The Vulnerable Accused in Scotland: 'A Fig for Those by Law Protected'?[1]

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1: Introduction

Like much else in human society in the tumultuous era of Covid 19, the manner in which criminal proceedings occur in Scotland, has changed markedly, in a remarkably short period of time.[2] As I write, jurors in the east and west of the country are assessing evidence, and determining guilt, not from the austere and solemn confines of the jury box of the High Court of Justiciary, but rather, from the relative comfort of the amply cushioned seats of various Scottish cinemas.[3] In Scotland's sheriff courts, there have also been convictions and acquittals in judge only summary trials conducted entirely virtually, with parties participating in proceedings, from various locations, using information technology software.[4] There have been changes too to the substantive Scots law of evidence itself, specifically the admissibility of hearsay.[5]

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[1] My title borrows from Robert Burns' celebrated posthumous poem, 'The Jolly Beggars". See Robert Burns, *The Poetical Miscellany; Containing Posthumous Poems, Songs, Epitaphs and Epigrams* (Glasgow 1800). I am grateful to Ryan Sloan and Tony Convery, who generously gave of their time to discuss matters that arose in my consideration of this area of practice. Any errors remain my own.

[2] See Paul F. Scott, 'Responding to Covid-19 in Scots Law' (2020) 24(3) Edinburgh Law Review, 421 for an overview of the various legal responses to the pandemic in Scotland.

[3] Douglas Barrie, 'Coronavirus in Scotland: Jurors Take a Seat at Cinemas to Tackle Courts Backlog' *The Times* (London, 2 October 2020) <https://www.thetimes.co.uk/article/coronavirus-in-scotland-jurors-take-a-seat-at-cinemas-to-tackle-courts-backlog-s7h3j2wvg> accessed 7 December 2020.

[4] Laura Paterson, 'Virtual Trials "Will Need to be Used as Default Option"' *The Times* (London, 4 July 2020) <https://www.thetimes.co.uk/article/virtual-trials-will-need-to-be-used-as-default-option-n577bc6kd> accessed 7 December 2020.

[5] See s.259 (2A) of the Criminal Procedure (Scotland) Act 1995 as amended by Part 5 of the Coronavirus (Scotland) Act 2020. Analysis of the potential implications of the change are outlined at Eamon Keane, 'Alarm Bells Ring Over Hearsay Proposals' (Scottish Legal News, 1 April 2020) < https://www.scottishlegal.com/article/eamon-keane-alarm-bells-ring-over-hearsay-proposals> accessed 7 December 2020. See also Fred Macintosh, 'Will the Risk of Covid-19 Lead to More Hearsay Evidence in Scottish Criminal Trials?' [2020] 166 Criminal Law Bulletin, 1.

Amidst such far-reaching reform, there is a palpable sense of recognition in Scotland that notwithstanding whatever improvement to the public health situation widespread vaccination may bring, there will be no simple return to the *status quo ante*.[6] Indeed, the head of the judiciary in Scotland, the Lord President, Lord Carloway, has remarked publicly that the pandemic has afforded the Scottish legal profession with 'an opportunity as well as a challenge'[7] and that 'the crisis has demonstrated that where change is a necessity, it can be made to happen.'[8] It therefore seems an apt juncture, for me to write about an area of Scottish legal practice, namely the current legal framework governing the vulnerable accused, in criminal proceedings, who is not *incapax*, that requires urgent consideration and reform.[9] As I will show, the right of effective participation is the normative principle guiding measures of support for the vulnerable accused in Scots law. There is however no authoritative exposition of the principle of effective participation in Scots law in this context. As a result, such support that does exist is fragmented, and in places ill defined. This is a matter which now more than ever, necessitates careful consideration from policy makers and practitioners, as the demographic in question, may be especially adversely impacted by increased digitalisation and other changes made to criminal procedure deemed necessary due to the pandemic.[10]

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[6] See Lord Carloway, 'Annual Address on the Opening of the Legal Year' (Edinburgh, Judiciary of Scotland, 28 September 2020) <https://www.judiciary.scot/home/media-information/media-hub-news/2020/09/28/opening-of-the-legal-year> accessed 7 December 2020.

[7] ibid.

[8] See Lord Carloway's comments reported at Kevin O'Sullivan, 'Five Year Digital Strategy Aims Achieved in a Matter of Months, Says Scotland's Most Senior Judge' (FutureScot, 16 September 2020) <https://futurescot.com/five-year-digital-strategy-aims-achieved-in-a-matter-of-months-says-scotlands-most-senior-judge/> accessed 7 December 2020.

[9] A different legal regime applies to the vulnerable accused who lacks legal capacity. From henceforth all references to 'the vulnerable accused' should be read as referring to an accused who has legal capacity, unless otherwise stated.

[10] See e.g. the findings contained relating to remote hearings and vulnerable individuals in The Law Society of England and Wales, 'Law Under Lockdown: Covid 19 Measures on Access to Justice and Vulnerable People' (September 2020 The Law Society of England and Wales).

2: Definition of the Vulnerable Accused

It is necessary, prior to outlining and analysing the substantive legal framework protecting the vulnerable accused in Scotland, to first define what I mean by 'the vulnerable accused', alongside noting a few other preliminary matters relating to questions of scope and definition. I acknowledge at the outset that the very definition of 'vulnerability' in this context is multifaceted and often contested, in keeping with the use of the term generally in matters of socio-legal policy.[11] That being so, for the purposes of this chapter, I use the term 'the vulnerable accused' to refer to any individual potentially facing criminal prosecution in Scotland, which I define as beginning at the stage of initial arrest and police interview,[12] through to the leading of evidence at trial, whose vulnerability is such that they engage a specific legal response, designed at assisting and enabling them to participate effectively in proceedings.[13] It should be noted that my definition of the vulnerable accused excludes from consideration the suite disposals commonly known as 'diversionary measures' which, in general terms are alternatives to prosecution that may be offered by the procurator fiscal, but that is not to say that issues do not arise in this context for those who are vulnerable.[14] I also will not consider individuals whose alleged criminality is dealt

[11] See Gillian Hunter, 'Participation in Courts and Tribunals' in Jessica Jacobson and Penny Cooper (eds) *Participation in Courts and Tribunals: Concepts, Realities and Aspirations* (BUP 2020) and Kate Brown, Kathryn Ecclestone and Nick Emmel, 'The Many Faces of Vulnerability' (2017) 16(3) Social Policy and Society, 497.

[12] Given that my definition includes the police interview it would be more accurate to refer to the 'vulnerable suspect' when referring to the individual at this stage of the process, but I have chosen the term 'vulnerable accused' to cover the entirety of proceedings for the sake of simplicity.

