Passage of the
Criminal Procedure (Legal Assistance, Detention and Appeals) (Scotland) Bill 2010

SPPB 150
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Criminal Procedure (Legal Assistance, Detention and Appeals) (Scotland) Bill 2010

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SPPB 150
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Foreword

Purpose of the series

The aim of this series is to bring together in a single place all the official Parliamentary documents relating to the passage of the Bill that becomes an Act of the Scottish Parliament (ASP). The list of documents included in any particular volume will depend on the nature of the Bill and the circumstances of its passage, but a typical volume will include:

- every print of the Bill (usually three – “As Introduced”, “As Amended at Stage 2” and “As Passed”);
- the accompanying documents published with the “As Introduced” print of the Bill (and any revised versions published at later Stages);
- every Marshalled List of amendments from Stages 2 and 3;
- every Groupings list from Stages 2 and 3;
- the lead Committee’s “Stage 1 report” (which itself includes reports of other committees involved in the Stage 1 process, relevant committee Minutes and extracts from the Official Report of Stage 1 proceedings);
- the Official Report of the Stage 1 and Stage 3 debates in the Parliament;
- the Official Report of Stage 2 committee consideration;
- the Minutes (or relevant extracts) of relevant Committee meetings and of the Parliament for Stages 1 and 3.

All documents included are re-printed in the original layout and format, but with minor typographical and layout errors corrected.

Documents in each volume are arranged in the order in which they relate to the passage of the Bill through its various stages, from introduction to passing. The Act itself is not included on the grounds that it is already generally available and is, in any case, not a Parliamentary publication.

Outline of the legislative process

Bills in the Scottish Parliament follow a three-stage process. The fundamentals of the process are laid down by section 36(1) of the Scotland Act 1998, and amplified by Chapter 9 of the Parliament’s Standing Orders. In outline, the process is as follows:

- Introduction, followed by publication of the Bill and its accompanying documents;
- Stage 1: the Bill is first referred to a relevant committee, which produces a report informed by evidence from interested parties, then the Parliament debates the Bill and decides whether to agree to its general principles;
- Stage 2: the Bill returns to a committee for detailed consideration of amendments;
- Stage 3: the Bill is considered by the Parliament, with consideration of further amendments followed by a debate and a decision on whether to pass the Bill.

After a Bill is passed, three law officers and the Secretary of State have a period of four weeks within which they may challenge the Bill under sections 33 and 35 of the Scotland Act respectively. The Bill may then be submitted for Royal Assent, at which point it becomes an Act.
Standing Orders allow for some variations from the above pattern in some cases. For example, Bills may be referred back to a committee during Stage 3 for further Stage 2 consideration. In addition, the procedures vary for certain categories of Bills, such as Committee Bills or Emergency Bills. For some volumes in the series, relevant proceedings prior to introduction (such as pre-legislative scrutiny of a draft Bill) may be included.

The reader who is unfamiliar with Bill procedures, or with the terminology of legislation more generally, is advised to consult in the first instance the Guidance on Public Bills published by the Parliament. That Guidance, and the Standing Orders, are available for sale from Stationery Office bookshops or free of charge on the Parliament’s website (www.scottish.parliament.uk).

The series is produced by the Legislation Team within the Parliament’s Chamber Office. Comments on this volume or on the series as a whole may be sent to the Legislation Team at the Scottish Parliament, Edinburgh EH99 1SP.

Notes on this volume

The Bill to which this volume relates was introduced on 26 October 2010.

The Parliament agreed at the start of its meeting on 27 October 2010 that the Bill should be treated as an Emergency Bill. Emergency Bill procedures are provided for by Rule 9.21 of the Scottish Parliament’s Standing Orders.

Under the Emergency Bill procedure, Stages 1, 2 and 3 were considered by the Parliament on the same day. No Stage 1 Report is required for an Emergency Bill, so Stage 1 consists only of a debate in the Chamber on the general principles of the Bill. The Parliament agreed in the afternoon session on 27 October to the general principles of the Bill at Stage 1.

After accepting a motion to extend the session of Parliament into the evening, the Parliament moved to Stage 2 which was taken by a Committee of the Whole Parliament. Although a Marshalled List and groupings were produced for this Stage, as no amendments were accepted and therefore, no ‘As Amended’ version of the Bill was produced.

Stage 3 proceedings were held after a short suspension. A Marshalled List was produced but as it consisted of one amendment, no groupings were required.
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Criminal Procedure (Legal Assistance, Detention and Appeals) (Scotland) Bill

[AS INTRODUCED]

An Act of the Scottish Parliament to make provision for persons being questioned by the police on suspicion of having committed an offence to have a right of access to legal assistance; to enable provision to be made for criminal advice and assistance under the Legal Aid (Scotland) Act 1986 to be available for such persons in certain circumstances without reference to financial limits; to extend the period during which a person may be detained under section 14 of the Criminal Procedure (Scotland) Act 1995, and to enable that period to be further extended in certain circumstances; to provide for a right to make representations in relation to applications for extension of time limits for bringing appeals; to provide a time limit for lodging bills of suspension or advocation; to make provision about the grounds for references made to the High Court by the Scottish Criminal Cases Review Commission and to confer power on the High Court to reject such references in certain circumstances; and for connected purposes.

Legal assistance

1 Right of suspects to have access to a solicitor

(1) The 1995 Act is amended as follows.

(2) In section 14 (detention and questioning at police station), in subsection (6)—

(a) in paragraph (e), for “subsection (1)(b) of section 15” substitute “sections 15(1)(b) and 15A(2) and (3)”, and

(b) in paragraph (f), after “15(1)(b)” insert “or 15A(2)”.

(3) In section 15 (rights of person arrested or detained)—

(a) in subsection (1)—

(i) for “section 17” substitute “sections 15A and 17”, and

(ii) in paragraph (b), the words “solicitor and to one other” are repealed,

(b) in subsection (4), for “section 17” substitute “sections 15A and 17”, and

(c) the title of the section becomes “Right of persons arrested or detained to have intimation sent to another person”.

(4) After section 15, insert—
"15A  Right of suspects to have access to a solicitor

(1) This section applies to a person ("the suspect") who—

(a) is detained under section 14 of this Act,

(b) attends voluntarily at a police station or other premises or place for the purpose of being questioned by a constable on suspicion of having committed an offence, or

(c) is—

(i) arrested (but not charged) in connection with an offence, and

(ii) being detained at a police station or other premises or place for the purpose of being questioned by a constable in connection with the offence.

(2) The suspect has the right to have intimation sent to a solicitor of any or all of the following—

(a) the fact of the suspect’s—

(i) detention,

(ii) attendance at the police station or other premises or place, or

(iii) arrest,

(as the case may be),

(b) the police station or other premises or place where the suspect is being detained or is attending, and

(c) that the solicitor’s professional assistance is required by the suspect.

(3) The suspect also has the right to have a private consultation with a solicitor—

(a) before any questioning of the suspect by a constable begins, and

(b) at any other time during such questioning.

(4) Subsection (3) is subject to subsections (8) and (9).

(5) In subsection (3), “consultation” means consultation by such means as may be appropriate in the circumstances, and includes, for example, consultation by means of telephone.

(6) The suspect must be informed of the rights under subsections (2) and (3)—

(a) on arrival at the police station or other premises or place, and

(b) in the case where the suspect is detained as mentioned in subsection (1)(a), or arrested as mentioned in subsection (1)(c), after such arrival, on detention or arrest (whether or not, in either case, the suspect has previously been informed of the rights by virtue of this subsection).

(7) Where the suspect wishes to exercise a right to have intimation sent under subsection (2), the intimation must be sent by a constable—

(a) without delay, or

(b) if some delay is necessary in the interest of the investigation or the prevention of crime or the apprehension of offenders, with no more delay than is necessary.
(8) A constable may delay the suspect’s exercise of the right under subsection (3) so far as it is necessary in the interest of the investigation or the prevention of crime or the apprehension of offenders that the questioning of the suspect by a constable begins or continues without the suspect having had a private consultation with a solicitor.

(9) Subsection (3) does not apply in relation to the questioning of the suspect by a constable for the purpose of obtaining the information mentioned in section 14(10) of this Act.”.

2 Criminal advice and assistance: automatic availability in certain circumstances

(1) The Legal Aid (Scotland) Act 1986 (c.47) is amended as follows.

(2) In section 8 (availability of advice and assistance), after “to” in the first place where it occurs insert “any provision made in regulations under section 8A(1) and”.

(3) After section 8, insert—

“8A Criminal advice and assistance: automatic availability in certain circumstances

(1) The Scottish Ministers may by regulations provide that, in such circumstances as may be prescribed in the regulations, advice and assistance in relation to criminal matters is to be available for any relevant client without reference to the financial limits in section 8.

(2) In subsection (1), “relevant client” means a client who is a person to whom section 15A of the Criminal Procedure (Scotland) Act 1995 (right of suspects to have access to a solicitor) applies.”.

(4) In section 37(2) (parliamentary procedure), after “7,” insert “8A(1),”.

Detention

3 Extension of period of detention under section 14 of 1995 Act

(1) In section 14 of the 1995 Act (detention and questioning at police station)—

(a) in subsection (2), for “Detention”, where it first occurs, substitute “Subject to section 14A, detention”, and

(b) in each of subsections (2), (4) and (5), for “six” substitute “12”.

(2) After section 14 of the 1995 Act, insert—

“14A Extension of period of detention under section 14

(1) This section applies in relation to a person who is being detained under section 14 of this Act (“the detained person”).

(2) Before the expiry of the period of 12 hours mentioned in section 14(2), a custody review officer may, subject to subsection (4), authorise that period to be extended in relation to the detained person by a further period of 12 hours.

(3) The further period of 12 hours starts from the time when the period of detention would have expired but for the authorisation.

(4) A custody review officer may authorise the extension under subsection (2) in relation to the detained person only if the officer is satisfied that—
(a) the continued detention of the detained person is necessary to secure, obtain or preserve evidence (whether by questioning the person or otherwise) relating to an offence in connection with which the person is being detained,

(b) an offence in connection with which the detained person is being detained is one that is an indictable offence, and

(c) the investigation is being conducted diligently and expeditiously.

(5) Where subsection (4) or (5) of section 14 applies in relation to the detained person, the references in subsection (2) of this section to the period of 12 hours mentioned in section 14(2) are to be read as references to that period as reduced in accordance with subsection (4) or, as the case may be, (5) of section 14.

(6) Where a custody review officer authorises the extension under subsection (2), section 14 has effect in relation to the detained person as if the references in it to the period of 12 hours were references to that period as extended by virtue of the authorisation.

(7) In this section and section 14B, “custody review officer” means a constable—

(a) of the rank of inspector or above, and

(b) who has not been involved in the investigation in connection with which the person is detained.

14B Extension under section 14A: procedure

(1) This section applies where a custody review officer is considering whether to authorise the extension under section 14A(2) of this Act in relation to a person who is being detained under section 14 of this Act (“the detained person”).

(2) Before deciding whether to authorise the extension, the custody review officer must give either of the following persons an opportunity to make representations—

(a) the detained person, or

(b) any solicitor representing the detained person who is available at the time the officer is considering whether to authorise the extension.

(3) Representations may be oral or written.

(4) The custody review officer may refuse to hear oral representations from the detained person if the officer considers that the detained person is unfit to make representations because of the person’s condition or behaviour.

(5) Where the custody review officer decides to authorise the extension, the officer must ensure that the following persons are informed of the decision and of the grounds on which the extension is authorised—

(a) the detained person, and

(b) any solicitor representing the detained person who is available at the time the decision is made.

(6) Subsection (7) applies where—

(a) the custody review officer decides to authorise the extension, and
(b) at the time of the decision, the detained person has not exercised rights under section 15 or 15A.

(7) The custody review officer must—

(a) ensure that the detained person is informed of the person’s rights under section 15 or 15A which the person has not yet exercised, and

(b) decide whether there are any grounds, under section 15(1) or section 15A(7)(b) or (8) (as the case may be), for delaying the exercise of any of the rights.

(8) The custody review officer must make a written record of—

(a) the officer’s decision on whether to authorise the extension, and

(b) any of the following which apply—

(i) the grounds on which the extension is authorised,

(ii) the fact that the detained person and a solicitor have been informed as required under subsection (5),

(iii) the fact that the detained person has been informed as required under subsection (7)(a),

(iv) the officer’s decision on the matter referred to in subsection (7)(b) and, if the decision is to delay the exercise of a right, the grounds for the decision.”.

Sections 1 and 3: transitional and saving provision

(1) The amendments made to the 1995 Act by section 1 have effect in relation to any person who is detained, or who attends or is arrested, as mentioned in subsection (1) of section 15A of the 1995 Act (as inserted by section 1(4)) where the period of detention, attendance or, as the case may be, arrest starts on or after the day on which this Act comes into force.

