

Proceed with Caution(s): A Critique of the Carloway Review's Rejection of Statutory Adverse Inference Provisions in Scottish Criminal Law

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Abstract

Scottish criminal procedure (unlike the rest of the United Kingdom and the Republic of Ireland) currently contains no statutory provisions permitting courts to draw adverse inferences from an accused's silence during police questioning or at their subsequent trial. The law in this area was recently examined in the Carloway Review, which rejected the introduction of statutory adverse provisions on two principal grounds, both of which are analysed in depth and contested in this article. This article contends that the Review Team's reasoning was problematic, insofar as it ran contrary to the opinions of many Consultation respondents and employed analysis and final decision-making based on selective quotation from leading academic analysis on the subject. It is suggested that Scotland can and should enact adverse inference provisions using an amended system of police cautions that are compliant with the European Convention on Human Rights ('ECHR'). Carefully constructed cautions, in conjunction with the new statutory disclosure and legal assistance regimes now in place in Scotland, would ensure that an accused person's vulnerability would not be unduly compromised.

1. Introduction

Over eighteen months have elapsed since the publication of the Carloway Review's Report and Recommendations.¹ The Review represented the Scottish government's principal response to the controversy arising out of the UK Supreme Court's decision in *Cadder*.² Prior to publication, the Review team had circulated a Consultation

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¹ The Carloway Review, *Report and Recommendations*, 17 November 2011.

<<http://www.scotland.gov.uk/Resource/Doc/925/0122808.pdf>> accessed 10 October 2012.

² *Cadder v HM Advocate* [2011] SC UKSC 43. The controversy is not revisited here.

Document,³ before considering fifty one responses.⁴ As regards the idea of introducing adverse inference provisions ('AIPs') in statutory form in Scotland, their final recommendation was that 'no change is made to the current law of evidence that prevents inferences being drawn at trial from an accused's failure to answer questions during the police investigation.'⁵ The Review provided two principal reasons. The first was that '(...) the introduction of adverse inference would not fit well with the presumption of innocence, the right to silence and the privilege against self-incrimination as understood and applied in Scotland'⁶ (an essentially conceptual argument). The second was a more practical argument, namely that '[i]nstead of promoting efficiency and effectiveness, it would bring unnecessary complexity to the criminal justice system.'⁷

This article, in disagreeing with the Review's reasoning, will argue that Scottish criminal law should, principally through the introduction of appropriately worded European Convention-compliant caution(s), be adjusted to permit the drawing of adverse inferences from an accused's silence in circumstances where this complements other proven incriminatory evidence. This is not an isolated or new position; it is supported by several Consultation respondents.⁸ This article seeks to refocus critical analysis on the factual realities and utility of statutory AIPs, and in doing so lends weight to the view expressed by the Scottish Law Commission ('SLC'), one of the primary respondents to the Consultation, that the law regarding AIPs in Scotland should be re-examined.⁹ Prior to setting out the case for AIPs, this article initially agrees with the prescient observations made by Raitt,¹⁰ and will attempt to reinvigorate a '(...) reflective argument vital to the law reform process'¹¹ that she and other concerned consultation respondents correctly forecast would be excluded.¹² It also sympathetically

³ The Carloway Review, *Carloway Review Consultation Document*, 8 April 2011 <<http://www.scotland.gov.uk/Resource/Doc/925/0116090.pdf>> accessed 7 October 2012.

⁴ The Carloway Review, *Responses to the Consultation Document*, 11 August 2011 <<http://www.scotland.gov.uk/About/CarlowayReview/Consultationprocess>> accessed 7 October 2012.

⁵ The Carloway Review, *Report and Recommendations* (n 1) 38.

⁶ *ibid* [7.5.26].

⁷ The Carloway Review, *Report and Recommendations* (n 1) [7.5.26].

⁸ The Carloway Review, *Responses to the Consultation Document* (n 4). See for example Raitt, at 61, the Association of Police Superintendents, at 102, and perhaps most importantly, the SLC at 200. The joint submission of Leverick & Farmer, at 34, states (from a stance opposing AIPs): '(...) if they are to be permitted at all, adverse inferences should only be permitted where there has been disclosure of the police evidence against the suspect.' This author agrees.

⁹ The Carloway Review, *Responses to the Consultation Document* (n 4) 202.

¹⁰ FE Raitt, 'The Carloway Review: An opportunity lost' (2011) 15(3) *Edinburgh Law Review* 427. At 429, she states: '(...) there must be real doubts about whether [Lord Carloway's agenda] can be achieved. The Review timetable permitted a consultation period of eight weeks. It is difficult to see how complex matters such as corroboration and the inference from silence can be fully explored in the proposed condensed schedule.'

¹¹ *ibid*.

¹² *ibid*. It is stressed that the degree of expertise and authority of those in the Review team is not in doubt. However the breadth of their remit and the timescale for completion led to criticism which was on occasion damning. See for example the Carloway Review, *Responses to the Consultation Document* (n 4) 319

acknowledges that a principal unpublished reason for rejecting statutory AIPs may have been the lack of available time to properly consider the merits of a change in law in sufficient depth.¹³ In building a case for statutory AIPs in Scotland, it is conceded that the incidence of silence at police stations is statistically low¹⁴ and that commentators have drawn attention to the marginal 'utility...and justification'¹⁵ of AIPs in other jurisdictions. However it is submitted here that the same could be said of the number of petitions to the *nobile officium* in Scotland. The fact that a tool for securing justice is only used infrequently does not mean that it should not remain available for use in appropriate circumstances.

In constructing my argument, the Carloway Review's published research summarising the current Scottish position will be critically analysed, with reference to both case law and leading texts. It will be shown that there is a degree of AIP currently present in Scotland, but that this practice appears both inconsistent and under-utilised. This incoherency appears partially attributable to an unwritten 'doctrine of fair play' and sometimes conflicting judicial precedent that predates (and therefore fails to embrace) the ECHR and its jurisprudence tolerating AIPs (with safeguards) within an overall Article 6 right to fair trial proceedings.¹⁶ It will be suggested that these factors have led to a culture of resistance to the drawing of adverse inferences even though no actual prohibition exists. Next, in order to highlight Scotland's unique position within the UK, a brief outline of the codified provisions existing in the neighbouring jurisdictions of Northern Ireland, England¹⁷ and the Republic of Ireland will be provided.¹⁸ The inherent *discretionary* nature of these AIPs will be highlighted in order to refocus analysis on the fact that such AIPs are discretionary, rather than *rule-based*, as is often suggested by opponents. It will be shown that this fundamental misconception as to how AIPs are applied has permeated the arguments of opponents to the extent that even the question relating to AIPs in the Consultation document was loaded in favour of those supporting the *status quo*.

As several opposing Consultation responses selectively cite Roberts and Zuckerman¹⁹ to support their positions, the actual stated position of these authors

for the succinct response of the Faculty of Advocates, who politely declined to respond. See also the articulate, measured criticisms of the Senators of the College of Justice, at 359.

¹³ As regards depth, comparison is invited between the background, history lesson, consideration and final conclusions on the corroboration requirement in Scots Law (46 pages) in the Carloway Review, *Report and Recommendations* (n 1) [7.1], with the 13 pages offered on Adverse Inference [7.5].

¹⁴ P Roberts & A Zuckerman, *Criminal Evidence*, (2nd edn, OUP 2009) 578.

¹⁵ I Dennis, 'Silence in the police station: The marginalisation of section 34' [2002] (Jan) *Criminal Law Review* 38.

¹⁶ Council of Europe, *European Convention on Human Rights as amended by Protocols 11 & 14*, supplemented by Protocols Nos. 1, 4, 6, 7, 12 and 13 < http://www.echr.coe.int/NR/rdonlyres/D5CC24A7-DC13-4318-B457-5C9014916D7A/0/Convention_ENG.pdf > accessed 13 March 2013.

¹⁷ References to 'England' and 'English legislation' include Wales.