[13] In Scotland, the police have a statutory power permitting them to arrest and ask questions of a suspect under caution without warrant as per the Criminal Justice (Scotland) Act 2016 s 1. A separate regime for questioning suspects also exists under the Terrorism Act 2000 s 41 and schedules 7 & 8 but consideration of same is excluded from this chapter.

[14] For further information on the operation of such measures in the Scottish context see Tracey Price, Tessa Parkes & Margaret Malloch, '"Discursive Struggles" between Criminal Justice Sanctions and Health Interventions for People Who Use Drugs: a Qualitative Exploration of Diversion Policy and Practice in Scotland' (2020) *Drugs: Education, Prevention and Policy* < https://www.tandfonline.com/doi/full/10.1080/09687637.2020.1775180> accessed 16 December 2020.

with exclusively via the Scottish Children's Hearing System.[15] Vulnerability, too, in terms of my definition, is broad enough to cover a range of relevant personal factors in the accused that potentially engage a supporting measure.[16]

3: The Historical Foundations of Support for the Vulnerable Accused in Scots Law

I will now consider the historical foundations of the support for the vulnerable accused in Scots law. The obligation upon the court to take steps to ensure the effective participation of the vulnerable accused, can first be conclusively identified in a recognisable manner in the modern era in Scotland, in a reported case from the High Court of Justiciary in 1941, namely *HM Advocate v Olsson*.[17] I use the phrase 'the modern era' here to signify in very general terms the period which followed the move towards a mode of criminal trial which is broadly similar to that which is used today. Which for present purposes I define, as beginning in 1898 whereby the accused was given the right, previously denied under common law in Scotland, to give evidence at trial and at all stages of the case, in their own defence.[18] This change, and the resulting period, is important in the context of my analysis because it heralded an era whereby the Scottish courts, in theory at least, required to adapt to the prospect of the vulnerable accused giving evidence. As I will show, this led to several important changes in practice relating to the right of effective participation, that set the foundations for the contemporary legal position.

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[15] A civil forum, designed to safeguard the welfare of children, that may however consider the alleged commission of criminal offences under its jurisdiction. See Kenneth Norrie, *Children's Hearings in Scotland* (W.Green 3rd edition 2013).

[16] In using this term, I am not suggesting that any of the groups to which I apply the label are inherently vulnerable, rather that the specific institutional circumstances which they face render them such. There are also myriad other factors, beyond the scope of this chapter, that influence whether effective participation can be achieved or not.

[17] *HM Advocate v Olsson,* 1941 JC 63.

[18] See The Criminal Evidence Act 1898 s 1.A similar provision is now contained in The Criminal Procedure (Scotland) Act 1995. See Margaret Ross, James Chalmers & Isla Callander (eds) *Walker & Walker The Law of Evidence in Scotland* (Bloomsbury, 5th edition, 2020) 13.11.1.

Returning to the case in hand, the accused, a Swedish sailor charged with a murder in Aberdeen, required the assistance of an interpreter in order to understand the evidence led at his trial. The case report notes that Lord Jamieson, who presided at first instance over the trial, ordered that such a step to be taken remarking that 'the mere physical presence of the accused in this case will not satisfy the requirements of justice…'.[19] The judgment acknowledges too that a similar direction and practice had been adopted earlier by Lord MacKenzie in the High Court of Justiciary in an unreported case from 1913, with the hope that such a way of proceeding would be followed where appropriate.[20] Whilst *Olsson* avoids the modern language of vulnerability and effective participation, the purpose of, and the principle behind, the judicial intervention may still be readily understood. Although the court is silent on why, exactly, the interpreter is required in the interests of justice, one can assume that the rationale behind such a step is to permit the accused in this case to understand the evidence led at trial, so that they may instruct their defence accordingly. Important here, as I have already mentioned, is the change in the late 19th century permitting the accused to give evidence in their own defence. Viewed in this context, the provision of the interpreter places the vulnerable accused on an equal footing such that they make an informed choice about whether to give evidence or not, in light of the Crown's case. Indeed, in the following year, the High Court of Justiciary determined that the failure to provide interpreters to three Polish accused at trial amounted to a miscarriage of justice and thus quashed their convictions.[21]

Importantly, the historical case law on the admission of extra-judicial confessions and statements made to the police from this era, also features instances of evidence rendered inadmissible at trial on the grounds that its admission would be unfair,

[19] *Olsson* (n 17) at 63.
[20] ibid.
[21] *Liszewski v Thomson*, 1942 JC 55.

given the personal characteristics of the accused.[22] These cases, again whilst avoiding the language of vulnerability and effective participation, narrate instances where the youth, physical and mental condition and the lack of English of the accused are all relevant in the assessment of fairness and thus admissibility. Whilst these judgments are also directly concerned with myriad other political and legal factors, one can also clearly perceive a recognition that the vulnerability of certain individuals may require targeted support at early stages of the criminal investigation, in order so that they can understand matters, thus facilitating their effective participation.[23] The limits to such 'effective participation' do need to be acknowledged however in this context. Scots law's historical treatment of the legal definition of the suspect is complicated, and the law of evidence has varied throughout the modern era as to what is, and is not, permitted in terms of police practice.[24] The cases cited in this context arise from an era in which there was no legal power for police to detain a suspect for questioning, and where the only legal power was that of arrest, with police officers permitted to ask questions to clarify responses to caution and charge, following arrest.[25] Nevertheless, the police often 'invited' suspects to accompany them to police stations for questioning.[26] There was no right of access to legal advice for such individuals.[27] What is especially interesting therefore in this early body of case law, is the reference that is made in certain of the judgments to the importance of access to legal advice for those who are deemed vulnerable.[28] The rationale again here is not made explicit, and as

[22] E.g. *Olsson (*n 17), *HM Advocate v Aitken,* 1926 JC 83; *HM Advocate v M'Swiggan,* 1937 J.C. 50.
[23] For further detailed analysis on the general factors that arise for consideration in this area of the law of evidence see Hock Lai Ho, 'The Criminal Trial, the Rule of Law and the Exclusion of Unlawfully Obtained Evidence' (2016) 10(1) Criminal Law and Philosophy 109.
[24] For a full analysis see Peter Duff, 'Adversarial Ideology and Police Questioning After Charge' (2013) 1(1) Juridical Review, 1 & Peter Duff, 'Chalmers to Cadder: Full Circle on Police Interrogation' (2015) 19(2) Edinburgh Law Review, 186.
[25] ibid.
[26] Lord Thomson described an individual's 'theoretical' freedom to refuse such an invitation (and the likely consequences of same i.e. formal arrest) in detail in *Swankie v Milne,* 1973 JC 1 at 6.
[27] See Duff, 'Adversarial Ideology' (n 24) & Duff, 'Chalmers to Cadder' (n 24). See also Justice Scotland, 'Legal Assistance in the Police Station' (Justice Scotland June 2018) 1.5.
[28] See e.g. *Olsson (*n 17) at 66 & *Aitken (*n 22) at 87.

alluded to above these decisions are multifaceted, but within the court's analysis of fairness in the context of the inadmissibility of evidence, we can discern again a recognition that the personal circumstances of the vulnerable accused may require additional measures be taken (e.g. the provision of legal advice by a solicitor), such that they may understand proceedings and be placed on an even footing with others. In short, we can see again here via these early judgments, the recognition of the importance of additional steps being taken to facilitate the protection and understanding of the vulnerable accused, throughout the criminal process.