(2) The amendments made to the 1995 Act by section 3 have effect in relation to any person who is detained under section 14 of the 1995 Act where the period of detention starts on or after the day on which this Act comes into force.

(3) Subsection (4) applies in relation to any person who is detained under section 14 of the 1995 Act where the period of detention began before this Act comes into force.

(4) Despite sections 1 and 3, sections 14 and 15 of the 1995 Act continue, after this Act comes into force, to have the effect they had immediately before that time.

Appeals

Extension of time for late appeals: right to make representations

(1) The 1995 Act is amended as follows.

(2) In section 111 (supplementary provision about appeals in solemn cases), after subsection (2) insert—

“(2A) An application under subsection (2) seeking extension of the period mentioned in section 109(1) of this Act must—
(a) state—
   (i) the reasons why the applicant failed to comply with the time limit
       in section 109(1), and
   (ii) the proposed grounds of appeal, and
(b) be intimated in writing by the applicant to the Crown Agent.

(2B) If the prosecutor so requests within 7 days of receipt of intimation of the
      application under subsection (2A)(b), the prosecutor must be given an
      opportunity to make representations before the application is determined.

(2C) Any representations may be made in writing or, if the prosecutor so requests,
      orally at a hearing; and if a hearing is fixed, the applicant must also be given an
      opportunity to be heard.”.

(3) In section 181 (extension of time for appeals in summary cases)—
   (a) after subsection (2) insert—

   “(2A) An application for a direction under subsection (1) in relation to the
       requirements of section 176(1) of this Act must—
   (a) state—
       (i) the reasons why the applicant failed to comply with the
           requirements of section 176(1), and
       (ii) the proposed grounds of appeal, and
   (b) be intimated in writing by the applicant to the respondent or the
       respondent’s solicitor.

   (2B) If the respondent so requests within 7 days of receipt of intimation of the
       application under subsection (2A)(b), the respondent must be given an
       opportunity to make representations before the application is determined.

   (2C) Any representations may be made in writing or, if the respondent so requests,
       orally at a hearing; and if a hearing is fixed, the applicant must also be given an
       opportunity to be heard.”, and

   (b) in subsection (3)(a), after “hearing” insert “(unless the respondent has requested a
       hearing under subsection (2C))”.

(4) The amendments made by this section have effect in relation to any application made
    under section 111(2) or, as the case may be, 181(1) of the 1995 Act on or after the day
    on which this Act comes into force.

6  Time limit for lodging bills of advocation and bills of suspension

   (1) After section 191 (appeal by suspension or advocation) of the 1995 Act, insert—

   “191A  Time limit for lodging bills of advocation and bills of suspension

   (1) This section applies where a party wishes—

       (a) to appeal to the High Court under section 191(1) of this Act by bill of
           suspension against a conviction or by advocation against an acquittal, or

       (b) to appeal to the High Court against, or to bring under review of the High
           Court, any other decision in a summary prosecution by bill of suspension
           or by advocation.
(2) The party must lodge the bill of suspension or bill of advocation within 3 weeks of the date of the conviction, acquittal or, as the case may be, other decision to which the bill relates.

(3) The High Court may, on the application of the party, extend the time limit in subsection (2).

(4) An application under subsection (3) must—
   (a) state—
      (i) the reasons why the applicant failed to comply with the time limit in subsection (2), and
      (ii) the proposed grounds of appeal or review, and
   (b) be intimated in writing by the applicant to the other party to the prosecution.

(5) If the other party so requests within 7 days of receipt of intimation of the application under subsection (4)(b), the other party must be given an opportunity to make representations before the application is determined.

(6) Any representations may be made in writing or, if the other party so requests, orally at a hearing; and if a hearing is fixed, the applicant must also be given an opportunity to be heard.”.

(2) In the case where the date of the conviction, acquittal or other decision referred to in subsection (1) of section 191A of the 1995 Act (as inserted by subsection (1) of this section) is before the date on which this Act comes into force, subsection (2) of section 191A (as so inserted) has effect as if, for the reference to the date of the conviction, acquittal or, as the case may be, other decision, there were substituted a reference to the date on which this Act comes into force.

References by the Scottish Criminal Cases Review Commission

(1) The 1995 Act is amended as follows.

(2) In section 194B (SCCRC’s power to refer cases to the High Court), in subsection (1), before “the case” insert “, subject to section 194DA of this Act,”.

(3) In section 194C (grounds for reference)—
   (a) the existing words become subsection (1), and
   (b) after that subsection, insert—
      “(2) In determining whether or not it is in the interests of justice that a reference should be made, the Commission must have regard to the need for finality and certainty in the determination of criminal proceedings.”.

(4) After section 194D, insert—

“194DA High Court’s power to reject a reference made by the Commission

(1) Where the Commission has referred a case to the High Court under section 194B of this Act, the High Court may, despite section 194B(1), reject the reference if the Court considers that it is not in the interests of justice that any appeal arising from the reference should proceed.
(2) In determining whether or not it is in the interests of justice that any appeal arising from the reference should proceed, the High Court must have regard to the need for finality and certainty in the determination of criminal proceedings.

(3) On rejecting a reference under this section, the High Court may make such order as it considers necessary or appropriate.”.

**General**

8 **Interpretation**

In this Act, “the 1995 Act” means the Criminal Procedure (Scotland) Act 1995 (c.46).

9 **Commencement**

This Act comes into force at the beginning of the day after the day on which the Bill for this Act receives Royal Assent.

10 **Short title**

This Act may be cited as the Criminal Procedure (Legal Assistance, Detention and Appeals) (Scotland) Act 2010.
Criminal Procedure (Legal Assistance, Detention and Appeals) (Scotland) Bill

[AS INTRODUCED]

An Act of the Scottish Parliament to make provision for persons being questioned by the police on suspicion of having committed an offence to have a right of access to legal assistance; to enable provision to be made for criminal advice and assistance under the Legal Aid (Scotland) Act 1986 to be available for such persons in certain circumstances without reference to financial limits; to extend the period during which a person may be detained under section 14 of the Criminal Procedure (Scotland) Act 1995, and to enable that period to be further extended in certain circumstances; to provide for a right to make representations in relation to applications for extension of time limits for bringing appeals; to provide a time limit for lodging bills of suspension or advocation; to make provision about the grounds for references made to the High Court by the Scottish Criminal Cases Review Commission and to confer power on the High Court to reject such references in certain circumstances; and for connected purposes.

Introduced by: Kenny MacAskill
On: 26 October 2010
Bill type: Executive Bill
CRIMINAL PROCEDURE (LEGAL ASSISTANCE, DETENTION AND APPEALS) (SCOTLAND) BILL

EXPLANATORY NOTES

(AND OTHER ACCOMPANYING DOCUMENTS)

CONTENTS

1. As required under Rule 9.3 of the Parliament’s Standing Orders, the following documents are published to accompany the Criminal Procedure (Legal Assistance, Detention and Appeals) (Scotland) Bill introduced in the Scottish Parliament on 26 October 2010:
   - Explanatory Notes;
   - a Financial Memorandum;
   - a Scottish Government Statement on legislative competence; and
   - the Presiding Officer’s Statement on legislative competence.

2. A Policy Memorandum is printed separately as SP Bill 60–PM.
EXPLANATORY NOTES

INTRODUCTION

3. These Explanatory Notes have been prepared by the Scottish Government in order to assist the reader of the Bill and to help inform debate on it. They do not form part of the Bill and have not been endorsed by the Parliament.

4. The Notes should be read in conjunction with the Bill. They are not, and are not meant to be, a comprehensive description of the Bill. So where a section or schedule, or a part of a section or schedule, does not seem to require any explanation or comment, none is given.

THE BILL

5. The Bill makes provisions in respect of persons being questioned by the police on suspicion of having committed an offence. Various amendments to the Criminal Procedure (Scotland) Act 1995 (“the 1995 Act”) are made. The amendments and stand alone provisions within the Bill affect the period of detention and the right of access to legal assistance before and during questioning. The Bill also makes provision to provide a right to make representations in relation to applications for extension of time limits for making appeals, and creates a time limit for lodging bills of suspension and advocation. It also makes provision about the grounds for references made to the High Court by the Scottish Criminal Cases Review Commission and enables the High Court to reject references in certain circumstances.

COMMENTARY ON SECTIONS

Legal Assistance

Section 1 Right of suspects to have access to solicitor

6. Subsection (3)(a)(ii) amends section 15 of the 1995 Act and removes from this section the entitlement to have intimation made to a solicitor concerning a person’s detention. The entitlement to this intimation is not lost however but rather is moved to a new section 15A inserted by the Bill.

7. Subsection (4) inserts section 15A into the 1995 Act. This new section applies to any person suspected of committing an offence who (i) attends the police station on a voluntary basis for questioning, (ii) any person detained within the meaning of section 14 of the 1995 Act and (iii) any person arrested but not charged who is being detained for the purposes of questioning. In these circumstances the person is afforded the rights contained in section 15A.

8. Section 15A(2) provides that the person has a right to have intimation sent to a solicitor of any or all of the following; the fact of the person’s voluntary attendance, detention or arrest, their location and that they require the solicitor’s professional assistance.

9. Section 15A(3) provides that the person has a right to have a private consultation with a solicitor prior to and during questioning by the police. Consultation is not confined to a face to
These documents relate to the Criminal Procedure (Legal Assistance, Detention and Appeals) (Scotland) Bill (SP Bill 60) as introduced in the Scottish Parliament on 26 October 2010

face meeting and can include any means appropriate in the circumstances including a telephone consultation (section 15A(5)).

10. Section 15A(7) provides that intimation can be delayed if it is in the interest of the investigation, prevention of crime or apprehension of offenders to do so. For the same reasons, section 15A(8) provides that the suspect can be questioned without having had a private consultation with a solicitor.

11. Section 14(10) of the 1995 Act requires a detained person to answer some basic questions to allow a constable to establish his identity. New section 15A(9) provides that the right to a private consultation with a solicitor before questioning does not apply to this type of questioning.

Section 2 Criminal advice and assistance: automatic availability in certain cases

12. This section amends the Legal Aid (Scotland) Act 1986 (“the 1986 Act”). Subsection (3) inserts a new section 8A into the 1986 Act to allow advice and assistance to be made available without reference to the financial limits under section 8 of that Act in such circumstances as the Scottish Ministers may, in regulations, prescribe. In those circumstances advice and assistance will be available to any person to whom section 15A of the 1995 Act (as inserted by section 1 of the Bill) applies. Advice and assistance is a form of State funded legal assistance. It is currently only available to clients who are financially eligible to receive it in terms of section 8 of the 1986 Act.

13. Subsection (4) provides that regulations made under the new section 8A will be subject to the affirmative resolution procedure.

Detention

Section 3 Extension of period of detention under section 14 of 1995 Act

14. Subsection (1) amends section 14 of the 1995 Act and provides that the 6 hour maximum period of detention is replaced by an initial maximum period of 12 hours.

15. Subsection (2) inserts new sections 14A and 14B into the 1995 Act. Section 14A provides that the 12 hour period of detention may be extended by a further period of 12 hours. Section 14A(4) provides the criteria to be satisfied before the 12 hour period may be extended. The extension may only be authorised by a “custody review officer” who is defined in section 14A(7).

16. Section 14A(6) provides that where the period is extended, the rights set out in section 14 remain applicable to the extended period.

17. Section 14B provides further procedures that the custody review officer must adhere to when considering an extension of the 12 hour period. Section 14B(2) provides that the custody review officer must give either the detained person or the solicitor representing the detained person, if available, the opportunity to make representations on the decision to extend the
period. If the detained person is unfit to make representation either through condition or behaviour the officer may refuse to hear any oral representations from him (section 14B(4)).

18. Section 14B(5) provides that the decision to extend the period and reasons for that decision must be communicated to the detained person and, if available, the solicitor representing the detained person at that time. Where such an extension has been made the detained person must be reminded of any rights that the detained person has thus far not exercised (section 14B(7)).

19. Sections 14B(8) provides the recording procedure on the decision on whether to extend the period that the custody review officer has to follow.

Sections 1 and 3: transitionals and savings

Section 4 Sections 1 and 3: transitional and saving provision

20. Subsections (1) and (2) of this section provide that the rights contained within section 1 and 3 apply to any person whose detention or arrest begins on or after the day on which the Bill comes into force.

21. Subsections (3) and (4) provide that if the detention period began before the day on which the Bill comes into force, the person will remain subject to sections 14 and 15 of the 1995 Act as they existed at the time of the commencement of the detention.

Appeals

Section 5 Extension of time limit for late appeals: right to make representations

22. This section inserts section 111(2A) to 111(2C) into the 1995 Act. Section 111(2A) provides that when an application is made seeking an extension to the period under section 109 within which a solemn appeal can be made, reasons must be given by the applicant as to why the time limit was not complied with. The application must be intimated by the applicant to the Crown Agent.