¹⁸ The outline of these provisions will be merely descriptive. Space constraints preclude discussion of the provisions in detail. Further, as will be suggested later in this article, criticisms of such provisions are of limited relevance to the creation of new AIPs for Scotland.

¹⁹ Roberts & Zuckerman, *Criminal Evidence* (n 14) 545-580.

regarding AIPs will be reaffirmed. This will reveal that not one of the selectively quoted rationales underpinning the arguments of opposing respondents actually stands up to detailed scrutiny. It will then be shown that the Review's first reason for rejecting AIPs reflects elements of the potential rationales identified and discredited by Roberts and Zuckerman. The Review's reasoning will be examined and rebutted, with additional scrutiny of the strong oppositional view expressed by Ferguson,²⁰ who appears to have had a significant influence on the Review's overall conclusions. The seminal European Court decision in *Murray*²¹ will be revisited to bolster my proposition that, as AIPs have been sanctioned by Europe's highest court (who have previously dictated adjustments to Scottish criminal law), there is little justification for not introducing AIPs in Scotland as an additional effective tool for securing justice in circumstances deemed appropriate. The subjective nature of complexity, coupled with the limited relevance of alluding to the English AIPs model when opposing AIPs for Scotland, will be demonstrated. An implicit oppositional rationale underpinning the Review's 'complexity' argument will also be discussed.

Finally, a personal view as to how a system of AIPs could be constructed simply on foundations of informative police cautions that truthfully communicate the implications of silence to suspects, rather than emphasise potential harm to their position, will be outlined. It will be contended that as both Scotland's disclosure regime and position on the right to legal assistance²² have now moved towards that of the rest of the UK,²³ the Review's stated aspiration that it seeks to avoid '(...) moving the trial process out of the courtroom and into the police station'²⁴ is ultimately untenable.

2. The Current Inconsistent Scottish Position

A. Adverse Inferences from Silence during Police Questioning

Walker and Walker state that: '(...) a person detained (...) is under no obligation to answer any question other than to provide certain specified information (...) so failure to

²⁰ The Carloway Review, *Responses to the Consultation Document* (n 4) 25.

²¹ *Murray v United Kingdom* (1996) 22 EHRR 29.

²² Criminal Procedure (Legal Assistance, Detention and Appeals) (Scotland) Act 2010, inserting an unqualified and universal right to legal assistance into ss 15 & 17 of the Criminal Procedure (Scotland) Act 1995. On the rationales justifying a right to legal assistance (which were also covered in her Consultation Response) see F Leverick, 'The right to legal assistance during detention' (2011) 15 (3) *Edinburgh Law Review* 352. Whilst the issue of waiver is also acknowledged here, word constraints prevent a full and frank discussion of the subject. See P Pleasance, V Kemp & NJ Balmer, 'The Justice lottery? Police station advice 25 years on from PACE' (2011) *Criminal Law Review* 3.

²³ Criminal Justice and Licensing (Scotland) Act 2010. Despite a clear nexus between administering cautions, AIPs and reciprocal disclosure obligations, there is insufficient space here to examine disclosure. For an excellent history, analysis and critique of Scottish disclosure requirements see F Raitt, 'Disclosure of records and privacy rights in rape cases' (2011) 15 (1) *Edinburgh Law Review* 33.

²⁴ The Carloway Review, *Report and Recommendations* (n 1) [7.5.24].

answer other questions cannot be regarded as of evidential value.’²⁵ Ferguson reinforces this position, positing that ‘(...) there are no detrimental consequences in refusing to answer questions at a police station, since a trial judge must not invite the jury to draw adverse inferences from the suspect's silence.’²⁶ In terms of precedent offering support to these statements, the Review cites *Hoekstra v HM Advocate (No 5)*²⁷ wherein Lord Justice General Cullen found that a direction given to the jury in the lower court, in which it was indicated that the jury was permitted to draw an adverse conclusion about credibility from the accused's refusal to answer police questions, amounted to a misdirection.

It would therefore appear reasonable, on the basis of the authority just quoted, to assume that Scottish criminal procedure excludes the drawing of adverse inferences against an accused who has offered no responses during interview. Further critical analysis of the Review Team's published research somewhat muddies these waters, however. The Review initially states that: ‘[i]n relation to police questioning prior to trial, no adverse inference at all can be drawn from a failure to respond’.²⁸ They ground this prohibition on ‘(...) the antecedent caution, which expressly warns the suspect of [their] right not to answer questions.’²⁹ However the Review Team go on to observe that:³⁰

It is different if a person states something positive in response to an allegation and his/her answer, though not directly incriminating, implies some degree of involvement. What is not said in a response might be taken as meaning that the suspect accepts the allegation, or part of it, even although he/she does not say so expressly.

*Kay v Allan*³¹ is cited, with a footnote explaining that ‘(...) a partially answered question’³² would allow an inference to be drawn from what is not said in response to an allegation. This is confusing. It is unclear whether such an allegation must be made by police during questioning or by someone else at a different point in the criminal process. It also begs the question as to why an adverse inference could be permitted to be drawn from the silent part of a response (whatever that entails) but not from

²⁵ Walker and Walker, *The Law of Evidence in Scotland* (3rd edn, Bloomsbury 2009) 104, referring to s14 (9) Criminal Procedure (Scotland) Act 1995.

²⁶ PR Ferguson, ‘Repercussions of the Cadder case: the ECHR's fair trial provisions and Scottish criminal procedure’ (2011) 10 Criminal Law Review 743, 747.

²⁷ *Hoekstra v HM Advocate* 2002 SLT 599.

²⁸ The Carloway Review, *Report and Recommendations* (n 1) [7.5.5], citing *Robertson v Maxwell* 1951 JC 11.

²⁹ *ibid.* Despite the best efforts of this author, there appears to be no formalised wording for the Scottish police caution. The version allegedly taught at Tulliallan states: ‘You are not obliged to say anything but anything you do say will be noted down and may be used in evidence

<<http://www.policemales.com/forum/index.php?/topic/97298-does-anyone-know-the-scottish-police-caution/>> accessed 7 December 2012.

³⁰ The Carloway Review, *Report and Recommendations* (n 1) [7.5.5].

³¹ *Kay v Allan* 1978 SCCR Supp 188.

³² The Carloway Review, *Report and Recommendations* (n 1) [7.5.5].

complete silence or ‘no comment’. The Review then mentions ‘*ex tempore* authority’³³ described as ‘highly dubious’³⁴ that ‘(...) a statement by a co-accused in the presence of the accused is admissible evidence, but only in order to show the reaction of the accused to it.’³⁵ The case cited is *Buchan v HM Advocate*,³⁶ wherein Lord Justice-Clerk Ross made the following comments:³⁷

[T]he law regarding statements by persons other than the accused is to be found in *Lewis v Blair*³⁸ and is stated correctly in Renton and Brown's *Criminal Procedure* (5th ed), para 18-41a... “A statement by another person...made in [the] presence of an accused, is not in itself evidence against that accused. The accused's reaction to that statement, or indeed his failure to react to it where it is an accusation of his guilt, is, however, evidence against him in the same way as a statement made by him, silence in the face of accusation being capable of being construed as an admission of guilt. The evidence of the other person's statement is therefore admissible for the limited purpose of explaining the accused's reaction.”

Two points are noteworthy here. Firstly, it appears that there are indeed occasions where Scots law will permit the drawing of adverse inferences from silence, albeit in somewhat confusing circumstances (such as the silent part of a partial response to a question,³⁹ or silence following accusation by a co-accused when made in the accused’s presence).⁴⁰ Secondly, the fact that an express statement of the law, cited with approval in *Buchan*, is regarded by the Review Team as ‘highly dubious’ suggests that understanding and interpretation of this common law adverse inference ‘provision’ lacks consistency and clarity. Why silence in the aforementioned circumstances can be interpreted against an accused, whereas silence in response to police questioning (particularly since the advent of the right to legal advice prior to or during such questioning imposed after *Cadder*)⁴¹ cannot be interpreted in a similar fashion is inadequately explained. Such confusion lends weight to the argument for clear, consistent statutory AIPs.