What is interesting about these decisions too is that the early caselaw on the admissibility of statements and the vulnerable accused contains a relatively intelligible legal framework governing the requirements of and remedies for, breach of the right of effective participation. This is attributable to the fact that, in this context, the right is subsumed within a broader legal process and analytical framework, namely, in this instance, the admissibility of extra-judicial confessions and statements. Whilst this development is understandable, in the sense that the right to effective participation, encroaches on various and variable other areas of the substantive and adjectival Scots criminal law and procedure, this feature often obscures what the right to effective participation actually entails, and makes generalisations about the requirement and consequences of breach of the right difficult to accurately predict.

Finally, the discussion of the historical position of the vulnerable accused in Scots law, is illuminated by mentioning briefly the now abolished historical legal pleas governing capacity.[29] Whilst the law in this respect predates what I define as the modern era, and detailed consideration of the area is beyond the scope of this chapter, one can nevertheless discern clearly general principles of crucial importance to our

[29] For further information on the historical position in Scots law in respect of these matters see The Scottish Law Commission, *Report on Insanity and Diminished Responsibility* (Scot Law Com No 92, 2004). These pleas were abolished by the Criminal Justice and Licensing (Scotland) Act s.171.

consideration of the topic at hand. Both the common law plea of insanity at the time of the criminal offence and as a plea in bar of trial, were predicated on the understanding that the accused's mental condition was such that they had suffered an alienation of reason thus absolving them from criminal responsibility.[30] It is interesting too that Hume's discussion of the subject of insanity in the 19th century expressly acknowledges the existence of the vulnerable accused who is none the less *capax*, noting as he does that the law cannot and does not excuse criminal responsibility in a case of 'mere weakness of intellect.'[31]

Insanity as a plea in bar of trial, also offers an insight into the matters which at the far end of the continuum of capacity, so to speak, render the accused unable to participate in the trial itself, and are thus of use when delineating the development of the modern contours of the right of effective participation. Whether the accused was able to instruct their counsel in order to conduct their defence and whether they could intelligibly follow proceedings were key questions to be determined under the old common law governing the plea.[32] The core of the plea was therefore premised on a recognition that the accused was fundamentally unable to effectively participate in the trial, notwithstanding any remedial measures that could be enacted in their aid. Appreciating where the boundary of effective participation used to lie in this respect is beneficial when thinking about the modern law, as it enables one to identity the parameters within which the right to effective participation is situated.

In conclusion, an analysis of the historical legal protection of the vulnerable accused in Scotland illustrates clearly the lineage and existence of the right to effective participation in the modern era of criminal trials, and reveals several characteristics of

[30] See the Scottish Law Commission (n 29) Part 2 & Part 4.
[31] See David Hume, *Commentaries on the Law of Scotland Respecting the Description and Punishment of Crimes* (2nd edn Bell & Bradfute 1819) Vol I, 37.
[32] See e.g. *HM Advocate v Brown*, (1907) 5 Adam at 343 and *HM Advocate v Wilson*, 1942 JC 75 at 79.

note. The right of effective participation can be shown to equate roughly to a right to understand legal proceedings so as to enable participation. I have outlined how historically the right has often necessitated a distinct legal response in order to facilitate its protection, but also how the exact requirements of the right and the consequences of its breach have varied.

4.1: The Modern Legal Framework Governing the Protection of the Vulnerable Accused in Scots Law: Arrest and Police Interview

Having outlined the historical foundations for the support of the vulnerable accused, I will now turn my attention to a series of contemporary legal measures relevant in this context. My focus here is on two distinct stages of the criminal prosecution, namely arrest and interview and the leading of evidence at trial. The analysis undertaken in this section, reveals that the normative principle that remains at the centre of legal measures of support, is the right to effective participation, and this again translates roughly to a right for the vulnerable accused to understand and participate in proceedings, so that they may make decisions about the conduct of their defence. Although importantly, I will reveal how in certain respects, the right's requirements remain remarkably uncertain in Scots law.[33]

There is now a unitary statutory power of arrest without warrant in Scotland which may be utilised where there are reasonable grounds for suspecting that an individual has committed or is committing an offence.[34] Arrested individuals thereafter may be

[33] The European Court of Human Rights first recognised the implied right to effective participation as implicit in Article 6 in 1994 in *Stanford v UK* (1994) Series A 282. The most comprehensive analysis of the right to date by the Strasbourg court occurred in 2005 in *SC v UK* (2005) ECHR 263. See Abenaa Owusu-Bempah, 'The Interpretation and Application of the Right to Effective Participation' (2018) 22(4) The International Journal of Evidence and Proof, 321.

[34] The Criminal Justice (Scotland) Act 2016 s. 1 (asp 1) hereafter 'The 2016 Act'. See also Eamon Keane and Fraser Davidson (eds), *Raitt on Evidence: Principles, Policy and Practice* (3rd edn W. Green 2018) 9.07 – 9.16 for a fuller consideration of the law and practice in this area.

questioned under caution in relation to the alleged offence.[35] The statutory regime governing this process contains several provisions of note from the perspective of the vulnerable accused. The Criminal Procedure (Scotland) Act 2016 places an obligation upon the police, when they consider an individual to be vulnerable who is in their custody, to communicate certain matters to what is known as an 'appropriate adult', with a view to said individual providing support so that the person in custody can understand what is happening, and so that 'effective communication' can be facilitated between the vulnerable accused and the police.[36] Vulnerability in this context is defined explicitly by the statute as any individual in police custody, over 16 years of age, who by reason of a mental disorder appears to the police to be unable to understand sufficiently what is happening, or is unable to communicate effectively with the police.[37] 'Mental disorder' is further defined in this context as per s.328 of the Mental Health (Care & Treatment) (Scotland) Act 2003 as any mental illness, personality disorder or learning difficulty.[38] The definition of mental disorder utilised explicitly excludes from its ambit certain matters, in rather archaic fashion, related to e.g. sexual orientation.[39] It also states that no one shall be deemed to be mentally disordered solely by virtue of dependence on drink and drugs nor solely via the effect of certain types of behaviour.[40] Oversight of the regime of appropriate adults is further regulated by specific provisions of the 2016 Act.[41] The act also contains several provisions which give those under the age of eighteen the right to have access to a parent or another individual, where a parent is not available, whilst they are in police