23. Section 111(2B) and 111(2C) provide that the prosecutor may within 7 days of receiving intimation of the application make representations before the application is determined. The representations may be in writing or oral if the prosecutor requests a hearing.

24. Subsection (3) inserts section 181(2A) to 181(2C) into the 1995 Act and provides that when an application is made seeking an extension to the period under section 176 within which a summary appeal can be made, reasons must be given by the applicant as to why the time limit was not complied with. The application must be intimated by the applicant to the respondent or respondent’s solicitor.

25. Section 181(2B) provides that the respondent may within 7 days of receiving intimation of the application make representations before the application is determined. The representations may be in writing or oral if the respondent requests a hearing.
26. Subsection (4) provides that the changes to section 111 and section 181 affect any application made under sections 111(2) or 181(1) on or after the day on which the Bill comes into force.

Section 6  Time limit for lodging bills of advocation and bills of suspension

27. This section inserts a new section 191A into the 1995 Act. This places time limits on the period allowed to lodge bills of suspension and bills of advocation. Section 191A(2) provides a 3 week period within which such bills may be lodged. That period may be extended by the High Court on application by either party (section 191A(3)).

28. Sections 191A(4) sets out the content of such applications. The other party upon receiving intimation of such an application may request a hearing and be given an opportunity to make representations upon the application.

29. Subsection (2) provides that if the decision which is the subject of the bill of suspension or advocation took place prior to this Bill coming into force, the 3 week time limit will be taken to start from the date that this Bill came into force.

Section 7  References by the Scottish Criminal Cases Review Commission

30. Subsection (3) amends section 194C of the 1995 Act to introduce a new subsection (2) which requires the Scottish Criminal Cases Review Commission to have regard to the need for finality and certainty in the determination of criminal proceedings when considering whether it is in the interests of justice to make a reference to the High Court.

31. Subsection (4) inserts section 194DA to the 1995 Act which provides that the High Court may reject a reference from the Commission if it considers that it is not in the interests of justice that any appeal arising from the reference should proceed.

General

Section 8  Interpretation

32. This section provides that references to the 1995 Act within the Bill refer to the Criminal Procedure (Scotland) Act 1995.

Section 9  Commencement

33. This section provides when the Bill comes into force. It will come into force at the beginning of the day after the day on which it receives Royal Assent.

Section 10  Short title

34. This section provides the short title of the Bill
FINANCIAL MEMORANDUM

INTRODUCTION

35. This document relates to the Criminal Procedure (Legal Assistance, Detention and Appeals) (Scotland) Bill introduced in the Scottish Parliament on 26 October 2010. It has been prepared by the Scottish Government to satisfy Rule 9.3.2 of the Parliament’s Standing Orders. It does not form part of the Bill and has not been endorsed by the Parliament.

36. The Criminal Procedure (Legal Assistance, Detention and Appeals) (Scotland) Bill will revise the law in order to:-

- Create in statute a new right of access to legal advice/representation for an accused person during detention by the police.
- Create an enabling power, permitting modification of the current eligibility rules in relation to legal advice, in order to give practical effect to the right of access.
- Extend the period by which an accused may be detained to twelve hours, which may be increased to a maximum of twenty four hours on the authorisation of a senior officer, to ensure that the careful balance is maintained between the rights of the accused and the ability of the police to fully and appropriately investigate crime.
- Establish a three week time limit for appeals to be lodged in Summary cases through the common law route of bills of advocation and bills of suspension.
- Require the Scottish Criminal Cases Review Commission (SCCRC) to consider the interests of finality and certainty in reaching decisions on applications before it. In addition the High Court will be given the power to reject cases referred to it by the SCCRC where it believes these tests have not been met.

IMPACT

37. The Bill will have an impact on costs related to offering legal advice before and during interview, and on the police in terms of arranging and providing access, and potentially detaining suspects for longer. Paragraph 4 outlines some of the background to this. In addition, the Bill will have an impact on appeals. Although we do not believe the Bill will, in itself, lead to additional costs in this area, paragraph 5 provides some background figures on appeals by way of context.

38. While there are no official figures, ACPOS estimates that in the order of 55-65,000 accused persons are detained each year in Scotland. The Bill will provide a new right of access to legal advice, either by telephone consultation or face to face with a solicitor at a police station. It should be noted that the costs quoted in this financial memorandum will be incurred whether there is legislation or not. The costs flow from the requirements placed on the justice system by the Supreme Court judgement\(^1\) and the purpose of the Bill is to place this in a statutory framework.

39. The Court of Appeal in 2008/09 disposed of a total of 193 appeals against Solemn convictions and 278 appeals against Summary convictions. The SCCRC in 2009/10 received a total of 94 new applications and for the period 01/04/1999 to 31/03/2010 referred a total of 97 cases to the High Court.

Methodology

40. A Business and Regulatory Impact Assessment for the Bill will be published separately.

41. For the purposes of this financial memorandum, all figures given assume a commencement of provisions on 30 October 2010.

COSTS FALLING ON THE SCOTTISH ADMINISTRATION

42. It is anticipated that there are minimal direct costs for the Scottish Administration including the Crown Office and Procurator Fiscal Service. There may be appeals resulting from the decision of the Supreme Court but the provisions in Sections 5 to 7 in the Bill will not in themselves create any new costs. Indeed, the function of these provisions is to limit the effect of the judgement in these areas and therefore contain potential costs.

Police

43. Creating a new right of access/representation during detention will have implications for police time and facilities. Extending the maximum period of detention will have a similar impact if it results in an increase in the average period of detention. The cost implications arise from the need to arrange solicitor access and the resources needed in police custody suites to do so. There are also costs arising from the need for training to ensure that the rights set out in the legislation are given proper effect in front line policing practice. The impact on facilities arises from the need for additional accommodation and telephony to allow for confidential consultations between suspect and solicitor.

Consultation Rooms

44. ACPOS advises that there are currently limited facilities in existence to permit solicitors to consult confidentially with clients at police stations. Consequently, it is anticipated that in order to facilitate the additional telephone and face to face consultations that might result from a right to legal access, additional interview accommodation may be required. ACPOS advises that there are currently 48 principal custody locations across Scotland that hold multiple prisoners overnight; these are primarily located at Force or Divisional Headquarters. In addition there are a further 54 stations and facilities across the country that detain prisoners for short term purposes, including interviews.

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45. It is anticipated by ACPOS that in order to accommodate the volume of legal access interviews a total of 198 consultation rooms will be required. This is on the basis of the provision of three rooms for each of the 48 principal custody locations and a single room for each of the 54 additional locations.

46. It is difficult to provide an exact cost for the provision of additional interview room facilities. ACPOS advises that in some instances this may be achieved at relatively low cost, in the order of £5,000 per room. In other instances more extensive work may be required and ACPOS anticipates costs of £35,000 or higher, per room. This would provide a total one off cost of between £990,000, if the lower conversion cost of £5,000 applied (198 rooms at £5,000 per room = £990,000) and £6,930,000 using the higher conversion cost of £35,000 (198 rooms at £35,000 per room = £6,930,000). Due to the scale of the conversion work it is assumed that these costs will straddle the 2010/11 and 2011/12 financial years on a 50/50 basis.

**Telephone Equipment**

47. Each interview room will also require fixed line telephone equipment to permit phone advice to be given to an accused by their solicitor during detention. It is anticipated that the cost per room will be in the order of £600, with a total one off cost of £118,000 (198 interview rooms at a cost of £600 per room = £118,000). Since the telephony costs are linked to the creation of additional interview rooms these costs will also be split over two financial years.

**Training Costs – Relief Cover**

48. ACPOS advises that a large number of staff with custody responsibilities will need to be trained in the new operational procedures that will be put in place as a result of the legislation. Additional costs will be incurred by forces to provide relief cover to permit officers to be freed up to receive training.

49. Training relief cost calculations are based on the following data and assumptions:-

- Custody staff (both full time and “relief staff” who are asked to cover on an ad hoc basis) will require one day (8 hours) of training
- Sergeants supervise custody staff at main custody centres. There are 300 of these posts across the country.
- There are 700 trained custody staff - a combination of police constable and police custody support officers. Police constables constitute 70% of this total and the default costs applied are based on the police constables rate.
- Uniformed Inspectors are the most likely senior police officers to be involved in the review/extension of detentions proposed. It is anticipated that 674 officers at this rank will require 4 hours training.
- Indicative costs used are based on the following :-
  (a) Constable indicative cost =£40,000 per annum, or £110 per day
  (b) Sergeant indicative cost =£45,000 per annum, or £123 per day
  (c) Inspector indicative cost £56,000 per annum, or £153 per day.
50. Based on this total relief costs to permit training are as follows:

- Constables/Custody Support Officers (700 officers - 1 day training at £110 per officer per day) = £77,000
- Sergeants (300 officers – 1 day training at £123 per officer per day) = £36,900
- Inspectors (674 officers - half day training at £76.50 per officer per half day) = £51,561

Total costs for relief training cover = £165,461

51. The training figures provided by ACPOS does not take into account costs associated with the design and delivery of training or the costs associated with training other operational members of staff who will subsequently require to be familiar with the new legislation. These factors, and an allowance for contingency, suggest that the overall cost of training should be rounded up to £200,000.

**Custody Staff Requirement**

52. ACPOS suggests that an increase in the detention periods and the need to manage an increase in solicitor interviews may place additional demands on police custody units. It is impossible to predict precisely what future annual interview volumes will be and importantly how the right of access will translate in terms of resource demands for police custody unit staff. However, ACPOS has suggested that this will require increases in staffing, re-deployed to principal custody locations to respond to any additional demand. ACPOS has provided the following set of assumptions:

- That staff will be deployed at the 48 principal custody locations and not for the 54 further locations.
- That two further members of staff will be required per shift
- That each location operates a rotating five shift pattern
- That 30% of the resource required would be at the rank of Sergeant, reflecting the current split of staff and 70% would be at constable/custody support officer grade

This would indicate that up to 480 custody staff would be required. (Number of Main Custody Facilities = 48 x 10 members of staff = 480)

53. Based on a total requirement of up to 480 staff the split would be as follows:

- 144 Sergeants (30% of 480 = 144)
- 336 Constables or PCSO’s (70% of 480 = 336)

54. Using the indicative staff costing figures supplied in paragraph 14 total annual costs would be up to £14,880,000, if based on a model of using Police Sergeant and Custody Support Officers, or up to £19,920,000 if based on an approach using Police Sergeant and Police Constable costs on a recurring basis. A more detailed breakdown of these figures is provided below:
These documents relate to the Criminal Procedure (Legal Assistance, Detention and Appeals) (Scotland) Bill (SP Bill 60) as introduced in the Scottish Parliament on 26 October 2010

- Sergeant cost per year = £45,000 x 144 officers = £6,480,000 per year
- Constables cost per year = £40,000 x 336 officers = £13,440,000 per year
- Total Cost = £19,920,000

or

- Sergeant cost per year = £45,000 x 144 officers = £6,480,000 per year
- Police Custody Support Officer costs per year = £25,000 x 336 officers = £8,400,000
- Total Cost = £14,880,000

55. The police have been working in accordance with the Lord Advocate’s interim guidance[4] in recent months without a significant increase in custody suites. It is expected that uptake will grow over time but it is difficult to predict at what rate and to what level. If the rate of increase or overall level of uptake is lower than predicted, then costs will be reduced accordingly. Once a longer term scheme is in place to provide legal advice to suspects in police detention, the mechanism involved in arranging such advice should be significantly simpler. This should also have the effect of limiting the additional demands on police time.

Upgrading of Police IT systems

56. There is currently no single national system for the purpose of recording custody information. ACPOS advises that it is difficult to provide detailed figures for costs in terms of updating the various police IT systems. ACPOS proposes that a broad estimate of £100,000 as a one-off cost informed by an early cost estimate would be appropriate.

Summary of Police Costs

<table>
<thead>
<tr>
<th>Cost Area</th>
<th>Non-Recurring Costs (2010-11)</th>
<th>Non-Recurring Costs (2011-12)</th>
<th>Recurring Costs</th>
</tr>
</thead>
<tbody>
<tr>
<td>Consultation Rooms</td>
<td>£495,000 - £3,465,000</td>
<td>£495,000 - £3,465,000</td>
<td>-</td>
</tr>
<tr>
<td>Telephone equipment</td>
<td>£59,000</td>
<td>£59,000</td>
<td>-</td>
</tr>
<tr>
<td>Additional Requirements</td>
<td></td>
<td></td>
<td>£14,880,000 to £19,920,000</td>
</tr>
<tr>
<td>Staff Requirements</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Training</td>
<td>£200,000</td>
<td>-</td>
<td>-</td>
</tr>
<tr>
<td>IT systems upgrade</td>
<td>£100,000</td>
<td>-</td>
<td>-</td>
</tr>
<tr>
<td><strong>TOTALS</strong></td>
<td><strong>£854,000 - £3,824,000</strong></td>
<td><strong>£554,000 - £3,524,000</strong></td>
<td><strong>£14,880,000 - £19,920,000</strong></td>
</tr>
</tbody>
</table>

57. It is anticipated that the overall cost to the police would be up to £21,328,000 or £27,268,000, depending on the assumptions used. Between £1,408,000 - £7,348,000 would represent non recurring costs and up to £14,880,000 - £19,920,000 would be recurring costs. These additional costs will be taken in account in forthcoming spending decisions, alongside a range of other factors.