³³ *ibid* [7.5.6].

³⁴ *ibid*.

³⁵ *ibid*.

³⁶ *Buchan v HM Advocate* 1993 SCCR 1076; 1995 SLT 1057.

³⁷ *ibid* [1059]. The latest Renton & Brown *Criminal Procedure* (6th edn, 2013) still states this as the law at [24]-[56].

³⁸ *Lewis v Blair* (1858) 3 Irv 16.

³⁹ *Kay v Allan* (n 31).

⁴⁰ *Buchan v HM Advocate* (n 36).

⁴¹ *Cadder v HM Advocate* (n 2).

B. Adverse Inferences from Silence at Trial

The Review's opening paragraph on silence at trial does little to clarify matters.⁴² It states that when an accused does not give evidence at trial, '(...) his/her silence cannot be used to prove, or assist to prove, fact, and, in that regard, to provide corroboration.'⁴³ Readers are then directed via footnote to compare this statement with *Maguire v HM Advocate*,⁴⁴ a case in which an accused's silence was in fact held to be corroborative. The preceding is not to be understood as an attack on the intellectual capabilities of the Review team, but rather as a demonstration that the current law is not being interpreted consistently. A further example of the inconsistency of the current Scottish position on the drawing of adverse inferences at trial is provided by Walker and Walker, who state:⁴⁵

When the facts proved by the Crown raise an inference of guilt of the accused person, the accused bears a provisional burden of introducing contradictory facts or explanation. The burden arises purely through the state of the evidence and if the accused remains silent the court may well draw the inference least favourable to him.

The above suggests that the accused's silence becomes relevant if the proven facts before the court appear to indicate guilt. It is submitted that, in the interests of justice, facts should be placed before the accused much further back along the procedural chain (i.e. the police interview now taking place after legal advice) and that it should be possible to draw the 'least favourable' inference at this stage.

The Review cites a number of cases, including *Maguire, ante*, with a firm line of precedent dating back to *Hardy v HM Advocate*,⁴⁶ in which Lord Justice-Clerk Aitchison opined that '(...) there are certain cases in which, in the absence of an explanation from the accused person, a jury may be amply entitled to draw an inference of guilt.'⁴⁷ It appears, therefore, that a clear and explicit common law AIP exists at the trial stage in Scotland. This common law AIP was applied in the terrorist appeal case of *McIntosh v HM Advocate*,⁴⁸ wherein Lord Justice-Clerk Ross opined that '(...) in relation to any inferences to be drawn (...) the trial judge was fully justified in reminding the jury that the appellant had not given evidence, and that (...) they might find it easier to draw from that evidence the inferences which the Crown invited'.⁴⁹ Citing *Donaghy v Normand*,⁵⁰ the Review goes on to state that '(...) the failure of an accused to testify, in

⁴² The Carloway Review, *Report and Recommendations* (n 1) [7.5.8].

⁴³ *ibid.*

⁴⁴ *Maguire v HM Advocate* 2003 SCCR 758; 2003 SLT 1307.

⁴⁵ Walker and Walker, *The Law of Evidence in Scotland* (n 25) [2.12.3].

⁴⁶ *Hardy v HM Advocate* 1938 JC 144.

⁴⁷ *ibid* [146].

⁴⁸ *McIntosh v HM Advocate* (No2) 1997 SLT 1320.

⁴⁹ *ibid* [1323]-[1324].

⁵⁰ *Donaghy v Normand* 1991 SCCR 877.

circumstances where the evidence ‘cries out’ for an explanation, is a relevant factor which can be taken into account by a judge or jury when reaching a verdict’.⁵¹ It concludes by stating that ‘(...) a judge may comment on the failure of the accused to give evidence where the facts established by the evidence, if accepted, raise a *prima facie* inference of guilt.’⁵² The supporting cases cited are *Brown v Macpherson*⁵³ and *HM Advocate v Hardy*.⁵⁴ Yet having demonstrated that comment on silence at trial is acceptable, the Review’s research then highlights the core flaw (namely inconsistency of interpretation) in not having a clearly defined statutory AIP framework, by observing that ‘(...) it has been made very clear by the courts that any such comment should be made with restraint and only in exceptional circumstances’,⁵⁵ and further that ‘[f]or this reason, it is seldom done.’⁵⁶ The topic is closed with the observation that since the Criminal Justice (Scotland) Act 1995⁵⁷ removed the prohibition whereby prosecutors could not comment adversely on an accused’s failure to give evidence, it remains the fact that ‘(...) in practice, such comment is widely regarded as contrary to the spirit of the fair trial requirement and is very rarely made.’⁵⁸

It therefore appears that AIPs do exist in Scotland, however at a later stage in the criminal process than in other jurisdictions and in inconsistent circumstances. Nevertheless, their existence at the trial stage perhaps explains the Review’s reluctance to introduce a system of codified AIPs, either in the belief that the existing provisions preclude the need or because to do so would be to move ‘(...) part of the trial out of the courtroom and into the police station.’⁵⁹ The circumstances under which adverse inferences are permitted at trial appear to be contingent on judicial precedent which significantly pre-dates the ECHR and which has been shown to be contradictory and confused. Prosecutorial comment also appears to be governed by an unwritten doctrine of ‘fair play’ that voluntarily prevents adverse inferences, even though the express prohibition was removed. The fact that the provisions already exist in their current common-law form makes the level of resistance to their introduction in statutory form difficult to understand. It appears that a culture of under-usage and ignorance of the true utility of the present position has developed, which is driving resistance to what in actuality would not be a significant change. It would not take a huge leap of faith to enshrine the current *ad hoc* provisions in an appropriate statute thereby rectifying this culture of resistance. It would also enable consistency in interpretation, particularly if the Scottish caution is adjusted to inform a suspect that adverse inference will be a possible outcome from any maintenance of contrived silence or refusal to comment. As will be argued later in this article, replacing the common law provisions with clear

⁵¹ The Carloway Review, *Report and Recommendations* (n 1) [7.5.8].

⁵² *ibid.*

⁵³ *Brown v Macpherson* 1918 JC 3.

⁵⁴ *HM Advocate v Hardy* (n 46).

⁵⁵ The Carloway Review, *Report and Recommendations* (n 1) [7.5.8].

⁵⁶ *ibid.*

⁵⁷ Criminal Justice (Scotland) Act 1995, s 32.

⁵⁸ The Carloway Review, *Report and Recommendations* (n 1) [7.5.9].

⁵⁹ *ibid* [7.5.24].

ECHR-centred cautions and a statutory framework governing the situations in which courts could draw adverse inferences not only allows for consistent (and therefore potentially more just) decision-making, but also sets out clearly to detained persons their responsibilities under law to account for themselves.

3. AIPs in Neighbouring Jurisdictions

As a member of the United Kingdom, Scotland is unique in not having AIPs codified in statute. In addition to making a case that argues that the Review was wrong to dismiss the idea of introducing such provisions in Scotland, it is appropriate to outline the AIPs as enacted in Northern Ireland, England and indeed in the Republic of Ireland.

A. Northern Ireland

The Criminal Evidence (NI) Order 1988 permits AIPs in certain circumstances. Article 3 sets out the circumstances whereby inferences may be drawn as a result of failure to mention particular facts when questioned by law enforcement agencies.⁶⁰ The caution associated with Article 3 expressly warns a person suspected of an offence, from the outset, that a failure to respond to relevant questions may have consequences.⁶¹ This caution is administered upon arrest and again prior to any interview. The Order provides for two further specific cautions for use as appropriate, each of which again expressly warns the detainee that adverse inferences may be drawn from their failure to adequately respond. These relate to requests to account for objects, substances or marks attributable to the commission of an offence (Article 5) and/or to account for their presence at a particular place (Article 6).