[35] The 2016 Act s.34. It is worth noting here that the statute uses the language of 'a person not officially accused', given that said individual becomes officially accused only after formal charge by the police, I however have chosen to use the expression the vulnerable accused throughout in this chapter for reasons outlined at (n 12).
[36] The 2016 Act s.42.
[37] ibid s. 42(1)(a)-(c).
[38] By virtue of The 2016 Act s. 33(6).
[39] The Mental Health (Care & Treatment) (Scotland) Act 2003 (asp 13) ss. 328(2)(a).
[40] *i*bid ss. 328(2)(e), (f) & (g). The types of behaviour are behaviour that causes or is likely to case harassment, alarm or distress to any other person and acting as no prudent person would.
[41] The 2016 Act Part 6 Chapter 2.

custody.[42] The act permits the police to refuse or restrict access to such an individual in certain exceptional circumstances.[43]

Furthermore, the act strengthens the protection afforded to the vulnerable accused in respect of questioning by the police. In this respect, anyone who is deemed vulnerable by the police (using the aforementioned unable to understand and/or communicate effectively due to mental disorder criteria) may not consent to be interviewed by the police without a solicitor present.[44] A similar provision applies to those who are under the age of sixteen or are sixteen or seventeen and are subject to a compulsory supervision order, or an interim compulsory supervision order.[45] The act does permit sixteen or seventeen year olds to consent to interview without a solicitor present but only with the permission of a 'relevant person'.[46] The police are also permitted to proceed to interview without a solicitor being present in respect of any of the above classes of individual in exceptional circumstances, which are defined as being where it is necessary to interview the individual without delay in the interests of the investigation or the prevention of crime or the apprehension of offenders.[47] Only a constable at the rank of sergeant or above, who has not been involved in the investigation of the offence to which questioning pertains may authorise this step.[48]

Several features of the contemporary regime of protection at arrest and interview for the vulnerable accused are worthy of comment. In the first instance, it requires to be noted that without contemporary empirical research on the topic, it is not possible to

[42] ibid s. 40. See also s. 41 which allows social work to have access to the arrested individual in certain circumstances.
[43] ibid s. 40(4).
[44] ibid s 33(2)(c).
[45] ibid s.33(3)-(5). These are orders made under the Children's Hearings (Scotland) Act 2011 (asp 1) that designate a local authority as responsible for the care of a child.
[46] The 2016 Act s 33(3)-(5).
[47] ibid s. 32(4).
[48] ibid s. 32(5).

comment conclusively on the efficacy of police practice and protection in this area.[49] That being said, one can reasonably conclude that the legal infrastructure to protect the vulnerable accused at this stage of the criminal process appears *prima facie* adequate. The scheme of protection, as has been outlined, is centred around a clear definition of vulnerability. The clarity of definition provided here stands in stark contrast to the situation that pertains relating to the protection of the vulnerable accused at trial, as will be seen.

One can also readily identify in this context, without supposition, that the right of effective participation roughly equates to the right to understand proceedings (so as to make decisions relative to the conduct of one's defence), and this remains the normative basis for the legal interventions outlined. Scots law has in essence via the act, embedded protection for those whose vulnerability renders them liable to incriminate themselves at police interview. The statutory framework has myriad targeted interventions in this sense, which may all be roughly characterised as seeking to ensure that the vulnerable accused understands the processes that are occurring, and may react accordingly in order to participate and conduct their defence. This explains why children are entitled to access to a parent at an early stage of arrest and may only consent to interview without legal advice, with the approval of a third party. This conception of effective participation as the right to understand proceedings is also inherent in the suite of measures related to appropriate adults, whose very *raison d'être* is to aid understanding and facilitate communication. The act also centres legal representation and advice, as a necessary component of the right to effective participation for the vulnerable accused, in a manner which also has clear echoes from the historical era. Of course, the broader context here is, as has been noted, a general system of police interview for all suspects in Scotland that was badly out of kilter with

[49] There is however concerning data available relative to the number of individuals who waive their right to legal advice at police interview generally in Scotland. The figure was thought to be as high as 75% in February 2017. See Justice Scotland (n 27) 2.7.

practice both in England and Wales, most of Europe, and Article 6 when it came to access to legal advice.[50] Still, the act, centres the solicitor as an important component for the protection for the vulnerable accused's effective participation rights, by strengthening the right of access to legal advice for such individuals.

4.2: Admissibility of Extra-Judicial Confessions by the Vulnerable Accused

Whilst the 2016 Act entrenches support for the vulnerable accused at the stage of arrest and interview, it remains primarily the Scots common law of evidence, specifically the law relating to the admissibility of extra-judicial confessions, that regulates the breach of the statute, at least in terms of ongoing criminal proceedings.[51] The Scots law of evidence here continues to operate a general, and to a certain extent nebulous, test of fairness, in this respect.[52] One can see here again how the regulation of the right to effective participation is thus subsumed within a broader legal framework.

The sea change to police practice at interview enacted by the 2016 Act, means that whereas in the past challenges to the fairness of extra-judicial confessions made by the vulnerable accused at police interview were relatively common place, such challenges, at least in the reported Scottish case law, are now vanishingly rare.[53] It is important to acknowledge in this context that Scots law retains a right of silence at interview for those accused of criminal offending, which combined with the strengthened provisions described above relative to access to legal advice and an appropriate adult, might go some way to explaining the apparent fall off in reported judgments in the

[50] See Duff, 'Chalmers to Cadder' (n 24) & *Cadder v HM Advocate,* [2010] UKSC 43; 2011 SC (UKSC) 13.
[51] A civil action for damages on the basis of a breach of convention rights following unlawful detention is competent in Scots law, see Human Rights Act 1998 s.8 & *McCaffer v Lord Advocate, PF Glasgow and Chief Constable Police Scotland* 2015 SLT (Sh Ct) 44.
[52] See *Gilroy v HM Advocate,* [2013] HCJAC 18, 2013 JC 163 at [56].
[53] For examples of pre-2016 Act challenges involving vulnerability see *Codona v HM Advocate,* 1996 SLT 1100, *Blagojevic v HM Advocate,* 1995 SLT 1189 & *LB v HM Advocate,* 2003 JC 94.