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COSTS ON LOCAL AUTHORITIES

58. There are no anticipated costs for local authorities.

COSTS ON OTHER BODIES, INDIVIDUALS AND BUSINESSES

Scottish Legal Aid Board

59. Creating a right of access to legal advice during detention and enabling changes to eligibility criteria will incur additional costs to the Legal Aid budget. It is difficult to provide exact figures for this since these will be dependent on a number of factors including the number of suspects detained by the police, the proportion of accused persons who request access to legal advice, the manner in which that advice is provided; whether it is by face to face contact or over the telephone and the duration of the advice.

60. The experience in England and Wales, 10 years after introduction of the Police and Criminal Evidence Act 1984 (PACE), suggests that in the order of 38% of accused detained by the police requested access to legal advice.\(^5\) More recent data suggests that the current rate may be higher still, in the order of 54%.\(^6\) There are of course notable differences between the system in Scotland from the PACE regime, nevertheless the figures provide a helpful indication of possible uptake rates and highlight the potential for this to increase further over time.

61. Early data gathered internally by ACPOS indicates that currently approximately 22% of detained suspects in Scotland request access to legal advice, following implementation of Lord Advocate’s guidelines to the police dealing with detention of suspects, that came into effect for Solemn cases in June 2010 and for Summary cases in July. However, it is anticipated that the creation of a statutory right of access will increase uptake rates.

62. In preparing cost figures the following assumptions and scenarios have been used:-

- Cost figures are based on the current remuneration rules
- A national annual detention figure of 55,000 per year and a higher end assumption of 65,000.
- That there will not be 100% take up of the opportunity to access legal advice. A low end 25% uptake rate, which matches early experience in Scotland, 38% reflecting the uptake rate in England and Wales 10 years following implementation of PACE, 50%, which approximates the current uptake rate reported under PACE and a high end assumption of 75% have all been modelled.
- A range of scenarios for the proportion of advice provided in person and via telephone contact. Scenarios using 22%, 50% and 75% face to face contact have been modelled.

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63. Current data from the police indicates that the proportion of face to face interviews is very low. However, it is anticipated that by creating a legal right of access, allied to any changes to eligibility criteria may result in more interviews being conducted on a personal consultation basis.

**Summary of Legal Aid Costs**

64. A summary of the potential costs based on these scenarios is provided in the table below. Based on this costs in the order of £0.5m - £1.7m would appear realistic. The lower range cost of £0.5m is based on an annual detention volume of 55,000 per annum, with a 38% uptake of legal advice and a relatively low proportion of personal consultations, 22%. The £1.7m figure is based on a higher annual detention figure of 65,000, with a 50% take up rate of legal advice, as is currently the case under the PACE regime and a higher proportion of personal consultations at 70%. It should be noted that these figures are based on a model of employed solicitors. It is anticipated that using an alternative model would cost significantly more but the Scottish Government, regardless of the approach used will seek to minimise costs and the figures in the table therefore provide a sensible indication of the likely outcome.

<table>
<thead>
<tr>
<th>No. of Detentions</th>
<th>Proportion of Face to Face / Telephone Consultations</th>
<th>75% Take Up Legal Advice</th>
<th>50% Take Up Legal Advice</th>
<th>38% Take Up Legal Advice</th>
<th>25% Take Up Legal Advice</th>
</tr>
</thead>
<tbody>
<tr>
<td>55,500</td>
<td>22/78</td>
<td>£950,596.20</td>
<td>£672,883.20</td>
<td>£502,007.40</td>
<td>£288,333.00</td>
</tr>
<tr>
<td>55,500</td>
<td>50/50</td>
<td>£1,591,619.40</td>
<td>£1,100,232.00</td>
<td>£822,519.00</td>
<td>£502,007.40</td>
</tr>
<tr>
<td>55,500</td>
<td>70/30</td>
<td>£2,072,386.80</td>
<td>£1,420,743.60</td>
<td>£1,089,612.00</td>
<td>£662,263.20</td>
</tr>
<tr>
<td>65,000</td>
<td>22/78</td>
<td>£1,912,131.00</td>
<td>£779,720.40</td>
<td>£929,356.20</td>
<td>£395,170.20</td>
</tr>
<tr>
<td>65,000</td>
<td>50/50</td>
<td>£2,499,735.60</td>
<td>£1,313,906.40</td>
<td>£1,249,867.80</td>
<td>£662,263.20</td>
</tr>
<tr>
<td>65,000</td>
<td>70/30</td>
<td>£3,354,433.20</td>
<td>£1,687,836.60</td>
<td>£1,677,216.60</td>
<td>£822,519.00</td>
</tr>
</tbody>
</table>

**Others**

65. We do not anticipate any further costs for other bodies, individuals or businesses arising from this legislation.
SUMMARY OF COSTS

66. The following table summarises the overall financial impact of the Bill.

<table>
<thead>
<tr>
<th>Cost Area</th>
<th>Non-Recurring Costs (2010-11)</th>
<th>Non-Recurring Costs (2011-12)</th>
<th>Recurring Costs</th>
</tr>
</thead>
<tbody>
<tr>
<td>Police Rooms - Consultation</td>
<td>£495,000 - £3,465,000</td>
<td>£495,000 - £3,465,000</td>
<td>-</td>
</tr>
<tr>
<td>Police - Telephone equipment</td>
<td>£59,000</td>
<td>£59,000</td>
<td>-</td>
</tr>
<tr>
<td>Police - Additional Staff</td>
<td>-</td>
<td>-</td>
<td>£14,880,000 -  £19,920,000</td>
</tr>
<tr>
<td>Requirements</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Police - Training</td>
<td>£200,000</td>
<td>-</td>
<td>-</td>
</tr>
<tr>
<td>Police - IT systems upgrade</td>
<td>£100,000</td>
<td>-</td>
<td>-</td>
</tr>
<tr>
<td>Legal Aid Costs</td>
<td>-</td>
<td>-</td>
<td>£500,000 - £1,700,000</td>
</tr>
<tr>
<td>TOTALS</td>
<td>£854,000 - £3,824,000</td>
<td>£554,000 - £3,524,000</td>
<td>£15,380,000 -  £21,620,000</td>
</tr>
</tbody>
</table>

SCOTTISH GOVERNMENT STATEMENT ON LEGISLATIVE COMPETENCE

67. On 26 October 2010, the Cabinet Secretary for Justice (Kenny MacAskill MSP) made the following statement:

“In my view, the provisions of the Criminal Procedure (Legal Assistance, Detention and Appeals) (Scotland) Bill would be within the legislative competence of the Scottish Parliament.”

PRESIDING OFFICER’S STATEMENT ON LEGISLATIVE COMPETENCE

68. On 26 October 2010, the Presiding Officer (Rt Hon Alex Fergusson MSP) made the following statement:

“In my view, the provisions of the Criminal Procedure (Legal Assistance, Detention and Appeals) (Scotland) Bill would be within the legislative competence of the Scottish Parliament.”
This document relates to the Criminal Procedure (Legal Assistance, Detention and Appeals (Scotland) Bill (SP Bill 60) as introduced in the Scottish Parliament on 26 October 2010

CRIMINAL PROCEDURE (LEGAL ASSISTANCE, DETENTION AND APPEALS (SCOTLAND) BILL

POLICY MEMORANDUM

INTRODUCTION

1. This document relates to the Criminal Procedure (Legal Assistance, Detention and Appeals (Scotland) Bill introduced in the Scottish Parliament on 26 October 2010. It has been prepared by the Scottish Government to satisfy Rule 9.3.3(c) of the Parliament’s Standing Orders. The contents are entirely the responsibility of the Scottish Government and have not been endorsed by the Parliament. Explanatory Notes and other accompanying documents are published separately as SP Bill 60–EN.

POLICY OBJECTIVES OF THE BILL

2. The ruling of the UK Supreme Court in the case of Cadder v. Her Majesty’s Advocate1 on 26 October 2010 has significant implications for the investigation and prosecution of crime in Scotland. This Bill forms a part of the Scottish Government’s response to the decision. It is designed to ensure that Scottish practice accords with the standards of the European Convention on Human Rights (ECHR) and to ensure the effective functioning of the criminal justice system following the judgement. The Bill should be considered alongside terms of reference for the Expert Review led by Lord Carloway established by the Government to investigate long term options for reform. The Review was announced on 26 October 2010 with the terms of reference to be published on the Government’s website2.

3. The Bill has four main aims:

- It will enshrine a right to legal advice for suspects being questioned by the police.
- It will extend the existing 6 hour period for police detention.
- It will provide a mechanism that could be used if necessary to ensure that adequate legal aid arrangements are available for detained suspects.
- Finally, it will make some provision to reinforce the principles of certainty and finality set out in the Supreme Court decision.

2 http://www.scotland.gov.uk/Topics/Justice/legal
BACKGROUND

The European Convention on Human Rights

4. Article 6 of the ECHR provides for the Right to a Fair Trial. The relevant provisions read:

“Article 6

Right to a fair trial

1. In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law. Judgment shall be pronounced publicly but the press and public may be excluded from all or part of the trial in the interests of morals, public order or national security in a democratic society, where the interests of juveniles or the protection of the private life of the parties so require, or to the extent strictly necessary in the opinion of the court in special circumstances where publicity would prejudice the interests of justice.

3. Everyone charged with a criminal offence has the following minimum rights:

(c) to defend himself in person or through legal assistance of his own choosing or, if he has not sufficient means to pay for legal assistance, to be given it free when the interests of justice so require;

5. Under section 6(1) of the Human Rights Act 1998\(^3\), it is unlawful for a public authority to act in a way which is incompatible with a Convention right. “Convention rights” are those rights and fundamental freedoms drawn from provisions of the ECHR which are set out in section 1 of the Human Rights Act. If a person claims that a public authority has acted, or proposes to act, in a way which is made unlawful by section 6(1), they may bring proceedings against the public authority under the Human Rights Act in the appropriate court or tribunal (section 7(1)(a)) or rely on the Convention right concerned in any legal proceedings. They are only permitted to do so if they are, or would be, a victim of the unlawful act. A “public authority” includes the members of the Scottish Executive collectively and individually.

6. Similarly, section 57(2) of the Scotland Act 1998\(^4\) provides that a member of the Scottish Executive has no power to act in a manner that is incompatible with Convention rights. This means that Convention rights proceedings can be brought against them under the Human Rights Act or under the Scotland Act.

Scottish law on detention

7. In Scotland, a person suspected of a crime may be detained and questioned by the police for a period of 6 hours prior to arrest. The introduction of this detention period was recommended

\(^3\) (c.42)
\(^4\) (c.46)
by the Thomson Committee in its 1975 Report “Criminal Procedure in Scotland”.\(^5\) This fundamental review of all aspects of Scottish criminal procedure led to legislation in 1980.\(^6\) The provisions on detention were subsequently re-enacted in section 14 of the Criminal Procedure (Scotland) Act 1995\(^7\) (the “1995 Act”). During detention, a suspect can have a solicitor and one other person informed and should be cautioned prior to any police interview. The caution informs them that he or she is not obliged to say anything (other than to confirm their name, address etc.), but that anything said will be recorded and may be used in evidence.

8. The purpose of detention is to facilitate the carrying out of investigations into the offence that the person is suspected of having committed and consideration of whether criminal proceedings should be brought against the person. Detention must end within 6 hours or if the person is (a) arrested; (b) detained in pursuance of another enactment; or (c) where there are no longer grounds for detention. If there are no longer grounds for detention and the person is released he or she cannot be re-detained on the same grounds or any other grounds arising from the same circumstances.

9. In summer 2010\(^8\), Scottish practice was altered so that all suspects should be offered a consultation with a solicitor (in practice often by telephone), with the option of solicitor attendance during interview (when this could practically be arranged and would not prejudice an ongoing investigation).

**ECHR compatibility of Scottish law on detention**

10. On 27 November 2008 the European Court of Human Rights (ECtHR) Grand Chamber made a ruling in the case of *Salduz v. Turkey*\(^9\). In that case, the Court unanimously held that there had been a violation of Article 6(3)(c) (right to legal assistance) of the ECHR in conjunction with Article 6(1) (right to a fair trial) on leading evidence of a confession made in police custody. The violation arose because the applicant was not able to access legal advice prior to police questioning and the start of the prosecution in court. The ECtHR (at para 55) observed that:

> “as a rule, access to a lawyer should be provided as from the first interrogation of a suspect by the police, unless it is demonstrated in the light of the particular circumstances of each case that there are compelling reasons to restrict this right. Even where compelling reasons may exceptionally justify denial of access to a lawyer, such restriction - whatever its justification - must not unduly prejudice the rights of the accused under Article 6”.