It is noteworthy that the 1988 Order has stood the test of time despite existing in a famously litigious environment. It has passed key tests of legitimacy and proportionality in the ECtHR.⁶² Such proven utility and Convention compliance provides a strong case for similar provisions in Scotland, albeit (as this article will suggest later) based on European Convention-centric, rather than 'warning' based, police cautions.

B. England and Wales

AIPs in England and Wales are set out in sections 34 to 39 of the Criminal Justice and Public Order Act 1994. Jackson observes that '[m]ost of the differences between the

⁶⁰ Criminal Evidence (NI) Order 1988, Article 3 (1).

⁶¹ Northern Ireland Office, *Police and Criminal Evidence (NI) Order 1989 Codes of Practice*, C10.5 <http://www.nio.gov.uk/police_and_criminal_evidence__ni__order_1989_codes_of_practice_2007_editi on.pdf> accessed 16 March 2013.

⁶² *Murray v United Kingdom* (n 21).

provisions of the 1994 Act and the original provisions in (...) Northern Ireland (...) no longer exist because the 1994 Act has amended the [NI] Order to conform almost entirely to the 1994 provisions.⁶³ The English cautions replicate those in Northern Ireland. However, in contrast to their Northern Irish equivalent, the English provisions have been extensively criticised. This may be due to the fact that, in Northern Ireland, it is usually the judge personally (with no requirement to direct a jury) weighing the available proven evidence and deciding as to whether an adverse inference is appropriate. In England, on the other hand, it will be a jury that make the decision as to whether to draw the inference.⁶⁴ The Carloway Review explicitly referred to criticism of the English provisions in their 'complexity' argument, which is discussed later in this article. The English cautions are (as in Northern Ireland) in daily use, with their interpretation governed by a judicial Specimen Direction.⁶⁵ This direction is guided by the ECtHR parameters set in the cases of *Murray*,⁶⁶ *Condrón*,⁶⁷ *Beckles*⁶⁸ and *Adetoro*.⁶⁹

C. Republic of Ireland

The Republic of Ireland, having observed the utility of AIPs in Northern Ireland and England, followed those jurisdictions by replacing the Criminal Justice Act 1984 with the Criminal Justice Act 2007. This Act permits Irish courts to draw adverse inferences from an accused's silence at both police interview and at trial.⁷⁰ Interestingly, the Carloway Review offered no criticism of the Irish provisions and there has been little in the way of academic criticism of the Irish AIP system. As in England, Wales and Northern Ireland, silence alone is incapable of grounding a conviction.

D. The Erroneous Preconception & Lessons from Other Jurisdictions

It is of critical importance to the debate regarding AIPs to emphasise several important facts. First, it is crucial to understand that detainees must be informed, in plain English, the meaning of each individual caution. The legislation in Northern Ireland expressly

⁶³ JD Jackson, 'Interpreting the silence provisions: the Northern Ireland cases' [1995] *Criminal Law Review* 587, 588. The 1994 Act's amendments to the Criminal Evidence (NI) Order 1988 are in Schedule 10 [61].

⁶⁴ See, for example D Birch, 'Suffering in silence. A cost-benefit analysis of section 34 of the Criminal Justice and Public Order Act 1994' [1999] *Criminal Law Review* 769 and JD Jackson, 'Silence and proof: extending the boundaries of criminal proceedings in the United Kingdom' (2001) 5 (3) *International Journal of Evidence and Proof* 145.

⁶⁵ Judicial Studies Board, *Crown Court Bench Book, Directing the Jury* (March 2010) (Specimen Direction (2004) 40.1) <http://www.judiciary.gov.uk/NR/rdonlyres/BE25EBB6-AAD2-4ACD-8115-28D3BF613164/0/benchbook_criminal_2010.pdf> accessed 19 March 2013.

⁶⁶ *Murray v United Kingdom* (n 21).

⁶⁷ *Condrón v United Kingdom* (2001) 31 EHRR 1.

⁶⁸ *Beckles v United Kingdom* (2003) 6 EHRR 162.

⁶⁹ *Adetoro v United Kingdom* [2010] ECHR 46834/06.

⁷⁰ See ss 18, 19 and 19a of the Criminal Justice Act 1984 as amended.

provides that it is the duty of the 'constable' to do so.⁷¹ Secondly, and of crucial significance, it should be emphasised that the mere act of remaining silent cannot, in any circumstances, ground a finding of guilt. There must be accompanying proved facts intimating guilt. This key safeguard is enshrined in the relevant judicial Specimen Direction.⁷² Finally, it is important to underline that an unfettered judicial discretion exists with respect to the use of AIPs. Otherwise put, in jurisdictions in which AIPs exist a court *may*, rather than *shall*, draw inferences when determining whether or not there is a case to answer or guilt at trial. A significant number of Consultation responses appeared to reflect the belief that adverse inferences, if introduced, would be drawn *as a rule* if an accused was brought to trial.⁷³ The law with respect to AIPs in Northern Ireland makes it clear that this is not the case. It is suggested here that this fundamental misconception about the discretionary nature of AIPs has, perhaps unwittingly, infiltrated the arguments of opponents to the introduction of AIPs in Scotland. This misconception has diverted attention from the actual position outlined previously: that under statutory AIPs courts are actually empowered with an unfettered statutory discretion, enabling them to draw common-sense inferences only as a supplemental consideration, when evaluating other proven incriminatory evidence. The erroneous misconception that a statutory regime for AIPs would mean that inferences would always be drawn appears to have influenced the AIPs debate to a point where opponents may only be opposed because of their adherence to it.

If the above suggestion is accepted, it is further submitted that the question posed in the Consultation Document⁷⁴ represented a dice loaded (perhaps inadvertently) in favour of those who have adopted this misconception. It asked, '[s]hould the court be allowed to draw an adverse inference from a suspect's silence when questioned by police?'⁷⁵ This question immediately facilitates a presumption that blanket permission is being sought to draw adverse inferences in all cases in which an accused has maintained silence at interview, with no consideration afforded to the accompanying safeguards built into the legislation outlined above (such as appropriate cautions and the need for additional incriminating evidence). It is therefore inevitable that potential respondents would have been influenced towards adopting a more cautious and entrenched approach.⁷⁶ Even if this cannot be accepted, it is submitted that

⁷¹ Criminal Evidence (NI) Order 1988, Article 5 (4).

⁷² See Judicial Studies Board for Northern Ireland, *Crown Court Bench Book* (3rd edition, 2010) 111-122 <<http://www.jsbni.com/Publications/BenchBook/Documents/BenchBook.pdf>> accessed 13 March 2013.

⁷³ Carloway Review, *Responses to the Consultation Document* (n 4). This tone permeates the responses of Ferguson, 25 and Leverick & Farmer, 34.

⁷⁴ Carloway Review, *Consultation Document* (n 3) 82.

⁷⁵ *ibid*, question 27. Question 28 invited respondents to speculate as to the impact of permitting such an inference. This did little to mitigate the effect of the preceding closed question and the conjecture invited would, without empirical evidence, do little to further this debate.

⁷⁶ See, for example the Carloway Review, *Responses to the Consultation Document* (n 4) 335, where the Scottish Society of Solicitor Advocates state: '[t]o allow such an inference would result in speculation and inevitably there would be a suggestion that the state is seeking to force a suspect to answer questions or

this question might have been more fairly phrased as follows:

In light of the right to legal advice now enshrined in Scottish law, and the enhanced disclosure requirements incumbent on prosecutors, should Scotland permit its courts, in circumstances in which other proven facts tend to demonstrate a suspect's guilt, to draw such inferences as appear sensible and proper from that suspect's silence during initial police questioning?

This question would have properly addressed the core issue and perhaps resulted in more measured responses. More weight may also then have been given to the responses supporting AIPs. If the AIPs debate is to be definitively decided on the basis of fact-based reasoning, this erroneous preconception must first be dispensed with and replaced with a clear understanding of the unfettered discretionary nature of statutory AIPs.