past few years.[54] This is not to suggest that there are no longer problems. As I have alluded to before, what is needed now in this context is a programme of empirical research focused on the vulnerable accused following arrest so the efficacy of practice in the area can be properly assessed. One must remember that it remains primarily within the gift of the police officers to identify vulnerability in this context, and so much is contingent on their own training and behaviour. What the pre-2016 Act law in this area tells us, is that the personal characteristics of the accused may preclude the admission of an extra-judicial confession on the grounds of fairness, albeit the assessment of same is undertaken on a fact specific basis.[55] Much depends, in this context, on the stage at which suspicion has reached, albeit it should be remembered the 2016 Act now entitles any individual in police custody to receive legal advice regardless of whether they will be questioned under caution or not.[56]

Ultimately, whether a confession given by the vulnerable accused is deemed admissible or not will effectively be determined on a case by case basis. The exact nature of the fairness test is, in this context, as I have alluded to, relatively nebulous although Article 6 of the ECHR has made its mark. As mentioned previously, any reliance on an extra-judicial confession made by the vulnerable accused at police interview by the prosecuting authorities, given without access to legal advice, in contravention of the 2016 Act, is a violation of Article 6 and thus such evidence is clearly inadmissible.[57] One can posit too that any other substantive breach of the provisions of the 2016 Act relating to the vulnerable accused's right to effective participation, as outlined above, is certainly likely to render any concomitant extra-judicial confession inadmissible.[58] In this context, it should be noted that Scottish case

[54] See *HM Advocate v Hawkins,* [2017] HCJ 79; 2017 SLT 1328 for an instance whereby undue pressure was applied by police officers thus vitiating the admissibility of evidence obtained at a police interview.
[55] See *Codona etc.* at (n 53).
[56] See *Ambrose v Harris,* [2011] UKSC 43; 2012 SC (UKSC) 53. The 2016 Act s. 44(1).
[57] *Cadder* (n 50).
[58] Although pertaining to pre-2016 Act practice see e.g. *HM Advocate v Mair,* 1982 SLT 471.

law's trajectory over the past eighty or so years has been somewhat unpredictable.[59] Whereas, as noted previously the original test referred explicitly to fairness to the accused alone as determining admissibility, the test was given a bipartite nature in later years, whereby the public interest in the detection of crime became a relevant factor to be weighed in the court's consideration.[60] This position has subsequently fallen out of favour in recent years in the High Court of Justiciary, with the court noting that 'it is not necessary to conduct empirical research into the fairness of the circumstances in every case, balancing the individual interest with that of the public. Indeed, that may be problematic in the modern era, where the emphasis is on the courts enforcing an individual's human rights as defined by the European Convention.'[61] The specific nature of the test remains somewhat uncertain, although as mentioned the protection of the 2016 Act and the lack of reported judgments concerning the vulnerable accused on the issue, suggest that practice in this area has changed for the better.

4.3: The Trial: The Vulnerable Accused Who Gives Evidence

I will now examine the measures available to the vulnerable accused at the stage of trial in Scots law.[62] There is a binary legal regime governing the vulnerable accused at this stage of the process, with different legal measures and protection applying contingent on whether the vulnerable accused is giving evidence, or not. It is here, more than anywhere else, that the requirements of the right to effective participation in Scots law become obscure and ill-defined.

[59] See Ross et al (n 18) 9.12.1 – 9.12.4 for further details.
[60] See e.g. *Miln v Cullen,* 1967 JC 21 at [30] & *Jamieson v Annan,* 1988 JC 62.
[61] *Gilroy* (n 52) at [56]. See also *B v HM Advocate,* 1995 SLT 961.
[62] Detailed consideration of these measures is outwith the scope of this chapter, albeit I will summarise their key features in the following section. For an examination of the subject in general, albeit one not including more recent changes, see Laura Sharp & Margaret Ross *The Vulnerable Witnesses (Scotland) Act 2004* (Dundee University Press 2008).

I will begin by considering the position of the vulnerable accused who gives evidence. The Criminal Procedure (Scotland) Act 1995[63] s. 271 represents years of successive statutory intervention aimed at accommodating and addressing the vulnerability of witnesses in general, who elect to give evidence.[64] In general terms, the act operates to as to create two classes of vulnerable witness; those witnesses automatically entitled to special measures which may assist them to give evidence, and those whose entitlement to such measures is discretionary.[65] Both categories may apply to the vulnerable accused.[66]

In respect of any measure of entitlement sought, an application requires to be drafted, intimated to the Crown and lodged with the court.[67] Automatic entitlement to special measures applies to all of those under the age of eighteen at the commencement of the proceedings (referred to as "child witnesses" in the language of the act), and those who are deemed vulnerable witnesses, albeit the latter category of deemed vulnerable witness does not apply to the vulnerable accused, as such status applies only to other witnesses and is contingent on the nature of the offence allegedly committed against them.[68] Discretionary entitlement to special measures may apply to any individual, including the vulnerable accused, whose mental disorder or fear or distress in connection with giving evidence creates a significant risk that the quality of their evidence may be affected, or because there is considered to be a significant risk of harm to the person by reason only of the fact that the person is giving or is to give evidence in the proceedings.[69] The definition of mental disorder used in this context is the same as that outlined in respect of the 2016 Act above, and thus applies to any

[63] Hereafter 'The 1995 Act'.
[64] See Keane & Davidson (n 34) 3.46 - 3.72.
[65] The 1995 Act ss. 271(1)(a)(b)(c) & (d).
[66] ibid s.271F.
[67] ibid s.271C.
[68] ibid s.271(1)(a) & (c).
[69] ibid s.271(1)(b) & (d).

mental illness, personality disorder or learning disability.[70] In deciding whether a witness may be entitled to discretionary special measures there are a wide range of circumstances that the court must take into account.[71] These factors, in the context of the vulnerable accused include whether the accused is or could be legally represented, the nature and circumstances of the alleged offence, the accused's age and maturity, any physical disability or other physical impairment, and any behaviour towards the accused by witnesses or co-accused, amongst others.[72] The court must have regard to the best interests and views of the witness in question (which applies to the vulnerable accused if he or she is the subject of the vulnerable witness application).[73] There is also an overarching obligation under the 1995 Act that requires the party seeking to lead evidence from a potentially vulnerable witness, including the vulnerable accused, to carry out an assessment to determine whether said individual may be vulnerable and thus if they require special measures in order to give evidence.[74] The party citing a vulnerable witness must also ascertain the vulnerable witnesses' views and have regard to their interests prior to making an application for special measures. [75]

The 1995 Act contains a host of both standard and non-standard special measures which may be sought and implemented in respect of the vulnerable accused.[76] The distinction between the two classes of measure pertains to whether the grant of the measure is automatic or not, which is contingent on the designation of vulnerability, essentially in this context, whether the vulnerable accused is under eighteen or not at the commencement of proceedings.[77] The measures available under the 1995 Act include the presence of a supporter whilst giving evidence, giving evidence via video