11. ECtHR rulings in relation to one jurisdiction do not necessarily have direct application in other countries that have signed up to the ECHR. Each national system is different and the

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\(^5\) Criminal Procedure in Scotland (Second Report), Cmnd. 6218, para. 3.24.

\(^6\) Criminal Justice (Scotland) Act 1980 (c.62)

\(^7\) (c.46)

\(^8\) Lord Advocate Guidelines - Interim Guidelines on Access to Solicitors. The guidance was issued in relation to solemn cases on 15 June and extended to all cases on 7 July: http://www.copfs.gov.uk/Publications/2010/06/LAGuidelines [Link no longer active]

\(^9\) The text of ECtHR decisions can be accessed at: http://cmiskp.echr.coe.int/tkp197/search.asp?skin=husdoc-en
checks and balances in place in each country can vary greatly. Nonetheless, ECtHR decisions are highly influential in influencing domestic law.

12. In Scotland, the law on detention was considered by the High Court of Justiciary (the most senior criminal court in Scotland) in 2000\(^\text{10}\) and 2001\(^\text{11}\) and ruled to be entirely compliant with ECHR. Following the decision in *Salduz*, the law was considered further by a bench of 7 judges of the High Court of the Justiciary in the case of *Maclean v. HMA*, decided on 22 October 2009. In that case, the High Court unanimously decided that Scottish practice was ECHR compliant. In particular, the court found that that the guarantees and protections otherwise available to suspected and accused persons under the Scottish criminal justice system (in particular, the requirement for the essential facts of every criminal case to corroborated by evidence from two separate sources) were sufficient to secure a fair trial even where the suspect was interviewed while detained without access to a lawyer\(^\text{12}\). The High Court also observed that “while the judgment in *Salduz* commands great respect, we are not obliged to apply it directly in Scotland”\(^\text{13}\).

13. In assessing Scottish law, the High Court opined that the Thomson Committee recommendations on detention “have been in place for nearly thirty years without serious concern in Scotland that the interests of suspected persons are being prejudiced. It is clear that Parliament did not intend that a detained person should have, in general, the right to have legal representation or advice during detention.”\(^\text{14}\)

14. In 2010, Scottish law on detention was considered by the UK Supreme Court in the case of *Cadder v. HMA*. The Supreme Court ruled that the law was incompatible with the ECHR as interpreted in the context of the decision in *Salduz*. The decision in *Cadder* means that amendment is required to the existing police powers to detain and question suspects. This Bill therefore creates a right of access to a solicitor before questioning by the police, in order to ensure that Scottish practice conforms to the standards of the ECHR. It also makes a number of other changes considered necessary to ensure effective future operation of the criminal justice system.

**POLICY OBJECTIVES OF THE BILL**

**Enshrining a right of suspects to have access to a solicitor**

15. It is fully accepted by the Scottish Government that the law on access to a solicitor during police questioning has changed. This Bill outlines the Government’s immediate response, enshrining a clear right to legal advice for suspects before and during detention by the police and taking important steps to make it work in practice.

16. Although the revisions to Scottish practice adopted in the summer of 2010 have, in effect, resulted in access to a solicitor being made available to accused persons, it is thought necessary

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\(^\text{10}\) *Paton v. Ritchie*, 2000 SCCR 151

\(^\text{11}\) *Dickson v HM Advocate*, 2001 SCCR 397


\(^\text{13}\) *Ibid*, paragraph 29

\(^\text{14}\) *Ibid*, paragraph 7
that access should be set out as a specific statutory right. This will ensure certainty in the law and, of course, provide a specific and identifiable protection for suspected persons. A legislative right of access ensures a more rigorous safeguard than practice based upon guidelines. Allowing suspects the opportunity to confer with a legal adviser prior to and during questioning will ensure that any statements are made on an informed basis.

17. There is a limitation on the right of access where it is thought that a delay in permitting contact is considered necessary in the interests of the ongoing investigation or to ensure the prevention of crime or to ensure that offenders do not escape justice. Extension of the time limit will afford police more time in which to reduce any discerned risk to the investigation ahead of questioning.

**Extension of period of detention under section 14 of the 1995 Act**

18. The 6 hour maximum detention period was established in 1980 as a result of the recommendations of the Thomson Committee. The period was chosen to provide the shortest practicable time limit for suspects to be detained for questioning. There was no intention at that time for legal advice to be made available during the 6 hour period and the Thomson Committee made clear that:

“As soon as the purpose of the detention is served, the police will have a clear duty. They must either liberate the detainee or arrest him.”

19. With the introduction of a system based on solicitor access during detention, six hours is not considered by the Crown Office and Procurator Fiscal Service (COPFS), the Scottish Police Services Authority (SPSA) or the Association of Chief Police Officers in Scotland (ACPOS) to be an adequate maximum period. In too many cases it could be insufficient to allow suspects to obtain legal assistance and for the police to conduct an effective investigation. There had previously been some suggestion that the period needed to be amended to reflect developments in practice since 1980, for example in relation to the conducting of interviews in sexual cases and to cover situations where the suspect was unable to be questioned (e.g. where they were inebriated).

20. In deciding that the 6 hour maximum must be extended, the Government has consulted closely with ACPOS, SPSA, COPFS and the Law Society of Scotland. The first 3 of those organisations considered that an extension in some form was required, but the Law Society considered that any extension should not feature in this Bill. Instead, the Society argued that options for change should be considered by the judicially-led Expert Review established to consider long term reform of the criminal justice system. The Government agrees that the Expert Review should consider the operation of the detention period and make recommendations for reform. Any such recommendations would be considered carefully at the appropriate time. However, it is highly unlikely that any reforms resulting from the Review could become law before late 2011 or more likely 2012. Waiting until this time to make a change does not appear

15 Criminal Procedure in Scotland (Second Report), Cmnd. 6218, para. 3.25.
to be a viable option when there is already evidence that the six hour period is too short for some cases that have arisen under the new access arrangements established in summer 2010 (specific examples provided by ACPOS has included serious cases involving multiple accused, who have each requested the same solicitor; and also situations where one or more suspect is a juvenile, requiring the police to contact and secure the attendance of responsible adults for each suspect).

It seems evident that a period designed as a maximum time in which to permit police questioning will come under unacceptable strain when legal advice has to be obtained and provided within the same period in every single case. In some circumstances, for example a detention period commencing at 3am in a rural area, it is almost certain that arranging access and conducting an interview within 6 hours would prove impossible.

21. The Bill will extend the maximum period for detention from 6 to 12 hours in all cases. However, ACPOS has indicated to the Government strong concerns that police forces would not be able to carry out the necessary investigations in this timescale in some serious and complex cases. Therefore, the Bill also permits a further extension of 12 hours (up to a maximum of 24 hours detention in total) in specific cases where a senior police officer affirms that an extension is required because of specific circumstances in a case. An extension may only be granted by a senior police officer of the rank of at least Inspector and who has not been involved in the investigation. An extension will only be granted if the continued detention is considered necessary to secure, obtain or preserve evidence, if the offence for which the person is being detained is an indictable offence and if the investigation is being conducted diligently and expeditiously. These time periods are supported by each of ACPOS, COPFS and the SPSA.

22. The changes contained within the Bill are considered to provide an appropriate maximum amount of time to permit police questioning of suspects and the provision of legal advice. It is relevant to observe that in England and Wales a person may be detained for 24 hours and this can be extended up to 36 hours by a police superintendent or to 96 hours by a magistrate. Although there are many differences between criminal procedure in Scotland compared to England and Wales, the detention periods there were designed for a system based on solicitor access during detention.

23. It should be noted that due to the current nature of the six hour detention period in Scotland there is limited empirical statistical evidence in support of any specific time period for detention. As a result, the provisions in the Bill are based upon operational experience and professional judgement. The practical experience of police forces and defence agents in operating within these new limits will be monitored and will provide an evidence base for the Expert Review to consider should it wish to assess the arrangements for police detention. One consequence of an extension to the time period will be to make it more practicable for suspects to receive advice from a solicitor of their choosing, rather than being compelled to reply upon an “on call” solicitor due to the need to meet the 6 hour time period.

24. Longer detention periods are likely to place pressures on police accommodation for holding suspects. Some police stations (both urban and rural) lack sufficient interviewing and custody facilities and suspects will in some cases be transported to stations with more appropriate accommodation (this is incidentally another argument in favour of an extension to the 6 hour period). The Government and ACPOS are considering the best way in which to adapt and

17 Police and Criminal Evidence Act 1984 (c. 60), sections 41-44
allocate police facilities in response to the increase in the maximum period of detention outlined in the Bill. These issues are also covered in the Financial Memorandum.

25. It must be emphasised that the time limits in question will still be maximum periods. Where the interviewing of suspects is concluded in a shorter period than 12 (or 24) hours, the suspect should be either released or arrested. It is anticipated the vast majority of cases will be dealt with in less than 12 hours. Extension to 24 hours will be exceptional, but is considered appropriate given the great variety in the nature of individual cases: in terms of complexity, number of people detained at any one time, number and nature of offences suspected and nature of enquiries or processes required during a detention period. The Government considers that it is unreasonable to expect one timescale to fit all cases. Not only would this potentially frustrate proportionate efforts to conduct full enquiries into the most serious and complex offences, but it also applies a “one size fits all” solution to cases that are less serious or complex. Most crucially, it provides additional options for the approach to police investigation, with scope for forensic testing to take place during the detention period and the results put to suspects during questioning. This has become common practice in some types of investigation in England and Wales, notably where suspects make no comment at the initial stage of an investigation. It is considered an essential balance to the right of access, in order to maintain the effectiveness of police investigations in the period until the longer term Expert Review is able to take a broader view of the system. A simple extension of the maximum detention period to 12 hours would not achieve this.

Criminal legal assistance: eligibility for legal assistance for accused persons in custody

26. Advice and Assistance is the form of State funded legal assistance available in relation to police station interviews. It is only available to clients who are financially eligible to receive it in terms of section 8 of the Legal Aid (Scotland) Act 1986\(^{18}\) (“the 1986 Act”).

27. The Bill, as introduced, will insert a new section 15A into the 1995 Act enshrining suspects’ rights of access to a solicitor in certain circumstances.

28. Section 2 of the Bill will amend the 1986 Act to confer on the Scottish Ministers an order making power to make advice and assistance available to any person to whom section 15A of the 1995 Act (as inserted by section 1 of the Bill) applies, in such circumstances as they may prescribe, without reference to the financial limits under section 8 of that Act.

29. The policy objective is to ensure that the financial eligibility requirements for advice and assistance do not come to act as an impediment to the ready availability of solicitors, which will be necessary to facilitate the new right of access to legal advice for suspects.

30. The financial eligibility requirements may come to present a practical impediment to the availability of solicitors in two ways. First, the Law Society of Scotland has argued that there is some evidence that some of its members have been struggling to verify clients’ financial eligibility before police interviews since the change in practice adopted earlier this year. The problem is a practical one, since most people arrested by the police do not have in their

\(^{18}\) (c.47)
possession at the point of arrest documents which allow a solicitor to be reasonably satisfied that they are eligible to receive advice and assistance. The concern for a solicitor in private practice asked to advise a client before or during a police interview is that he or she may not be paid for the advice provided should it transpire that the client is ineligible to receive advice and assistance.

31. Second, the financial eligibility requirements present a problem for publicly employed solicitors. In terms of section 28A of the 1986 Act, solicitors from the Public Defence Solicitors’ Office (“PDSO”) can only provide “advice and assistance” as defined by the 1986 Act. They cannot, as a result, assist those who are financially ineligible for advice and assistance. So if changes are not made to the operation of the financial eligibility requirements in certain circumstances then some solicitors in private practice may decide that they are unwilling to carry out this work; and, in addition, those from the PDSO will not be able to advise those who are financially ineligible to receive advice and assistance.

32. To overcome these obstacles the Government believes it likely that it will need to disapply the financial eligibility criteria in certain circumstances. Until the terms of the judgement have been fully considered it is difficult to ascertain exactly what those circumstances might be. Allowing a degree of flexibility in defining the circumstances in which advice and assistance is to be made available without reference to the financial limits, will enable the Government to consult closely with the Scottish Legal Aid Board, the Law Society of Scotland and other justice sector partners to ensure that any scheme devised can be made to work, in order to give practical effect to the right of access to legal advice. This is the reason for the provision being in the form of a regulation-making power.