4. Roberts & Zuckerman and The Carloway Review

A. The Roberts and Zuckerman Factor

Referring to rationales sourced from Roberts and Zuckerman,⁷⁷ Leverick and Farmer's consultation response cites '(...) three principled reasons for recognising an absolute right to silence.'⁷⁸ The latter authors unknowingly played a significant role in underpinning the arguments of opposing respondents, with their analysis often selectively quoted to reinforce flawed reasoning. As an example of selective quotation, the aforementioned response of Leverick and Farmer appears somewhat misleading in referring to '(...) three principled reasons for recognising an absolute right to silence.' What Roberts and Zuckerman actually categorise are '(...) three types of argument (...) advanced as justificatory rationales for the privilege [against self-incrimination].'⁷⁹

Leverick and Farmer sidestep the fact that Roberts and Zuckerman caution that 'both the 'right of silence' and the 'privilege against self-incrimination' can be '(...) defined and disaggregated in different ways',⁸⁰ before finding '(...) fundamental inadequacies in the justificatory rationales supposedly underpinning the privilege.'⁸¹ Roberts and Zuckerman's ultimate conclusion is that '(...) none [of the rationales]

give evidence thus diluting his right to a fair trial. It is unnecessary and unfair (...) [t]he likely scenario being: '(...) look at the evidence against him, he has not given evidence so he must be guilty.'

⁷⁷ Roberts & Zuckerman, *Criminal Evidence* (n 14) 548. The authors identify three justificatory rationales for the privilege against self-incrimination: intrinsic (e.g. the protection of privacy and the prevention of cruel choices); conceptualist (such as adversarial procedure and the presumption of innocence); and instrumental (essentially the prevention against wrongful conviction).

⁷⁸ The Carloway Review, *Responses to the Consultation Document* (n 4) 40.

⁷⁹ Roberts and Zuckerman, *Criminal Evidence* (n 14) 548.

⁸⁰ *ibid* 540.

⁸¹ Roberts and Zuckerman, *Criminal Evidence* (n 14) 579.

individually or in combination, strikes us as particularly compelling.⁸² At no point do they express support for an absolute right to silence, indeed they specifically caution that the '(...) juridical concepts [of a right to silence and the privilege against self incrimination] need to be disentangled and kept distinct.'⁸³

B. The Carloway Review's First Reason for Rejection

'The introduction of AIPs does not fit well with the presumption of innocence, the right to silence and the privilege against self-incrimination as understood and applied in Scotland.'⁸⁴ This reasoning amalgamates elements of all three possible justificatory rationales posited by Roberts and Zuckerman.⁸⁵ The flaws in this reasoning will shortly be demonstrated. Firstly, however, it should be underlined that the presumption of innocence as 'understood and applied in Scotland' is, for present purposes, understood as the idea '(...) that pre-trial procedures should be conducted, so far as possible, *as if* the defendant were innocent.'⁸⁶ Similarly, for present purposes, 'right to silence' and 'privilege against self-incrimination' comprise the right to silence as outlined by Lord Mustill,⁸⁷ juxtaposed with the ECtHR's seminal findings in *Murray*;⁸⁸ namely that the '(...) right to remain silent under police questioning and the privilege against self-incrimination are generally recognised international standards which lie at the heart of Article 6.'⁸⁹

Of more importance in advancing this article's case is the following statement contained in the ECtHR's *Murray* judgment, which it is necessary to restate in full:⁹⁰

What is at stake (...) is whether these immunities are absolute, in the sense that the exercise by an accused of the right to silence cannot under any circumstances be used against him at trial or, alternatively, whether informing him in advance that, under certain conditions, his silence may be used, is always to be regarded as "improper compulsion." On the one hand, it is self-evident that it is incompatible with the immunities under consideration to base a conviction solely

⁸² *ibid.*

⁸³ *ibid* 539. They specifically state that 'the privilege against self-incrimination' is often invoked loosely and has a tendency to become confused with the overlapping notion of the 'right to silence.' In their response to the consultation, it appears that Leverick & Farmer have fallen victim to this tendency. See Carloway Review, *Responses to the Consultation Document* (n 4) 34.

⁸⁴ The Carloway Review, *Report and Recommendations* (n 1) [7.5.26].

⁸⁵ Roberts and Zuckerman, *Criminal Evidence* (n 14) 548.

⁸⁶ See A Ashworth, 'Four threats to the presumption of innocence' (2006) 10 (4) *International Journal of Evidence and Proof* 2006, 243.

⁸⁷ *R v Director of Serious Fraud Office, ex parte Smith* [1993] AC 1 [30-31]. Here, Lord Mustill defined the right to silence as '[not denoting](...) any single right, but rather...a disparate group of immunities, which differ in nature, origin, incidence and importance...' Please see case for Lord Mustill's full elaboration of what 'the right to silence' entails.

⁸⁸ *Murray v United Kingdom* (n 21).

⁸⁹ *Murray v United Kingdom* (n 21) [45].

⁹⁰ *ibid* [47].

or mainly on the accused's silence or on a refusal to answer questions or to give evidence himself. On the other hand, the Court deems it equally obvious that these immunities 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.

Wherever the line between these two extremes is to be drawn, it follows from this understanding of "the right to silence" that the question whether the right is absolute must be answered in the negative. It cannot be said therefore that an accused's decision to remain silent throughout criminal proceedings should necessarily have no implications when the trial court seeks to evaluate the evidence against him.

Although it is appreciated that European and English jurisprudence regarding AIPs has evolved significantly since *Murray*, these original findings have never been overruled. Strasbourg fully endorsed the Criminal Evidence (NI) Order 1988 provisions. More specifically, Strasbourg endorsed the findings of the European Commission on Human Rights, agreeing that:⁹¹

(...) the provisions (...) constitute a formalised system which aims at allowing common sense implications to play an open role in the assessment of evidence. The Commission finds no indication on the facts of this case that it deprived the applicant of the right to silence or that the consequences which flowed from his exercise of that right were unfair.

This statement by Europe's highest court immediately renders the Review's 'main argument'⁹² untenable. As AIPs are plainly afforded legitimacy by Europe's highest court (who will have weighed these conceptual arguments more often and in greater depth than the Review team), it is disappointing that the Review team used such demonstrably unconvincing conceptual analysis as its principal reason for rejection. If Europe's highest court has sanctioned the use of AIPs, any legal argument made opposing their introduction in any European jurisdiction begins to lack cogency. Furthermore, it is difficult to understand the logic of opponents when the analogous situation surrounding the right to legal assistance is considered. In *Cadder*, the Supreme Court's application of the European Court's findings in *Salduz*⁹³ compelled the introduction of legislation finally bringing Scotland into line with a European standard her courts had fought tooth and nail to evade. Examination of the associated case law appears to suggest that Scottish judicial resistance was founded mainly on a perceived need to protect cherished historic procedural differences, rather than any aspiration

⁹¹ *ibid* [54].

⁹² The Carloway Review, *Report and Recommendations* (n 1) [7.5.23].

⁹³ *Salduz v Turkey* (2009) 49 EHRR 19.

towards ensuring a Convention-compliant legal system.⁹⁴ The ultimate futility of such a stance was rather embarrassingly brought home in *Cadder*. If Europe's highest court requires a right to legal assistance prior to questioning, and Scotland's government feels forced to comply, where is the credibility in refusing to pre-emptively update Scottish investigative procedure with cautions and provisions legitimised by the same court?