[70]ibid s.271(1)(b)(i) which incorporates the definition given in The Mental Health (Care & Treatment)(Scotland) Act 2003 s. 328.
[71] The 1995 Act S. 271(2) as read alongside s.271F.
[72] ibid.
[73] ibid s.271(4A).
[74] ibid s. 271BA.
[75] ibid s.271E(1)(a).
[76] ibid s.271H.
[77] ibid s. 271A.

link and giving evidence in chief in the form of a prior statement.[78] The first two of these measures are standard special measures under the act.[79] Certain measures in the statutory scheme are expressly excluded from use by the vulnerable accused, namely the use of screens blocking sight of other witnesses and the clearing of court of members of the public.[80] The provisions of the act, recently introduced, that apply to the giving of evidence on commission of child witnesses also do not apply to the vulnerable accused.[81]

The Crown or a co-accused may object to the application for special measures on behalf of the vulnerable accused.[82] Beyond the standard special measures, the court must be convinced that the measures sought are appropriate and that the individual in question is indeed vulnerable, and the act makes provision for the hearing of argument in this regard if the measures sought are contested, or the court itself *ex proprio motu* disagrees with the application.[83] The court retains the power to keep under review the grant of special measures and may on its own motion or on motion of either party revoke or amend any measures previously authorised.[84]

The statutory scheme, as summarised above, is unnecessarily complicated as far as it pertains to the vulnerable accused.[85] That being as it may, it still manages to centre an identifiable scheme of assistance around a clear definition of vulnerability with a clear procedural framework. In the absence of comprehensive empirical research or data, it is impossible to comment authoritatively upon the efficacy and prevalence of the use of special measures for the vulnerable accused. One can still however make some

[78] *ibid* s.271H.
[79] *ibid s.* 271A.
[80] *ibid s.* 271F(8).
[81] *ibid* ss. 271BZA(1) & 271F(8).
[82] *ibid* ss. 271A & 271C.
[83] *ibid* s.271C.
[84] *ibid s*.271D.
[85] The 1995 Act utilises a scheme of adjustment fairly described as 'tortuous' in Ross et al (n 18) 13.4.9.

observations relative to the normative basis for such measures, in the context of the wider analysis undertaken in this chapter, alongside commenting on the scope of the provisions themselves. In respect of the former matter, we can see here again clearly, that in a general sense, these measures are targeted at ensuring the effective participation of the vulnerable accused, albeit in this context, it is the provision of the accused's evidence itself alone that attracts support. In isolation therefore, this area of the law is the first considered where *prima facie* the vulnerable accused's understanding of proceedings does not seem to be the matter primarily targeted by the legal intervention. This is interesting in itself. A broader conception of the right to effective participation, as inclusive of not only the right to understand proceedings, but also the right to give understandable evidence at trial, is implied by the 1995 Act. This goes further than the requirements of Article 6, as interpreted by the European Court of Human Rights.[86] What appears problematic in this context however is the practical measures provided to support such a right. For the vulnerable accused, electing to give evidence, the measures available give no guarantee that their evidence will in fact be understood. Despite the lack of empirical research one can surmise that the use of video-link and a supporter are of questionable assistance in this respect. The former merely changes the forum in which evidence is provided, and the latter's role is limited to merely being present beside the vulnerable accused whilst giving evidence.[87] In respect of the remaining special measure available, the use of a prior statement as evidence in chief, this section is arguably otiose in respect of the vulnerable accused, following the fact that legislative change brought about by the 2016 Act now means that any answer given to police at interview under caution is admissible as an exception to the hearsay rule.[88] This means in practice that if the vulnerable accused gives a position at interview under caution, then said position can be conveyed to the court as their evidence. The provision under the 1995 act seems

[86] See *SC* (n 33) & Owusu-Bempah (n 33).
[87] The 1995 Act s 271L.
[88] ibid s. 261ZA.

practically redundant in light of this change, given that if invoked it would still render the vulnerable accused liable to cross-examination, a choice unlikely to be made for obvious strategic reasons. So, whilst the right to effective participation in Scots law seems to encompass the right to give comprehensible evidence, one must question the efficacy of the measures that exist to further this aim. Tellingly, as will be seen in the following section considering the common law jurisdiction of the courts to address vulnerability, Scotland, unlike England, Wales and Northern Ireland, has no statutory provision, or legal precedent, to allow third parties to act as intermediaries, providing active (and effective) assistance to the vulnerable accused in understanding and relying information during their evidence.[89] There is also no Scottish appellate case law outwith instances whereby the accused was *incapax*, on whether the inability of the accused to give comprehensible evidence in this respect constitutes a miscarriage of justice.

4.4:The Protection of the Vulnerable Accused Beyond the Giving of Evidence

Beyond the giving of evidence, it falls to the discretion at common law of the Scottish courts to regulate their own proceedings, to protect the vulnerable accused.[90] This power is well developed in one specific sense, namely the provision of an interpreter so that the accused may understand proceedings (and be understood in turn via the giving of evidence). We have seen earlier in the chapter how the importance of such a measure was recognised early in the modern era. The importance of the right has been underlined by both the text of Article 6 itself which refers to the right 'to free assistance of an interpreter if he cannot speak the language' and associated caselaw which has held that this aspect of the provision is essential to the right of effective participation.

[89] See Joyce Plotnikoff & Richard Woolfson, *Intermediaries in the Criminal Justice System - Improving Communication for Vulnerable Witnesses and Defendants* (Policy Press 2015).
[90] *Hampson v HM Advocate*, 2003 SLT 94. A power asserted by the High Court of Justiciary, albeit in the context of other vulnerable witnesses. See also the 1995 Act s. 271G.

6.[91] Scots law has continued to protect the right of the vulnerable accused to have evidence translated by an interpreter at trial, albeit the High Court of Justiciary has stressed that the right does not apply to all procedural diets and that the onus is on the defence to indicate any problems that arise.[92] The right has in recent years been characterised directly as an explicit part of the right to effective participation in terms of Article 6.[93] Unfortunately, the High Court of Justiciary's analysis in this respect has been somewhat perfunctory. In *Erkurt v Higson* it was noted that in order for bill of advocation (which is a mechanism for challenging procedural irregularity prior to the determination of a case) to be sustained on the ground of a lack of effective translation, the appellant has to show that he was 'prejudiced by his absence of understanding, in the sense of his being unable to participate effectively in the proceedings.'[94] A similar principle applies in the context of post-conviction appeals.[95] There has been little further detailed exposition however of the broader principles at play in the area, albeit guidance on the practicalities of interpretation at trial has been given.[96]