Time limits for late appeals

33. The Supreme Court’s decision in Cadder has been framed to protect finality and certainty in most completed cases. It also limits the possibility of appeals on the grounds that the suspect was detained and questioned without having had access to legal advice. The decision indicated that:

“convictions that have become final because they were not appealed timeously, and appeals that have been finally disposed of by the High Court of Justiciary, must be treated as incapable of being brought under review on the ground that there was a miscarriage of justice because the accused did not have access to a solicitor while he was detained prior to the police interview. The Scottish Criminal Cases Review Commission must make up its own mind, if it is asked to do so, as to whether it would be in the public interest for those cases to be referred to the High Court. It will be for the appeal court to decide what course it ought to take if a reference were to be made to it on those grounds by the Commission.”

19 Cadder v. HMA, Lord Hope at para. 62.
This document relates to the Criminal Procedure (Legal Assistance, Detention and Appeals (Scotland) Bill Bill (SP Bill 60) as introduced in the Scottish Parliament on 26 October 2010

34. The Government’s view is therefore that as a general principle, concluded criminal cases should not be re-examined solely because the law has subsequently changed. This assessment is in line with similar positions that have arisen in case law in England and Wales.\textsuperscript{20}

35. However, this does not affect the ongoing cases (estimated to be around 3,500 in number) where an appeal has already been made or the relevant point taken during the course of the trial. Appeals in these cases will be considered on their merits by the courts.

36. For cases which have not been finally concluded, the 1995 Act makes provision\textsuperscript{21} for time limits in which appeals against conviction must be made. For example, in solemn cases appellants must note an intention to appeal against conviction within 2 weeks of the decision and specify grounds of appeal within a further 8 weeks. However, courts have discretion to waive these time limits in certain circumstances. There is currently no test in the 1995 Act for the allowing of such “out of time” appeals and there is no developed jurisprudence of the court which makes apparent when such extensions will be granted or refused.

37. The Bill makes provision in relation to statutory appeal rights under the 1995 Act so that late appeals will require the appellant to give reasons why they failed to comply with the time limits and the proposed grounds of appeal. The application must be intimated by the applicant to the Crown Agent, and the prosecutor may within 7 days of receiving intimation of the application request a hearing and be given an opportunity to be heard upon the application (or to make representations in writing). This provision is made for both solemn and summary cases.

38. As well as these modifications to the procedures for statutory appeals, the Bill (in section 6) introduces time limits for the taking for appeals by bills of advocation and bills of suspension. It provides a 3 week period for such appeals, and that period may be extended by the High Court on application by either party, explaining why the applicant failed to comply with the time limit and setting out the proposed grounds of appeal or review. This limit is required because such appeal by bills of suspension and bills of advocation are not currently subject to time limits, which could have potentially allowed some settled historical convictions to be appealed.

References by the Scottish Criminal Cases Review Commission

39. Applications may in future be made to the Scottish Criminal Cases Review Commission (SCCRC) on the basis that legal access was denied to a suspect during detention. These applications could potentially be made in relation to historical convictions where there is no other appeal route available.

40. The SCCRC has a vital role in considering possible miscarriages of justice, but the Government does not think that an application to the SCCRC should be used as a means to undermine the need for finality and certainty that the Supreme Court has expressed. The Bill therefore provides that the SCCRC must have regard to finality and certainty in making referrals to the High Court. It also provides that the Court may reject a reference from the SCCRC if it considers that it would not be in the interests of justice for any appeal arising from the reference

\textsuperscript{20} In particular, the case of Cotterell, 2007 1 WLR 3262
\textsuperscript{21} Sections 109-111 in relation to appeals in solemn cases; sections 176 and 179 for summary cases.
to proceed. Finality and certainty in criminal proceedings is also identified as a specific factor for the High Court to consider in making this assessment.

ALTERNATIVE APPROACHES

41. There is no alternative approach to primary legislation that would achieve the Bill’s policy objectives.

42. In relation to a right of access, practice has been changed in order to afford suspects with legal advice on request. While this has been a necessary step in the interim, the Cadder decision means that a specific change to the law is required.

43. The remaining measures in the Bill are not required in order to ensure that Scottish criminal procedure is ECHR compatible. However, they are considered by the Government, COPFS, ACPOS and SLAB to be essential in order to ensure that the justice system can meet the newly established ECHR requirements and continue to operate satisfactorily. The fundamental concern is to ensure that the thorough, fair and proportionate investigation and prosecution of crime are not imperilled. The measures in this Bill are designed to maintain an appropriate balance between the rights of suspects and the need for the rights of victims to be upheld through an effective system of investigating and prosecuting crime.

44. In relation to extending the detention period, it would be possible to retain the 6 hour period as set out in the 1995 Act. However, this is not considered to be a satisfactory option. For many serious offences it would prove impossible to arrange contact with and attendance by legal advisers and then also conduct questioning of suspects without exceeding the time periods. There is also the option of a simple extension of the detention period to 12 hours. While this would provide much greater scope for solicitor access to be arranged and interviews conducted, it would not allow for forensic analysis to be completed during the period of detention. The ability to undertake such analysis will become more important in an environment where there is a right of access to a solicitor as this is likely to lead to fewer admissions in the early stages of investigations.

45. Similarly, not making provision in the Bill to permit change to legal aid arrangements is not considered a satisfactory option. It would run the risk of suspects not receiving advice, either because a publicly employed solicitor is unable to provide advice because the person is not financially eligible, or where a privately employed solicitor who is unsure of eligibility refuses to provide advice, because they may not be paid. It may also disadvantage private solicitors who do provide advice, in circumstances where they may not receive payment.

46. The provisions made in relation to appeals are considered to be necessary in order to reinforce the need for finality and certainty expressed by the Supreme Court.

47. The provisions are all considered to be appropriate for emergency legislation given the immediate need to reform law and practice following the decision in Cadder.
This document relates to the Criminal Procedure (Legal Assistance, Detention and Appeals (Scotland) Bill Bill (SP Bill 60) as introduced in the Scottish Parliament on 26 October 2010

CONSULTATION

48. This Bill is an emergency response to a judicial decision and as a result it has not been possible to conduct the usual Government processes for consultation ahead of legislation. The Government has however been in close contact over summer 2010 with the Law Society of Scotland, COPFS, ACPOS, SPSA, Scottish Legal Aid Board, SCCRC, the Scottish Prison Service, the Scottish Court Service and the Ministry of Justice. Informal soundings have also been taken from Justice spokespersons from the other parties represented in the Scottish Parliament. Weekly meetings with key stakeholders have been held to discuss the experience of the changes to existing practice introduced in summer 2010 and also the possible options for changing the law. Consultation with each of these bodies has informed the content of this Bill. These discussions have also influenced the terms of reference for the Expert Review. This Review will take evidence over the period 2010-11 and provide a detailed report based upon input received.

EFFECTS ON EQUAL OPPORTUNITIES, HUMAN RIGHTS, ISLAND COMMUNITIES, LOCAL GOVERNMENT, SUSTAINABLE DEVELOPMENT ETC.

Equal Opportunities

49. The Bill is focused upon criminal investigations and proceedings and has the potential to apply to anyone detained and questioned in relation to a criminal offence. The Bill’s provisions do not discriminate on the basis of gender, race, marital status, religion, disability, age or sexual orientation.

Island communities

50. The Bill has no differential impact upon island communities, although in some cases the extension to the detention period may allow greater facility for suspects to be transferred to appropriate facilities for interview. It will also make it easier for the suspect to receive a solicitor of his or her choice if the solicitor is not present on the island at the start of detention. The provisions of the Bill apply equally to all communities in Scotland.

Local government

51. The majority of police costs fall within the scope of the local government finance settlement and the effect on these is detailed in the Financial Memorandum for this Bill. The Scottish Government is satisfied that the Bill has no wider impact on local authorities.

Sustainable development

52. The Bill will have no negative impact on sustainable development.

Human rights

53. The Scottish Government is satisfied that the provisions of the Bill are compatible with the European Convention on Human Rights. The establishment of a right of access is designed specifically to ensure compliance with the ECHR. No compliance questions are considered to
arise in relation to the extension to the detention period (which even at its higher limit remains shorter than that for many other EU jurisdictions). The changes that may be made to ensure legal aid provision will be designed to ensure the right of access to a solicitor can be given effect in a consistent and reliable manner. The provisions in the Bill in relation to appeals are also considered to be within the Parliament’s legislative competence.
CRIMINAL PROCEDURE (LEGAL ASSISTANCE, DETENTION AND APPEALS) (SCOTLAND) BILL

DELEGATED POWERS MEMORANDUM

PURPOSE

1. This memorandum has been prepared by the Scottish Government in accordance with Rule 9.4A of the Parliament’s Standing Orders, in relation to the Criminal Procedure (Legal Assistance, Detention and Appeals) (Scotland) Bill. It describes the purpose of the subordinate legislation provision in the Bill and outlines the reasons for seeking the proposed power. This memorandum should be read in conjunction with the Explanatory Notes and Policy Memorandum for the Bill.

2. The contents of this memorandum are entirely the responsibility of the Scottish Government and have not been endorsed by the Scottish Parliament.

Outline of Bill provisions

3. The Criminal Procedure (Legal Assistance, Detention and Appeals) (Scotland) Bill makes provision in relation to the questioning of persons on suspicion of having committed an offence by the police. In particular—

   • It will enshrine a right to legal advice for suspects being questioned by the police.
   • It will extend the existing 6 hour period for police detention.
   • Section 2 is to amend the Legal Aid (Scotland) Act 1986 (“the Legal Aid Act”) to confer on the Scottish Ministers a power to make advice and assistance available, in such circumstances as they may prescribe, without reference to the financial limits under section 8 of that Act.
   • It will make provision to reinforce the principles of certainty and finality set out in the Supreme Court’s judgment in Cadder v Her Majesty’s Advocate [2010] UKSC 43.

Rationale for subordinate legislation

4. The Bill provides for only one delegated power (section 2). In deciding to take a power to make subordinate legislation rather than make provision on the face of the Bill, the Scottish Government had regard to the need to—
• strike the right balance between the importance of the issue and providing flexibility to respond to changing circumstances, without having to include the necessary provision in primary legislation;
• make proper use of valuable, and this being proposed as an emergency Bill especially limited, Parliamentary time;
• anticipate the unexpected, which might otherwise frustrate the purpose of the provision in primary legislation approved by the Parliament.

Delegated power

Section 2 – Criminal advice and assistance: automatic availability in certain circumstances

Power conferred on: Scottish Ministers
Power exercisable by: regulations made by Scottish statutory instrument
Parliamentary procedure: affirmative resolution of the Scottish Parliament

Provision

5. Section 2 will insert a new section 8A into the Legal Aid Act to allow advice and assistance to be made available without reference to the financial limits under section 8 of that Act in such circumstances as the Scottish Ministers may, in regulations, prescribe to any “relevant client”. The expression “relevant client” is defined to mean any person who has a right of access to a solicitor under the new section 15A of the Criminal Procedure (Scotland) Act 1995, which will be inserted by section 1 of the Bill. Thus, in the circumstances which the Scottish Ministers prescribe in regulations, advice and assistance will be available to anyone who is being questioned by the police prior to charge.

6. Advice and assistance is the type of State funded legal advice made available to suspects prior to charge. At present advice and assistance is available only to those who are eligible in terms of section 8 of the Legal Aid Act. That means it is currently available to anyone whose disposable capital is below £1,664 and who either has less than £238 per week disposable income or who is (directly or indirectly) in receipt of income support, an income-based jobseeker’s allowance or an income-related allowance under Part 1 of the Welfare Reform Act 2007. The figures prescribed in section 8 are annually adjusted by regulations to take account of inflation. They were most recently adjusted by the Advice and Assistance and Civil Legal Aid (Financial Conditions and Contributions) (Scotland) Regulations 2010 (S.S.I. 2010/139).

Reason for taking power

7. Section 1 of the Bill will create a right to legal advice for suspects before and during questioning by the police. For that right to be practical and effective solicitors will need to be available wherever and whenever required. In order to ensure that solicitors are readily available at police stations throughout Scotland the Government will work closely with solicitors in private practice and the Scottish Legal Aid Board (“the Board”).

8. It is likely that a mixture of solicitors in private practice and solicitors employed by the Board will have to be used to ensure that solicitors are available as and when required. Furthermore, to ensure that the necessary availability of solicitors can be secured at a reasonable
cost to the public purse the Board may choose to enter into contracts with solicitors’ firms to provide cover in particular localities. The Board’s powers to employ solicitors and enter into contracts are limited in the sense that they can only employ solicitors to provide, and enter into contracts for the provision of, “legal aid” and “advice and assistance” as defined by the Legal Aid Act. If advice and assistance remains subject to the section 8 eligibility criteria solicitors directly employed, or with whom the Board has a specific contract to provide advice and assistance, will be unable to advise a suspect who is ineligible for advice and assistance. Moreover even establishing whether the suspect is eligible or not may be problematic as a person detained by the police is unlikely to have about his or her person the documentation a solicitor needs to establish eligibility.