A second significant point of concern is that this principal reason for rejection appears to have been arrived at by the Review team in isolation, with little in the way of support from the responses that they were supposed to consider. Detailed scrutiny of the responses uncovered only two which expressly alluded to this reasoning, namely those of the Scottish Liberal Democrats⁹⁵ and Justice.⁹⁶ Cynics could be forgiven for concluding that greater weight was given to the views of a political (as opposed to a legal) entity (which of itself could be construed as partisan) and those of a civil rights organisation, rather than to the views of Scotland's principal law reform body,⁹⁷ its rank and file police service⁹⁸ and victim support groups.⁹⁹ It appears that as well as ignoring leading European jurisprudence on the subject, the Review ignored virtually all of its own consultation responses in arriving at this reason for rejection. This does not inspire confidence that the subject has been approached in a balanced and comprehensive manner.

Returning to academic grounds to finally and convincingly rebut this particular aspect of the Review team's reasoning, it was suggested earlier that this reasoning amalgamated elements of each of Roberts and Zuckerman's justificatory rationales, in particular the 'conceptualist rationale.'¹⁰⁰ The latter authors define the 'conceptualist rationale' as one that includes the assertion that the privilege against self-incrimination '(...) follows by necessary implication from the presumption of innocence.'¹⁰¹ Correctly observing that '(...) conceptual analysis can never be an adequate surrogate for moral argument in rationalizing criminal procedure',¹⁰² Roberts and Zuckerman describe three versions of the argument markedly akin to that underpinning the Review's first reason for rejection. Alternatively phrased versions of this argument also appear in several of the Consultation Responses.¹⁰³ This section will now outline each version, followed by the authors' considered and logical rebuttals.

⁹⁴ For an excellent synopsis of the background to Scotland's forced conversion to a right to legal assistance see F Leverick 'The right to legal assistance during detention' (n 22).

⁹⁵ The Carloway Review, *Responses to the Consultation Document* (n 4) 156.

⁹⁶ *ibid* 217.

⁹⁷ *ibid* 200.

⁹⁸ *ibid*. See the Scottish Police Federation at 87, the Association of Scottish Police Superintendents at 102 and the Association of Chief Police Officers in Scotland at 250. All police responses supported AIPs.

⁹⁹ *ibid*. Particularly those representing the rights of rape victims. See Rape Crisis Scotland at 163.

¹⁰⁰ Roberts and Zuckerman, *Criminal Evidence* (n 14) 540.

¹⁰¹ *ibid* 554.

¹⁰² *ibid*.

¹⁰³ The Carloway Review, *Responses to the Consultation Document* (n 4). See C Christie at 7, F Stark at 44, Scottish Liberal Democrats at 156, Justice at 217 and the Senators of the College of Justice at 359.

Firstly, there is the argument that '(...) removing the privilege against self-incrimination would diminish the prosecution's duty to prove guilt beyond reasonable doubt.'¹⁰⁴ The authors rebut this line of reasoning by stating that it:¹⁰⁵

(...) confuses a normative standard of sufficiency of proof with the type of evidence capable of satisfying that standard. Where silence is evidentially probative it may contribute towards discharging the prosecutor's burden of proof without in any way diluting the traditional standard of proof (...) there is no more justification for preventing the prosecutor from relying on probative silence, than for discounting other apparently incriminating evidence, such as for example (...) that the suspect was seen fleeing from the scene of the crime.

Secondly, there is the argument that '(...) the privilege is a component of the accused's right not to have to (...) defend himself unless the prosecution first establishes a *prima facie* case.'¹⁰⁶ Again, Roberts and Zuckerman effectively negate this assertion by observing that:¹⁰⁷

Even if the privilege were abolished the prosecution should still continue to bear the burden of establishing a *prima facie* case (...) silence in court might *contribute* to a *prima facie* case, but could never constitute a case to answer. Silence (...) is only ever probative in the context of other incriminating evidence.

This statement reinforces the factual position as set out in the Northern Irish and English legislation, namely that silence of itself does not automatically permit the drawing of an adverse inference. Roberts and Zuckerman's third version of the argument underpinning that relied upon by the Review is as follows:¹⁰⁸

(...) it might be contended that the presumption of innocence is greatly weakened if accused persons are required to account for themselves during police interrogation. The prosecution might then rely on (...) suspicious silences in order to establish a *prima facie* case at trial. This (...) is all the more perplexing to the extent that police are not obliged to disclose information (...) prior to an interrogation, beyond the bare fact that he is suspected of a particular offences (...) the presumption of innocence is truly a bulwark of autonomy, a cipher of justice and a servant of democratic accountability in liberal societies.

The authors rebut this effectively by correctly observing that powers of arrest, detention and right to question persons in custody are set out in statute '(...) completely independently of the privilege (...) [which] itself consequently does little to safeguard

¹⁰⁴ Roberts & Zuckerman, *Criminal Evidence* (n 14) 554.

¹⁰⁵ *ibid.*

¹⁰⁶ *ibid.*

¹⁰⁷ *ibid* 554-555.

¹⁰⁸ *ibid* 555.

the citizen from the perils of arrest, detention and police interrogation.¹⁰⁹ Put bluntly, the existence of a privilege against self-incrimination, already disentangled from an absolute right to silence, in no way protects a person from being accused of a crime, arrested and brought to a police station and interviewed with a view to eliciting their account of the circumstances which brought about their arrest or detention. However, the privilege as understood in Scotland currently hands the suspect an early advantage in obstructing the pursuit of truth, whereby the original grounds for arrest are neutered by a caution which tells the suspect that they are under no obligation to assist the investigative process at all. This state of affairs has been compounded since the advent of a right to legal assistance in Scotland as the accused can legally contrive to remain silent. As will be seen shortly, the above approach is at odds with less controversial powers occasionally employed to obtain non-verbal evidence forcefully, such as samples, which of themselves can lead to adverse inferences being drawn.

Some of the most vehement opposition to AIPs was expressed in the consultation response of Ferguson, who has previously described AIPs as a '(...) potentially legitimate form of compulsion.'¹¹⁰ She asserts that:¹¹¹

(...) when failure to respond to police questioning is treated as an indication of guilt, there is no true "right" to silence at all: silence is being treated as a form of self-incrimination. We tend to think of compulsion as coming from physical or psychological threats, but it may equally come from the knowledge that one's silence may form part of the prosecution's case.

It is respectfully submitted that Ferguson's view is too strong and fundamentally inaccurate. Failure to respond to police questioning is not treated as an indication of guilt *any more* than the original arrest upon reasonable suspicion or complaint is treated as an indication of guilt. In jurisdictions with AIPs, failure to respond to police questioning (after a suitable caution and the benefit of legal advice delivered prior to interview) *may*, in conjunction with (*and only in conjunction with*) other proven evidence, be subject to an adverse inference. Silence *is not* treated as a form of self-incrimination; rather silence *may* simply be viewed as an additional contributory indicator of participation in the offence(s) alleged when assessed alongside other incriminating evidence. It is impossible to incriminate oneself through maintaining silence. Incrimination only arises through the inferences that can be drawn from all the other available evidence, with a failure to adequately explain the presence of that evidence being permitted to give additional weight to all the proven facts. It is submitted here that there is no compulsion element whatsoever. Ferguson's contentions conform to Roberts and Zuckerman's 'intrinsic rationales',¹¹² whereby remaining silent allegedly

¹⁰⁹ Roberts & Zuckerman, *Criminal Evidence* (n 14) 555.

¹¹⁰ Ferguson (n 26) 753.

¹¹¹ Ferguson (n 26) 753-754. This exact statement was reproduced in her response (Carloway Review, *Responses to the Consultation Document* (n 4) 29.

¹¹² Roberts & Zuckerman, *Criminal Evidence* (n 14) 549.

'(...) spares the accused the 'dilemma' of the choice between testifying truthfully and contributing to his own conviction, or committing perjury in order to escape punishment.'¹¹³ These authors argue that none of the '(...) modern rationales emphasizing the hardship of compelled self-incrimination (...) satisfactorily neutralises Bentham's original critique of the privilege against self-incrimination.'¹¹⁴ Ferguson's arguments regarding privacy and personal autonomy also mirror this intrinsic rationale. She contends that:¹¹⁵

The suspect (...) is in a vulnerable position. S/he may be unaware of the full nature of the allegations being made against him/her and the basis for these allegations. On (*sic*) should not be required to account for what one was doing/where one was/who one was with at such a preliminary stage in the proceedings.