Beyond the context of the provision of the interpreter, and specific provisions related to the giving of evidence considered above, one is left mainly to speculate about the scope and extent of the right to effective participation for the vulnerable accused at trial, who is not *incapax.* Some assistance may be indirectly gained from the terms of the statutory defence of plea in bar of trial due to mental disorder.[97] The statute operates so as to avoid a criminal prosecution continuing when the accused is deemed unfit for trial, and this question is determined by reference as to whether, by reason of a mental or physical condition, they are incapable of effectively participating in

[91] *Stanford* (n 33) at [26].
[92] See e.g *Mikhailitchenko v Normand*, 1993 SLT 1138 & *Erkurt v Higson,* 2004 JC 23.
[93] *Erkurt,* (n 92) & *San Lee v HM Advocate,* [2016] HCJAC 39; 2016 JC 133.
[94] *Erkurt* (n 92) at [27].
[95] *San Lee* (n 92).
[96] ibid.
[97] s. 53F The 1995 Act.

proceedings.[98] In answering this question, the court is to have regard to the ability of the person to understand the nature of the charge and the requirement to tender a plea to the charge and the effect of same and any other factor the court considers relevant.[99] The court must also have regard to the ability of the person to understand the purpose of, and follow the course of the trial, to understand the evidence that may be given against the person, and to instruct and otherwise communicate with their legal representative.[100] The plea must be established by the defence on the balance of probabilities.[101] These factors reflect Strasbourg jurisprudence.[102] Whilst the statute helps one focus their mind on the relevant issues, this chapter is of course concerned with the position of the vulnerable accused who does not meet these criteria. In this specific sense, there remains no authoritative exposition of effective participation, and no statutory guidance, and so one is left to guess as to what the right, in effect, means and how at trial if the right is impugned, that situation may be remedied. This is disappointing given that Strasbourg case law offers at least a template by which to approach and discuss the concept of effective participation in this context, in the national setting.[103] What is illuminating too, for comparative purposes, is the relatively well-developed body of case law that exists on the concept of effective participation in the Children's Reporter System in Scotland.[104] There are of course different considerations applicable in the criminal context, and indeed often different articles of the European Convention on Human Rights at play, but the lack of meaningful analysis by the High Court of Justiciary results in uncertainty about what the right to effective participation actually guarantees in Scotland.[105]

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[98] ibid s.53F(1).
[99] ibid s. 53F(2)(i) & (ii).
[100] ibid s. 53F(2)(iii) – (v).
[101] ibid s. 53F(1)
[102] See *SC* (n 33).
[103] ibid.
[104] See e.g. *ABC v Principal Reporter and Another*, [2020] UKSC 26; 2020 SLT 679 & *Murtaza v Murtaza,* [2011] CSOH 214.
[105] Cases involving the Children's Reporter System in Scotland tend to invoke Article 8, but also often feature Article 6 in its civil context.

This problem however is not merely doctrinal. It is difficult because of the unstructured and obscure nature of the courts' discretion to ascertain what is, and what is not, practically possible in the context of measures of support, beyond those previously commented upon. The Equalities and Human Rights Commission and the Law Society of Scotland have both considered the issue in the past, albeit neither has conducted in depth empirical research specifically in Scottish context, and as mentioned there is a dearth of case law on the subject.[106] One thing that we can be sure about though is that Scotland has no established system for the provision of intermediaries such as those that exist, in a limited fashion, in England, Wales and Northern Ireland.[107] It is possible in Scotland, at common law, for the court to permit a supporter to be present beyond the giving of evidence of the vulnerable accused, and for said individual to be tasked with ensuring that the vulnerable accused understands proceedings.[108] The grant of an active role to that individual however such that they may intervene to ensure that questions put to the vulnerable accused and their evidence given in reply are understood, whilst theoretically possible in Scotland under the common law, does not occur in practice.[109] This is a matter which requires urgent political attention. The overarching issue identified here relating to support, beyond the vulnerable accused who gives evidence, is that in the absence of any statutory regulation, and authoritative judicial guidance, the protection of the vulnerable accused at trial is left almost exclusively to individual discretion. Thus,

[106] Although the Commission did undertake interviews with solicitors, judges and accused in Scotland albeit the transcription of same is not available. It should be noted that there has been valuable work in Scotland on the topic of the vulnerable accused in recent years, see e.g. the work of the Law Society of Scotland, 'Next Stage of Vulnerable Accused Persons Project' (Law Society News 28 August 2019) <https://www.lawscot.org.uk/news-and-events/law-society-news/help-vulnerable-accused-persons-project/> accessed 14 December 2020 and the work of the Equality and Human Rights Commission, which specifically considered Scotland and digitalisation during its UK wide inquiry into the experiences of disabled defendants and accused persons, Equalities and Human Rights Commission, 'Inclusive Justice: a System Designed for All' (EHRC April 2020).

[107] See Plotnikoff & Richard Woolfson (n 89).

[108] Data on file with author.

[109] See the comments of the Equalities and Human Rights Commission (n 106) 28.

such protection that does exist relies on the defence to raise the issue and on the individual judge to put in place the appropriate measure of support. Under a system configured in this way, in a criminal justice system under significant stress, one can safely assume there will be instances where practice varies greatly, and the protection afforded to the vulnerable accused is inadequate to permit them to participate effectively.[110] It is telling to consider that over the course of many years the Scottish Parliament has (correctly) considered it necessary to legislate to protect the rights of vulnerable witnesses whilst giving evidence in Scottish courts.[111] What then to deduce from the fact that outwith instances whereby the vulnerable accused is to give evidence, they are still left wholly to rely on largely undirected judicial discretion alone for their protection at trial? Whilst, of course, the court itself retains the overarching legal obligation to ensure that proceedings are compliant with Article 6, this disparity in treatment between the two classes of actor (vulnerable witness and the vulnerable accused) is, I suggest, none the less revealing.

5: Conclusion: A Fig for Those Protected by Law?

In this chapter, I have analysed the support available to the vulnerable accused in Scotland at distinct stages of the criminal process. I have shown how the level and structure of protection varies greatly depending upon the stage at which proceedings have reached. I have traced the historical development of the protection for the vulnerable accused in the contemporary era through to the present day, and have revealed how measures of support have consistently been centred around the right to effective participation, which loosely equates to a right to understand, and participate in, legal proceedings. This chapter reveals however that Scots law on this topic in

[110] For information on the financial and other pressures on the Scottish criminal justice system at present see e.g. Marc Horne, 'Lawyers Strike Over Legal Aid Crisis' *The Times* (London 1 December 2020) <https://www.thetimes.co.uk/article/scottish-lawyers-strike-over-legal-aid-crisis-qqccfwtx2> accessed 7 January 2021.