9. To prevent the difficulties described above from arising, and thereby ensure that the comprehensive coverage necessary to make the right to legal advice for suspects before and during police interview practical and effective, advice and assistance may need to be made available without reference to the financial limits under section 8 of the Legal Aid Act. To allow a degree of flexibility in defining the circumstances in which advice and assistance is to be made available without reference to the financial limits, the Government considers it most appropriate to define those circumstances in subordinate legislation rather than attempt to do so in the Bill.

Choice of procedure

10. The Government recognises that any change to the eligibility criteria for State funded legal assistance requires thorough Parliamentary scrutiny. The affirmative procedure is therefore considered appropriate. This is consistent with the approach taken throughout the Legal Aid Act in relation to powers which modify the eligibility criteria for legal aid and advice and assistance.
The meeting opened at 2.00 pm.

Criminal Procedure (Legal Assistance, Detention and Appeals) (Scotland) Bill:
The Cabinet Secretary for Justice (Kenny MacAskill) moved S3M-7266—That the Parliament agrees that the Criminal Procedure (Legal Assistance, Detention and Appeals) (Scotland) Bill be treated as an Emergency Bill.

After debate, the motion was agreed to.
The Presiding Officer (Alex Fergusson): The next item of business is consideration of business motion S3M-7274, in the name of Bruce Crawford, on behalf of the Parliamentary Bureau, setting out a revised business programme for this week.

Motion moved,

That the Parliament agrees—

(a) the following revision to the programme of business for Wednesday 27 October 2010—

followed by

SPCB Question Time
followed by

Ministerial Statement: Literacy Action Plan
followed by

Health and Sport Committee Debate: Report on out-of-hours healthcare provision in rural areas
followed by

Business Motion
followed by

Parliamentary Bureau Motions
followed by

5.00 pm Decision Time
followed by

Members’ Business
and insert

followed by

Debate on a Government Motion to treat the proposed Criminal Procedure (Legal Assistance, Detention and Appeals) (Scotland) Bill as an Emergency Bill
followed by

Stage 1 Debate: proposed Criminal Procedure (Legal Assistance, Detention and Appeals) (Scotland) Bill
followed by

Financial Resolution: proposed Criminal Procedure (Legal Assistance, Detention and Appeals) (Scotland) Bill

(b) the following revision to the programme of business for Thursday 28 October 2010—

followed by

Standards, Procedures and Public Appointments Committee Debate: Report on Draft Revised Code of Practice for Ministerial Appointments to Public Bodies in Scotland

and insert

followed by

Ministerial Statement: Economic and Social Impact of the Strategic Defence and Security Review—[Bruce Crawford,]

Motion agreed to.
Criminal Procedure (Legal Assistance, Detention and Appeals) (Scotland) Bill (Emergency Bill)

The Presiding Officer (Alex Fergusson): The next item of business is consideration of motion S3M-7266, in the name of Kenny MacAskill, to treat the Criminal Procedure (Legal Assistance, Detention and Appeals) (Scotland) Bill as an emergency bill.

14:05
The Cabinet Secretary for Justice (Kenny MacAskill): I propose that the Criminal Procedure (Legal Assistance, Detention and Appeals) (Scotland) Bill be considered under the emergency legislation procedure. If Parliament allows the bill to be dealt with under that procedure, I will explain the background in more detail in the stage 1 debate. For now, I will outline why the bill should be handled under that exceptional procedure.

The need for the bill stems from the judgment of the United Kingdom Supreme Court in the case of Cadder v HMA, issued yesterday, which decided that the practice of police interviewing detained persons in a police station without allowing them access to legal advice is contrary to the European convention on human rights and therefore Scots law. That overturned decades of Scots law and overruled the decision of the highest criminal court of appeal here in Scotland just last year. We did not choose this situation, but we are required to address it.

There are three main reasons why I believe the legislation needs to be passed under emergency procedure. First, the judgment affects current practice in detaining suspects. That is at the heart of our justice system, with tens of thousands of detentions taking place every year. The ruling of the UK Supreme Court, notwithstanding the decision of our High Court of criminal appeal in 2009, means that, as we stand here, our statute is incompatible with the ECHR in a key part of the justice system. In my view, we must act immediately to correct that. Although the Lord Advocate’s guidance provides some protection in individual cases, it is a poor substitute for a specific and identifiable right in statute.

Robert Brown (Glasgow) (LD): The cabinet secretary seeks to justify emergency legislation going through in one day with no scrutiny other than what we will have today. Will he make it clear exactly what difference there would be in leaving the Lord Advocate’s guidelines in place until we have proper scrutiny of legislation, rather than concluding matters today? Would he have any additional cases to worry about that he does not have in the first place?

Kenny MacAskill: I think that we might do. Clearly, the police operate under section 14 of the Criminal Procedure (Scotland) Act 1995. As the member knows, we are not entitled in Scotland to have legislation that is contrary to the ECHR. Accordingly, there is a possibility of challenges that could strike down the basis on which the police operate. We are in a situation in which 1,000 or so people are detained every week. Without new legislation, there is the danger that matters could be struck down and that we could be left in a position in which we have no right of detention, so I believe that it is essential.

Robert Brown: I am sorry to press the point, but it is important. The Lord Advocate’s guidelines operate at the moment. Is the cabinet secretary suggesting that the guidelines are not being followed by police officers? If he is not suggesting that, what is the problem?

Kenny MacAskill: Of course the Lord Advocate’s guidelines are followed: the police accept the instructions and act as directed by our senior law officer. The law that stands in Scotland is section 14 of the Criminal Procedure (Scotland) Act 1995. The police are correctly taking actions on the basis of the wise and sound counsel given by the Lord Advocate, but at present we face the possibility of detention being struck down. In fact, we could find ourselves in the position of not having the power to detain, full stop. That would be a retrograde step that would damage the rights of those who are the victims of crime, never mind the safety of our communities.

Patrick Harvie (Glasgow) (Green): I want to develop Robert Brown’s point. Is the cabinet secretary confident that the interim practice that has been in place while the court case has been going on is sufficient to ensure that no further challenges could be brought on the same terms? If the current arrangements are sufficient to have prevented further challenges, they are sufficient to prevent them for even just a few weeks longer, which would give us time for at least some cursory scrutiny.

Kenny MacAskill: There are two matters to consider. First, the guidelines were introduced on an assumption of what the decision that became available only at 9.45 yesterday may or may not have been. They were wise actions taken by the Lord Advocate to protect the nature of convictions in cases that are outstanding. They are guidelines only: they are not the statute that currently stands, which is why we are required to act.

Secondly, are we certain that we will not be subject to challenges? If only that were the case. Because of the lack of protection that this
Government and Parliament have, we face challenges on each and every thing. It is feasible to envisage a situation in which the bill, if it is passed, will be the subject of challenge yet again by a small industry out there that seems to think that it can take public funds, in many instances, and go to the Supreme Court, bypassing the High Court of appeal in Scotland. There is a clear necessity to take action.

The creation of a right of access to advice from a solicitor cannot stand on its own. If we are to create such a right, we must also act immediately to put in place the means to give effect to that right and to maintain an effective system of police investigation. I therefore believe that it is necessary to act immediately to revise the maximum period of detention and to provide powers to adjust legal aid to make that work.

Finally, the bill contains provisions to ensure that we give effect to the court's intention that closed cases are not reopened.

Mike Rumbles (West Aberdeenshire and Kincardine) (LD): Will the minister take an intervention?

The Presiding Officer: No, I am sorry but we do not have time.

Kenny MacAskill: Certainty and finality are important principles. It is vital that we move immediately to apply time limits to certain types of summary appeals and ensure that the Scottish Criminal Cases Review Commission takes account of those principles. Passing the bill today will show that the Parliament is committed to maintaining the ECHR compatibility of Scots law; that we intend to give practical effect to that right; and that we want to maintain an effective, balanced system of police investigation. It will also signal our intention to bring certainty to concluded cases as quickly as possible, which is very much in line with the spirit of the judgment.

The bill is longer and more complex than emergency legislation that has been passed previously in the Parliament; however, for the reasons above, I believe that the bill must be seen as a package, all the elements of which are critical to maintaining an effective system of justice in Scotland and must be included.

For those members who are conscious of the adage of legislating at haste and repenting at leisure, I offer the reassurance that, although we are required to act as a result of a UK Supreme Court decision, all these matters will be subject to further consideration in Lord Carloway’s review of law and practice, which will start very soon.

I move,
Criminal Procedure (Legal Assistance, Detention and Appeals) (Scotland) Bill:
The Cabinet Secretary for Justice (Kenny MacAskill) moved S3M-7267—That the
Parliament agrees to the general principles of the Criminal Procedure (Legal
Assistance, Detention and Appeals) (Scotland) Bill.

After debate, the motion was agreed to (by division: For 111, Against 3, Abstentions 0).

Criminal Procedure (Legal Assistance, Detention and Appeals) (Scotland) Bill:
Financial Resolution: The Cabinet Secretary for Justice (Kenny MacAskill) moved
S3M-7275—That the Parliament, for the purposes of any Act of the Scottish
Parliament resulting from the Criminal Procedure (Legal Assistance, Detention and
Appeals) (Scotland) Bill, agrees to any expenditure of a kind referred to in Rule
9.12.3(b)(iii) of the Parliament’s Standing Orders arising in consequence of the Act.

After debate, the motion was agreed to.
Criminal Procedure (Legal Assistance, Detention and Appeals) (Scotland) Bill: Stage 1

The Presiding Officer (Alex Fergusson): The next item of business is a debate on motion S3M-7267, in the name of Kenny MacAskill, on the Criminal Procedure (Legal Assistance, Detention and Appeals) (Scotland) Bill. I warn members that time is very limited and that they should stick to the times that they are given.

14:13

The Cabinet Secretary for Justice (Kenny MacAskill): Yesterday, the United Kingdom Supreme Court issued its decision in the case of Cadder v Her Majesty’s Advocate. The case considered the practice in Scotland of the police interviewing detained persons in a police station without ensuring that they have had access to legal advice. The Supreme Court decided that that practice was contrary to the European convention on human rights, changing decades of law in Scotland and overturning an earlier Scottish appeal court ruling by our highest court of criminal appeal just last year. The idiosyncrasies of the Scotland Act 1998 mean that Scotland is uniquely susceptible to the effect of ECHR challenges in criminal cases. Normally, in criminal matters, the Scottish court of appeal has the final say. However, this route of raising devolution issues is undermining its final authority. I will make clear to the UK Government our view that the centuries-old supremacy of the High Court as the final court of appeal in criminal matters must be restored.

Mike Rumbles (West Aberdeenshire and Kincardine) (LD): In Parliament, we are always to pass laws on the basis of evidence that is presented to Parliament. Could the minister make any evidence at all available to Parliament to support the view that there is a requirement to increase the period of people’s detention in police stations? I am afraid that I cannot see that any evidence for that has been made available.

Kenny MacAskill: I am happy to advise that the Lord Advocate is happy to discuss such matters with any member in relation to any requirements for stage 2. If Mr Rumbles wishes, the Lord Advocate, as the senior law officer and prosecutor in Scotland, will explain why the Crown holds that view. Equally, we predicate our view on information from the Association of Chief Police Officers in Scotland. I would think that, if Mr Rumbles spoke to any police officer in his constituency, he would be advised that the scales of justice require to be balanced. When they are changed in one direction, in the interests of the rights of the accused, they require to be balanced in the other direction, in the interests of the rest of our community.

Robert Brown (Glasgow) (LD): On the issue of balance, can the minister advise us who has been consulted by the Scottish Government? For example, have the Scottish Human Rights Commission and the Glasgow Bar Association been consulted? Apart from the prosecution interest, in the form of the Law Society of Scotland, which is the only body that is mentioned in the document, has anyone else been consulted?

Kenny MacAskill: There have been many meetings throughout the preparation period to discuss the difficulties that we knew would come, details of which were made available to us only at 9.45 yesterday. Obviously, those meetings included the Law Society, which represents the bulk of solicitors in Scotland. Also included were representatives from ACPOS, the Scottish Police Services Authority, the Crown and so on. I cannot confirm whether any of the other organisations that have been mentioned were contacted but, as I said previously, we cast our net widely to ensure that those who are part of the legal family—the court, the prosecution, the police and the defence—were all taken into account and had their views brought in.

We need to respond to the implications of the decision. I have announced my plans to establish a judicially led review of the law and criminal procedure in Scotland. However, we cannot wait for that to conclude. We need to act now.

The bill has four main aims. It will enshrine in statute a right to legal advice for suspects who are detained and questioned by the police. It will give us the necessary powers to ensure adequate provision of state-funded legal advice to suspects. It will extend the existing maximum six-hour period for detention to 12 hours, with the possibility of further extension to 24 hours, along with appropriate safeguards. Finally, it will make provision in relation to cases that occurred prior to the Cadder decision.

The provisions on legal advice create a right for suspects who have been detained to have access to advice from a solicitor before and during questioning by the police. That is necessary in order to bring statute into line with the Supreme Court judgment.

Alison McInnes (North East Scotland) (LD): Does the cabinet secretary intend children to be treated in the same way as adults?