However, Roberts & Zuckerman correctly observe (with reference to Article 8 of the ECHR) that:¹¹⁶

(...) the right to privacy is subject to numerous qualifications and limitations (...) although people should be left alone with their private thoughts (...) it is not oppressive, where material suspicions of offending are aroused, to invite citizens to respond to accusations or to account for apparently incriminating circumstances (...) the right to privacy is no more persuasive justification for silence in the police station than at court.

As regards the idea that a detainee should not have to account for their movements, or for objects or marks, it is argued that, in the interests of pursuing truth and justice, this is exactly what they should have to do. Investigative agencies are required to obtain evidence and process accused persons as swiftly and diligently as possible. Ferguson argues that there should be adequate time for a suspect to consider advice and to form a response to the allegations made against him/her. It is submitted here that the time between initial suspension of liberty and the receipt of the prescribed legal advice is more than adequate to form at least the basis of a defence. Some of the evidence the police are required to secure expeditiously is best obtained by questioning, which now cannot take place until after legal advice has been received. Any decision to remain silent requires a conscious effort to resist questions designed to elicit guilt or innocence and impacts directly on the quality of evidence being retrieved. In turn, this impacts on the quality of the evidence that can be placed before a court, meaning that the state's duty to protect society by bringing suspected offenders before that court is obstructed. Whether or not an accused is aware of the full nature of the allegations

¹¹³ *ibid.*

¹¹⁴ *ibid* 550.

¹¹⁵ The Carloway Review, *Responses to the Consultation Document* (n 4) 29.

¹¹⁶ Roberts & Zuckerman, *Criminal Evidence* (n 14) 551-552.

being made, it cannot seriously be countenanced that total silence is not a contrived condition.

Ferguson expresses support in her response for the idea of a distinct legal status of 'suspect' with associated rights and permitted infringements.¹¹⁷ She has no issue with a court drawing adverse inferences from a suspect's failure to voluntarily submit to an identification parade or from a suspect's failure to co-operate with the taking of samples.¹¹⁸ This is despite the fact that obtaining such samples may require police or medical staff to legally assault a non-compliant suspect, something which is unthinkable when contemplating how to elicit verbal evidence. If adverse inferences appear permissible despite these infringements of the accused's body, it is difficult to understand the objection to drawing an inference from contrived silence, where the accused has received legal advice, his/her interview is audio/video recorded and where the contents of his or her mind are of at least as much evidential value as other physical evidence.

In sum, it is therefore submitted that the Review's first published reason for rejecting AIPs fails to accord sufficient weight to European Court jurisprudence on the subject (namely the paradigm case of *Murray*, which still stands), and inflates the importance of arguments based on selectively quoted Roberts and Zuckerman potential rationales, which in fact have all been analysed and discredited by these authors themselves. Such reasoning simply does not stand up to scrutiny.

5. The Carloway Review's Second Reason for Rejection

As noted in the introduction to this article, the second argument advanced by opponents of AIPs in the Review is that AIPs would bring unnecessary complexity to the criminal justice system. This argument for rejecting AIPs is potentially stronger than the principled argument outlined in the part above and directly opposes this article's stated position that statutory AIPs would bring clarity and consistency to Scottish criminal procedure. It is a practical, seemingly logical argument which does not fit the aforementioned rationales for rejection. It also featured in many of the Consultation responses.¹¹⁹ In this respect at least this reason for rejection is reflective of the views of respondents. It can however be rebutted, and in doing so, two complementary arguments are offered.

Firstly, it is argued here that in citing the problems and complexity associated with English AIPs as a fundamental reason not to adopt such provisions in Scotland,¹²⁰ little or no consideration was afforded to the idea that Scotland does not have to follow

¹¹⁷ The Carloway Review, *Responses to the Consultation Document* (n 4) 25.

¹¹⁸ *ibid.*

¹¹⁹ *ibid.* 8 of the 19 responses opposing AIPs can be read as opposing AIPs on, *inter alia* 'complexity' grounds. See for example Henderson at 19, Leverick & Farmer at 34, Stark at 44 and Chalmers at 57.

¹²⁰ *ibid.* Leverick & Farmer's response, at 34, explicitly states that they have '(...) drawn much assistance from AIPs in England & Wales.'

the English model, but can instead draft its own AIPs. Suggested cautions are set out below further below. Redmayne (also selectively cited by opponents of AIPs) points out that '[e]xporting section 34 [i.e. its potential consequences] would not necessarily mean exporting the case law that has accreted to it.'¹²¹ It is conceded that English AIPs have become complex and convoluted, due principally to the machinations of successive judges rather than the original drafting. The English cautions, which refer to 'warning' and 'harming a defence', are inherently unsuitable when set against the aspiration of an overall Convention-compliant 'fair trial' process. Hamilton (in assessing the current state of the presumption of innocence in Ireland) has said the following about the English system:¹²²

(...) the much more structured approach taken by the English courts means that a comparison with recent English jurisprudence is unfavourable. This divergence [in how AIPs are applied and interpreted] is perhaps surprising given the recent incorporation of the European Convention (...) in both jurisdictions.

This statement acknowledges not only that Ireland's courts have not felt compelled to develop similar convoluted interpretations of their AIPs, but also, more crucially, that a small Member State utilising a similar adversarial trial system as Scotland, within an evolving Area of Freedom, Security and Justice,¹²³ can and does use the margin of appreciation available to it to operate Convention-compliant AIPs.¹²⁴ Scotland, with a blank canvas currently available, can do likewise.

As mentioned above, the English caution refers to 'harming a defence'. The Northern Ireland caution also uses this language. In pursuit of a just criminal procedure and a fair trial, it may perhaps be better to concentrate on advising a person in custody (who has received or is receiving legal advice) that, if they wish to express their right to silence or not offer any explanatory words in response to questioning, that a court may, when considering all the relevant proven evidence, also take a view of their failure to account for themselves. This author is of the view that the wording contained in the English and NI models, in the context of delivery to a vulnerable detainee (from any authority figure) provides ammunition to opponents of AIPs seeking to legitimately assert the existence of a degree of compulsion.

¹²¹ See M Redmayne, 'English Warnings' [2008] *Cardozo Law Review* 1047, 1086. Although critical of the English provisions, Redmayne does not adopt a position of being against AIPs *per se*.

¹²² C Hamilton, 'Threats to the presumption of innocence in Irish criminal law: an assessment' (2011) 15(3) *International Journal of Evidence and Proof* 181 at 205.

¹²³ Consolidated Treaty on the Functioning of the European Union, Title V, Area of Freedom, Security and Justice. See in particular Chapter 4, Judicial Cooperation in Criminal Matters and Chapter 5, Police Cooperation in Criminal Matters.

¹²⁴ Hamilton (n 122) cites no challenges to the Irish AIPs, either in Europe or at Irish Supreme Court level. Furthermore the Review's synopsis of the Irish provisions makes no criticisms of them.

