadder*]”: Scottish Parliament, Official Report col 29673 (27 Oct 2010).

206 Listed in the text accompanying n 63 above.

its role in assisting suspects to understand the RTS and its implications for their best interests then the only one of these protections that might perform a similar function is the caution and, as shown earlier, it cannot be guaranteed that this is understood by suspects. A RLA therefore has a valuable role to play.

However, it might also explain why the Supreme Court and the High Court reached such radically different conclusions about the RLA in *Cadder* and *McLean* respectively. The High Court in *McLean* does not discuss the rationale for a RLA but if it had a different rationale in mind then this might explain why it reached the conclusion it did. For example, if the court was thinking about the RLA in terms of it protecting against wrongful conviction, it is clear why other protections might make the RLA unnecessary. The recording of interviews (ensuring that suspects' words are presented accurately); the corroboration requirement (ensuring that conviction cannot be based on a confession alone); the fact that no adverse inferences can be drawn from silence during police questioning; and the inadmissibility of statements obtained via coercion are all protections aimed at their core at preventing miscarriages of justice. They might not be perfect protections but their existence does at least provide a basis for a coherent argument as to why the RLA might be unnecessary. But, as we have seen in *Cadder*, Lords Rodger and Hope proceeded on the basis that the RLA stems from the RTS and, if this is so, the protections identified in *McLean* may be irrelevant. The RTS can itself be justified in a number of ways, only one of which is its possible role in preventing wrongful conviction.²⁰⁷ Unless Lords Rodger and Hope subscribed to this view of the underlying purpose of the RTS,²⁰⁸ in effect the two courts may have been talking at cross-purposes.

Finally, however the RLA is justified, in practice the hoped for benefits may not transpire. As has already been discussed, in England and Wales – where a RLA has been recognised for some time – the proportion of suspects who request legal assistance is around 45 per cent and the proportion of those who receive it is even lower.²⁰⁹ If those who do not request legal assistance do so because they are in no need of it, this would be of little concern. But research suggests that this is not the case and suspects refuse legal advice because, for example, they fear it will prolong detention.²¹⁰ It cannot therefore be assumed that introducing a RLA will achieve the desired protections for all those who are in need of them.

207 See text accompanying n 118.

208 This seems very unlikely in Lord Rodger's case, given that his concern appears to be primarily with ensuring that suspects understand the RTS and identify their best interests accordingly. Lord Hope's view is impossible to discern from the text of *Cadder*.

209 See text accompanying n 134.

210 See text accompanying n 138.

This would imply that introducing any other changes to the legal system (such as qualifying the RTS or weakening the requirement for corroboration) on the basis that the RLA makes these protections unnecessary should be done with extreme caution.²¹¹ In England and Wales, restrictions were placed on the right to silence, allowing adverse inferences to be drawn from silence at police questioning stage in certain circumstances.²¹² This was justified, at least in part, by the increased protection given by legal advisers.²¹³ But if uptake of legal assistance is as low as 45 per cent, the majority of suspects ended up less well protected in England and Wales than they were before the RLA was introduced, something that is of concern.²¹⁴

If a proportion of those who are in need of legal advice do not request it, then one might come to the conclusion that, as Fenwick has suggested, legal representation during detention should be automatic.²¹⁵ The most radical version of this proposal would be to prevent waiver of the RLA in any circumstances and provide legal assistance even to those who do not request it. At present, there are no provisions in the revised Scottish legislation on waiver.²¹⁶ Introducing an inalienable RLA would, as even Fenwick acknowledges, be costly and administratively difficult.²¹⁷ In addition, respect for autonomy and freedom of choice suggests that assistance should not be forced upon someone who neither wants nor needs it, although a counter argument could be made that forcing someone to talk to a lawyer briefly is hardly a great imposition and allowing them to make choices without understanding their potential legal consequences is far worse. Whatever one's perspective on this, serious consideration should be given to preventing waiver for children and vulnerable adults,²¹⁸ or, at the very least, adopting provisions similar to those in England and Wales, whereby an appropriate adult can request legal assistance for a child who has declined it, if it

211 Hodgson (n 154) at 99.

212 Criminal Justice and Public Order Act 1994 ss 34-35.

213 See e.g. Home Office, *Report of the Working Group on the Right to Silence* (1989) para 57.

214 The vast majority of academic commentators in England and Wales have argued for the repeal of the adverse inferences provisions for this reason (among others) (see e.g. D Birch, "Suffering in silence: a cost-benefit analysis of section 34 of the Criminal Justice and Public Order Act 1994" [1999] Crim LR 769; J Jackson, "Silence and proof: extending the boundaries of criminal proceedings in the United Kingdom" (2001) 5 *International Journal of Evidence and Proof* 145) and Redmayne has specifically warned against importing them into other jurisdictions as a model for reform (M Redmayne, "English warnings" (2008) 30 *Cardozo LR* 206).

215 H Fenwick, "Evading access to legal advice" (1995) 59 *J Crim L* 198 at 205.

216 The issue was addressed by the High Court in *Jude v HM Advocate* [2011] HCJAC 46, but given that the court was concerned with waiver of the RLA prior to the decision in *Cadder* (i.e. before the RLA had practical effect in Scots law) it is of limited assistance.

217 Fenwick (n 210) at 206.

218 An option that is canvassed by Lord Carloway (n 11) at para 14.

would be in the child's best interests.²¹⁹ Even then, however, difficulties remain. It is not always obvious when an adult suspect is vulnerable²²⁰ and the addition of a legal adviser may make questioning more intimidating for a child, given the number of adults who will already be present.²²¹ A less radical proposal would be to permit waiver, at least for adults without vulnerabilities, but to make sure that it is recorded in writing²²² or (preferably) videotaped. Whatever option is preferred, if the RLA is to be taken seriously, the fact that over half of all suspects waive the right in England and Wales cannot simply be ignored.

219 PACE Code C (n 154) para 6.5A.

220 J Pearse, "Police interviewing: the identification of vulnerabilities" (2006) 5 *Journal of Community and Applied Social Psychology* 147.

221 Carloway Review, *Consultation Document* (n 11) at para 14.

222 As is the case in England and Wales: PACE Code C (n 154) para 3.5(b) and see also ACPOS Manual (n 141) para 3.4.1.