[111] See e.g. ss 274 & 275 of the 1995 Act.

respect of the vulnerable accused, who is not *incapax,* is fragmented and ill-defined. The scope of the right to effective participation is accordingly hard to identify, and its meaning and requirements in places obscure. In some instances, the right has been subsumed into other aspects of the substantive and adjectival Scots criminal law. Whilst in other respects, the protection of the right has been left entirely to the use of unstructured and unregulated discretion. Ultimately, I have suggested, channelling Burns, that those protected by law in Scotland often may be receiving little practical benefit from its auspices.

Scottish criminal justice is, as I remarked upon earlier in this chapter, currently amidst a period of almost unprecedented flux.[112] Changes to the manner of trial, such as the increased use of remote hearings, bring with them an increased risk to the ability of the vulnerable accused to effectively participate in proceedings.[113] The work undertaken in this chapter has revealed a distinct gap in knowledge about what is, and is not, occurring in the Scottish criminal justice system concerning the vulnerable accused. Now, more than ever, thorough empirical research is required, and politicians and practitioners need to carefully consider the current efficacy of the protection afforded by law for the vulnerable accused in Scotland. As Lord Carloway has said, the current era provides an opportunity as well as a challenge, it is hoped that in respect of the vulnerable accused, that opportunity is firmly seized.

[112] If one ignores for present purposes Oliver's Cromwell's attempts to abolish Scots law in the 17th century. See John D Ford, *Law and Opinion in Scotland during the Seventeenth Century* (Hart Publishing 2007).

[113] See e.g. the comments of the English Law Society (n 10).

Bibliography

Text Books

Burns R, *The Poetical Miscellany; Containing Posthumous Poems, Songs, Epitaphs and Epigrams* (Glasgow 1800)

Dewart M, *The Scottish Legal System* (Bloomsbury 6th edition 2019).

Ford J D, *Law and Opinion in Scotland during the Seventeenth Century* (Hart Publishing 2007).

Hume D, *Commentaries on the Law of Scotland Respecting the Description and Punishment of Crimes* (2nd edn Bell & Bradfute 1819) Vol I, 37

Keane E & Davidson F (eds), *Raitt on Evidence: Principles, Policy and Practice* (3rd edn W. Green 2018)

Norrie K, *Children's Hearings in Scotland* (W.Green 3rd edition 2013)

Plotnikoff J & Woolfson R, *Intermediaries in the Criminal Justice System - Improving Communication for Vulnerable Witnesses and Defendants* (Policy Press 2015).

Ross M & Chalmers J (eds) *Walker & Walker The Law of Evidence in Scotland* (Bloomsbury, 4th edition, 2015)

Sharp L & Ross M *The Vulnerable Witnesses (Scotland) Act 2004* (Dundee University Press 2008).

Journal Articles

Duff P, 'Adversarial Ideology and Police Questioning After Charge' (2013) 1(1) Juridical Review, 1

Duff P, 'Chalmers to Cadder: Full Circle on Police Interrogation' (2015) 19(2) Edinburgh Law Review, 186

Ho H L, 'The Criminal Trial, the Rule of Law and the Exclusion of Unlawfully Obtained Evidence' (2016) 10(1) Criminal Law and Philosophy, 109.

Macintosh F, 'Will the Risk of Covid-19 Lead to More Hearsay Evidence in Scottish Criminal Trials?' [2020] 166 Criminal Law Bulletin, 1.

Owusu-Bempah A, 'Understanding the Barriers to Defendant Participation in Criminal Proceedings in England and Wales' (2020) 40 (4) Legal Studies (Society of Legal Scholars), 1

Owusu-Bempah A, 'The Interpretation and Application of the Right to Effective Participation' (2018) 22(4) The International Journal of Evidence and Proof, 321

Price T, Parkes T & Malloch M, '"Discursive Struggles" between Criminal Justice Sanctions and Health Interventions for People Who Use Drugs: a Qualitative Exploration of Diversion Policy and Practice in Scotland' (2020) *Drugs: Education, Prevention and Policy* <https://www.tandfonline.com/doi/full/10.1080/09687637.2020.1775180

Rahmatian A, 'The Role of Institutional Writers in Scots Law' (2018) 1 Juridical Review 42.

Scott P. F, 'Responding to Covid-19 in Scots Law' (2020) 24(3) Edinburgh Law Review, 421

Newspaper Articles and Online References

'Next Stage of Vulnerable Accused Persons Project' (Law Society News 28 August 2019) <https://www.lawscot.org.uk/news-and-events/law-society-news/help-vulnerable-accused-persons-project/> accessed 14 December 2020

Barrie D, 'Coronavirus in Scotland: Jurors Take a Seat at Cinemas to Tackle Courts Backlog' *The Times* (London, 2 October 2020) <https://www.thetimes.co.uk/article/coronavirus-in-scotland-jurors-take-a-seat-at-cinemas-to-tackle-courts-backlog-s7h3j2wvg> accessed 7 December 2020.

Carloway, 'Annual Address on the Opening of the Legal Year' (Edinburgh, Judiciary of Scotland, 28 September 2020) <https://www.judiciary.scot/home/media-information/media-hub-news/2020/09/28/opening-of-the-legal-year> accessed 7 December 2020.

Horne M, 'Lawyers Strike Over Legal Aid Crisis' *The Times* (London 1 December 2020) <https://www.thetimes.co.uk/article/scottish-lawyers-strike-over-legal-aid-crisis-qqccfwtx2> accessed 7 January 2021

Keane E, 'Alarm Bells Ring Over Hearsay Proposals' (Scottish Legal News, 1 April 2020) < https://www.scottishlegal.com/article/eamon-keane-alarm-bells-ring-over-hearsay-proposals> accessed 7 December 2020

O'Sullivan K, 'Five Year Digital Strategy Aims Achieved in a Matter of Months, Says Scotland's Most Senior Judge' (FutureScot, 16 September 2020)

<https://futurescot.com/five-year-digital-strategy-aims-achieved-in-a-matter-of-months-says-scotlands-most-senior-judge/> accessed 7 December 2020.

Paterson L, 'Virtual Trials "Will Need to be Used as Default Option"' *The Times* (London, 4 July 2020) <https://www.thetimes.co.uk/article/virtual-trials-will-need-to-be-used-as-default-option-n577bc6kd> accessed 7 December 2020.

Reports

Equalities and Human Rights Commission, 'Inclusive Justice: a System Designed for All' (EHRC April 2020)

The Law Society of England and Wales, 'Law Under Lockdown: Covid 19 Measures on Access to Justice and Vulnerable People' (The Law Society of England and Wales September 2020).

The Scotland Institute, 'Mental Health and Scotland's Prison Population' (The Scotland Institute July 2015)

Justice Scotland, 'Legal Assistance in the Police Station' (Justice Scotland June 2018)