On another note, although ‘complexity’ is sometimes a cause for judicial ‘anxiety’,¹²⁵ criminal law is by definition, inherently complex. ‘Complexity’ is a subjective term. Whilst it featured prominently as a potential problem with AIPs in the responses of opponents, no responses in support expressed similar concerns. Complexity is in the eye of the beholder and consequently can be interpreted differently by supporters and opponents of AIPs. The Review’s complexity argument may, in reality, reflect an unwillingness to embrace necessary change or a desire to maintain cherished ‘differences’. It may alternatively be founded on a perception that educating Scotland’s police, prosecutors, the legal profession and judiciary as to AIPs represents too burdensome or costly a task.¹²⁶ The complexity rejection can be easily satirised to read that cost and bureaucratic/logistical reservations do not fit well with the Article 6 right to a fair trial as understood in Scotland. What may be currently missing in Scotland is a sufficient impetus or collective will on the part of the legal establishment to adapt to the evolving European model (to which Scotland is inextricably, if indirectly bound).¹²⁷ The Review itself alluded to this requirement for the legal profession to adapt.¹²⁸

The preceding argument in no way implies that Scotland should homogenise its procedures with those of Europe, but merely that harmonization may be the way forward.¹²⁹ It is worth underlining, however, that ‘(...) continental/civilian jurisprudence has never found any difficulty in condoning common sense inferences from silence.’¹³⁰ Given that most of Europe has little difficulty with the concept of AIPs (albeit due to the inquisitorial trial model) there remains little justification for Scotland to continue to exclude them. It is submitted that the dismissal of AIPs on grounds of undue ‘complexity’ uses irrelevant English based evidence, ascribes an overly harsh subjective interpretation as to what constitutes ‘complexity’ and fails to grasp the reality of Scotland’s current position (and future direction) within Europe.

6. Making it Happen

The key to introducing a Convention-compliant criminal procedure facilitating AIPs lies

¹²⁵ See the comments of the judge in *R v Bresa* [2005] EWCA Crim 1414, cited by Ferguson in her consultation response (Carloway Review, *Responses to the Consultation Document* (n 4) 29).

¹²⁶ See the analogous view of Roberts and Zuckerman, *Criminal Evidence*, (n 14) 560, observing, in relation to England, that ‘(...) the duty solicitor scheme (...) boasts impressive geographical coverage, but such expenditures are not obvious vote-winners.’

¹²⁷ An example of the evolving European model is the European Commission’s Proposal for a Directive on the Right of Access to a Lawyer etc (COM(2011) 326 final) <<http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=COM:2011:0326:FIN:EN:PDF>> accessed 12 July 2012.

¹²⁸ The Carloway Review, *Report and Recommendations* (n 1) [5.2.31].

¹²⁹ On this debate see Ferguson (n 26) 756.

¹³⁰ Roberts and Zuckerman, *Criminal Evidence* (n 14) 579.

in the introduction of new statutory cautions.¹³¹ Having outlined the shortcomings of the English caution(s) and dismissed the relevance of referring to the English system when contemplating a scheme for Scotland, suggested wording for an initial caution upon detention is suggested by way of footnote.¹³² Prior to questioning, and after legal advice has been received or waived (preferably with a legal representative present) a suspect could then be formally cautioned as per the footnote below.¹³³ Whilst this caution appears lengthy in comparison to its UK counterparts, potential criticism is countered by the fact that it could be in print and available in relevant custody areas, with the suspect invited to retain a signed copy. It represents a clear statement of the suspect's Convention rights and reciprocal responsibilities. It carries no intimation of compulsion. As the written caution constitutes a disclosable document, there will be no issue for the defence or the courts in proving that the investigating team have adhered to the need for Convention fairness. For those unable to read the document, the caution could be fully explained (on tape) in layperson's terms prior to interview, with an indication sought from the detainee as to their comprehension of it. This article submits that it is possible for a ECHR-compliant procedure, which commences in every other respect when a person is first detained, to permit that detainee to be clearly informed not only of their rights, but of an obligation to verbally provide their explanation that can then be assessed in conjunction with any other evidence. The cautions as suggested ensure that that obligation is fairly explained to them.

¹³¹ Carloway Review, *Responses to the Consultation* (n 4). See also the views of Raitt, at 61 and the Association of Scottish Police Superintendents at 102 who support this position.

¹³² Your Convention right to liberty is now suspended, as I suspect you of involvement in the offence(s) of _____. This means that you are now arrested/detained. You will be brought to _____ (Police Station or other place of detention). You have a right to silence, under the European Convention on Human Rights and anything you do say to me now will be recorded and included in my evidence. At _____ (place of detention) you have an immediate Convention right to a private consultation with a solicitor before I/we pursue our investigation any further.

¹³³ You are reminded as to why your Article 5 right to liberty has been suspended; namely suspicion of involvement in _____. You have received/are receiving professional legal advice in relation to that/those matters. You will now be questioned by us in relation to that matter as part of our investigations. You have a right to remain silent or not to answer any of these questions under the European Convention on Human Rights. However the European Court of Human Rights has held this right not to be absolute. All of your responses, or the fact that you remained silent will be (tape) recorded. If this matter proceeds to a hearing in a court, that record will be presented as part of our evidence. Because you also have a Convention right to a fair legal process, you are strongly advised to tell us during this interview, of any fact or explanation you may have to offer which may tend to assist in proving your innocence. If you do not take the opportunity during this interview to do so, a court may, when assessing all the evidence we put forward relating to you, infer that you, by not taking this opportunity to offer any fact or explanation, have no innocent explanation to offer.

7. Conclusion

It has been shown in this article that AIPs do currently exist in Scotland, but on an inconsistent basis, combining occasionally conflicting judicial precedent and an unwritten doctrine of fair play practiced by prosecutors. The relevant AIPs in Northern Ireland, England and the Republic of Ireland have been briefly described, along with a reminder to opponents of the fact that the ECtHR fully legitimised such provisions in *Murray*. This fact renders the Review's first 'conceptual' reason for rejecting Scottish AIPs untenable. The main opposing arguments (analysed by reference to their selectively quoted Roberts and Zuckerman potential rationales) have also been rebutted. It is revealing that no opposing respondent, or indeed the Review team, acknowledged Roberts and Zuckerman's ultimate conclusion that '(...) the interests of suspects in the police station, and of the accused at trial, are more fairly and effectively protected by tailor-made procedural safeguards, such as those set out in minute detail by PACE 1984 and its associated Codes of Practice.'¹³⁴ This article fully endorses that conclusion.

The Review's second (practical) argument regarding potential complexity (relying on the prevailing complexity of the English provisions) has been shown to be irrelevant in contemplating AIPs for Scotland, being more likely motivated by perceptions of cost and logistics. Law is, by definition, complex, and the term is subjective. There is little complexity in the cautions proposed herein, which do not represent finalised versions, but an embryonic way forward. Furthermore, if criminal law is continually 'tweaked', rather than repealed and renewed in line with prevailing societal needs, it will inevitably become increasingly complex. The Criminal Procedure (Scotland) Act 1995 is living testament to this.¹³⁵ It is suggested that the published Review as a whole should be referred to the SLC with a view to creating a single complete statute on Criminal Investigative Procedure for Scotland, similar, but not necessarily identical to the Police and Criminal Evidence Act 1984. Despite predating the Scottish Act by eleven years, the Act's provisions have stood the test of time more steadfastly. This would be preferable to the current piecemeal reforms coming forth in relation to legal access and disclosure which, although welcome, mean that various statutes have to be referred to rather than a single PACE equivalent law and associated Code of Practice. This in itself may create undue complexity.

There can be no doubt that the Carloway Review represents a commendable achievement when set against the magnitude of the task it was presented with. It is disappointing, however, that it used such demonstrably weak reasoning in its rejection of AIPs. This is compounded by the fact that the responses of those supporting AIPs for Scotland were totally ignored in the published document. All parts of Scotland's police service supported AIPs. As the public service at the coal face of investigating reported crime, their views should have carried greater weight. Despite the well-documented

¹³⁴ Roberts and Zuckerman, *Criminal Evidence* (n 14) 579.

¹³⁵ There have been over 120 modifications to the original Act.

obstacles to securing justice for Scotland's rape victims, their views (and other victims' rights groups) also carried little weight. It is strongly suggested that with SLC interest in re-examining the matter,¹³⁶ Scottish Ministers should refer the topic to the Commission in order for the law relating to adverse inferences to receive the level of scrutiny it deserves. Victims of crime need to know that every Convention-compliant procedure is available to agencies in Scotland charged with investigating crime.

¹³⁶ Carloway Review, *Responses to the Consultation Document* (n 4) 200.