Kenny MacAskill: Children have never been treated in the same way as adults, and that will continue to be the case. Children are viewed in a special category as are, for example, those with learning difficulties. Clearly, they will be dealt with...
differently. Such matters are dealt with in the ACPOs and Crown guidelines. Children are dealt with according to their nature and are subject to the provisions around detention periods. However, they would usually be dealt with in the presence of a responsible adult, and that will continue.

The bill makes provision to ensure that we have the necessary powers to make the right to legal advice for suspects effective in practice. Section 2 will therefore amend the Legal Aid (Scotland) Act 1986 to give the Scottish ministers a regulation-making power to allow state-funded legal advice to be made available to suspects in certain circumstances without reference to the financial eligibility criteria.

Section 3 relates to the detention period. The six-hour maximum has been in place since 1980. Advice from ACPOs, the SPSS and the Crown is that the establishment of an automatic right to consult a solicitor places intolerable strain upon the six-hour limit. We believe that an immediate extension of the limit to 12 hours, with the possibility of extension to 24 hours, is essential to maintaining the effectiveness of police investigations. It will also assist with the practicalities of giving access, particularly in remote and rural locations.

Bill Butler (Glasgow Anniesland) (Lab): The cabinet secretary referred earlier to safeguards that are built into the provision for the possible extension to 24 hours of the detention period. What are those safeguards?

Kenny MacAskill: Those safeguards are that the investigating officer will not be present; that the provision will be used only in relation to a serious crime; and that the officer who is present will be of an inspector grade or higher and will not have been involved in the case. Those are appropriate safeguards and they mirror those that are in place south of the border. As I said earlier, the parties’ business managers and justice spokespeople will have opportunities to discuss the guidance with ACPOs as it is produced.

To repeat, an extension to 24 hours will happen only in exceptional cases and only when a senior police officer confirms that it is needed. Justice requires checks and balances.

The final sections of the bill relate to appeals. The Supreme Court emphasises the importance of finality and legal certainty in concluded criminal cases, and the judgment takes us a long way towards that objective by ruling out statutory appeals on these grounds in concluded cases where time limits have elapsed.

Christine Grahame (South of Scotland) (SNP): On the question of finality and certainty, I have concerns about section 7. It appears to undermine the Scottish Criminal Cases Review Commission’s role and purpose by introducing what seems to be something new, which is “the need for finality and certainty in the determination of criminal proceedings”.

That can apply to many cases. Section 7 will also allow the High Court, when it sits as an appeal court, to reject a reference from the SCCRC.

Kenny MacAskill: Lord Hope and Lord Rodger referred to those matters, and advised that they should be dealt with so that there was not a back route by which people would seek to bring through the SCCRC cases of some vintage that would not be brought in through the front door of the High Court of appeal.

That is appropriate where an appeal was made timeously or the relevant point was made, but we must balance matters. According to the Crown Office, there could be up to 120 appeals outstanding among the live cases that are currently affected, so we need to ensure that we protect the validity of those judgments and provide some certainty.

The bill applies the principle of finality through the remaining common-law appeal route and to consideration of cases by the SCCRC. That is why we have introduced section 7, which relates to the issues to which Lord Hope and Lord Rodger have referred. It makes clear that finality and certainty are essential for legal judgments, but it does not preclude the possibility of other factors being taken into account: it simply requires the SCCRC to take that factor—along with others—into account to decide whether a case should proceed through that body.

I urge Parliament to endorse that approach. We must ensure that we have the requisite checks and balances; when the scales of justice are tilted, it is necessary that we balance them.

I move,

That the Parliament agrees to the general principles of the Criminal Procedure (Legal Assistance, Detention and Appeals) (Scotland) Bill.

14:22

Richard Baker (North East Scotland) (Lab): We on the Labour side of the chamber are keenly aware of the momentous nature of the United Kingdom Supreme Court ruling with regard to our justice system. Today we are debating the issues that require our urgent action and attention, but the wider ramifications for Scots law will need much greater deliberation in the Parliament at a later date.

We can debate now whether the situation in which we find ourselves is fair to our legal system, of which we are rightly proud. We can debate how
we got here, and whether ministers should have done more at the time of the European Court ruling in the Salduz case. However, we agree that today we must deal with the actions that we must take urgently and rightly to minimise the judgment’s effect on our courts and on the victims of crime.

There is no doubt that the fact that the ruling is not, broadly speaking, retrospective in effect means that we will be dealing with fewer cases than may have been feared. However, there will still be cases that involve very serious offences, and that is why we recognise the need to act.

We have seen the comments from the chair of the Equality and Human Rights Commission that counsel against emergency legislation, and the solicitor advocate John Scott has made the point that legislation that is made in haste is often repented at leisure. As members have said, this is not an easy issue; we agree.

I do not believe that any member views as desirable the fact that we have to consider emergency legislation. However, while we are always ready to provide opposition to Government measures when it is the right thing to do, we believe that in this situation it is responsible to accept the cabinet secretary’s argument for emergency legislation and the broader direction that he has decided to take as a result of the judgment.

The more I examine the detail of the judgment, the more I accept the case that the cabinet secretary has made for the legislation. Although I understand the restrictions that emergency legislation necessarily places on debate, some of my concerns would have been afforded reassurance by more dialogue and more notice of the detail of some proposals. However, I understand that we are where we are.

Mike Rumbles: Does the member share the concern that I have expressed? Since July, we have been operating a system whereby the police service has had six hours in which to interview suspects. Is he aware of any evidence that has been produced to us in the Parliament today that shows that that has been a problem and that the time should be increased at the police’s request to 24 hours?

Richard Baker: I am simply aware of the advice that ACPOS has given. I would have liked us to have had more debate and dialogue on the issue, but there are practical considerations about the time for which people can be detained if they are to access legal representation. I am sure that we will debate some of those issues during today’s debate.

I am persuaded that we should act quickly to change our laws on access to legal representation during detention and, as a consequence, the time limits for detention. I do not believe that we should continue with our laws if they have been deemed to be incompatible with European law. I also believe that it is important to act quickly to legislate to include the need for finality and certainty in the factors that the SCCRC must consider when it deals with applications, as I understand that that will have a material impact on how many appeals can go ahead. I accept the case that the cabinet secretary made in his response to Christine Grahame’s question.

However, that is not to say that we should not debate the issues in the limited time that is afforded to us today. Specifically, we question whether there should not be greater debate on whether it should be possible for an application to extend the period of detention from 12 hours to 24 hours to be determined by a police officer of the rank of inspector or above. If such extensions are to be made only in exceptional circumstances, perhaps the role would be more appropriately performed by a sheriff. I understand from the legislation team that we will be able to debate that proposal through an amendment from Robert Brown. I ask the cabinet secretary to give the matter serious consideration and provide a response during the debate.

The financial memorandum suggests that the costs to the public purse might be higher than was previously indicated, not only because of the cost of legal aid but because the provision of the necessary police staff will cost the police some £20 million. My colleague James Kelly will raise more questions on that.

I mentioned the concerns that many have understandably expressed about the emergency legislation. It is important that we allay some of those fears by ensuring that the Parliament has an opportunity in the near future to consider these important issues in the normal detail and timescale that we afford to legislation.

There are, of course, far broader implications for Scots law, particularly with regard to our long-established laws on corroboration. In that context, we welcome the cabinet secretary’s request for Lord Carloway to undertake his review.

Many will argue that we should not be in a position where we have to review the operation of such key tenets of our well-established legal system. However, we must recognise that, although our own court of appeal made its view on the matter clear, the UK Supreme Court, including the Scottish senators, had to reflect on what the European court said on the matter. The ruling on Salduz is already affecting other European jurisdictions such as Belgium, France, the Netherlands and Ireland. In any circumstance, we cannot be immune to that. Unless people are
suggesting that we opt out of the ECHR, or out of Europe entirely, this is where we were always going to be. I do not dispute that it would be good to see an ECHR issue discussed that was not about the rights of the offender but more about the rights of victims, but the idea of having human rights guaranteed throughout Europe is important.

Those broad debates are for the future. We have important issues to resolve today, and our approach is that the Parliament should work together to do that.

14:28

John Lamont (Roxburgh and Berwickshire) (Con): The Supreme Court’s decision is of importance to Scotland’s criminal law—of that there can be little doubt. However, it would be wrong to suggest that it was the decision of some foreign court that was imposing its will on Scottish law. I detected more than a hint of that in some of the comments from the Cabinet Secretary for Justice during his various media interviews in the past 24 hours. I do not remember the Scottish National Party raising any of those concerns when the Scotland Act 1998 or the Human Rights Act 1998 were passing through Parliament. We should also remember that the leading judgments were given by Scottish law lords.

I would like to deal with two points in my speech. The first is the suggestion by some in the legal profession that the Supreme Court’s decision is itself not compliant with the human rights convention in so far as it does not apply to all cases, even those that are subject to final determination.

In my view, that argument flies in the face of the long-established principle of the rule of law, the basic intuition of which is that the law must be capable of guiding those who are subject to it. It must provide certainty and predictability; after all, we must know what the law is if we are to plan our lives and organise our affairs, and that applies as much to public officials as to private individuals. In other words, judicial decisions must enable public officials to administer the criminal law and requiring all judicial decisions in criminal matters to apply to all prior decisions would be a radical departure from the simple truth that lies at the heart of the rule of law.

That truth is captured in paragraph 103 of Lord Rodger’s opinion, in which he cites Chief Justice Murray’s judgment in the Supreme Court of Ireland’s decision in the Arbour Hill prison case. This useful analysis illustrates not only how the law can effectively operate retrospectively but, more important, how new judgments can affect previously closed cases. Chief Justice Murray said:

“No one has ever suggested that every time there is a judicial adjudication clarifying or interpreting the law in a particular manner which could have had some bearing on previous and finally decided cases, civil or criminal, that such cases be reopened or the decisions set aside.”

The reason that it has not been suggested is that no legal system comprehends such an absolute or complete retroactive effect of judicial decisions. To do so would render a legal system uncertain, incoherent and dysfunctional, the consequences of which would cause widespread injustices. On that basis, I do not accept the view that the judgment itself should be retrospective in terms of reopening previous cases, and I hope that the legal profession does not use it as the basis for future challenges.

Of more concern, however, is the SCCRC’s position. Does it have the power to reopen closed cases, as is perhaps suggested in the Supreme Court judgment? In paragraph 62 of the Cadder judgment, Lord Hope notes that it is for the commission to “make up its own mind, if it is asked to do so, as to whether it would be in the public interest for ... cases” already subject to final determination “to be referred to the High Court.”

Furthermore, I note that under section 194C of the Criminal Procedure (Scotland) Act 1995, as amended, the commission “may refer a case to the High Court” where it believes “that a miscarriage of justice” has “occurred” and that “it is in the interests of justice that a reference should be made”.

Given my earlier argument about the need of retrospective judicial decisions in a common law system, it is not clear whether there is anything amounting to a “miscarriage of justice” in cases that are already subject to a final determination. In any event, it would surely not be “in the interests of justice” for the commission to refer any such cases. Ultimately, there might be concerns about chilling the courts in that, if the commission referred cases after the Cadder judgment, future courts might be reluctant to make decisions on criminal matters that would involve important changes to the law in case such a move led to a flood of cases under the SCCRC process.

Christine Grahame: Will the member give way?
The Presiding Officer: No. Mr Lamont is closing.

John Lamont: It is critical that we legislate as far as possible to limit the commission’s ability to reopen decided cases. Although we certainly hope that the bill achieves that aim, I am not sure that it does. Indeed, I know that the Law Society of Scotland has a number of concerns in that respect. I hope that my concerns do not prove to be legitimate, but only time will tell.

14:33

Robert Brown (Glasgow) (LD): Now that the terms of the judgment are available, it is clear that the decision of the United Kingdom Supreme Court in Peter Cadder v HMA is neither an isolated spasm of eccentricity from judgements unversed in Scots law nor an overreaction to a ruling in the Salduz case by the Grand Chamber of the European Court, on which it was based. In fact, the two lead judgments in the UK Supreme Court were given in uncompromising terms by Lord Hope and Lord Rodger, Scottish judges of significant calibre on the Supreme Court, and follow a substantial body of jurisprudence that has required changes to practice in a considerable number of European countries, leaving Scotland increasingly isolated.

As a result, the chamber should take issue with—and take with a large pinch of salt—not only the indignant claims that we have heard in the past 24 hours that the European Court of Human Rights is unwarrantably trampling over our rights in this country but the strident claims that in some way the integrity of the Scottish criminal justice system is being impugned. Such claims are nonsense. It is absolutely right that Scots law be judged by the same standards of justice, procedure and respect for human rights that apply in other European countries.

Liberal Democrats were ready to back action to close off a flood of retrospective appeals, but the judgment rightly does not have retrospective effect. Live cases could not be affected by the legislation, of course, and the interim action that the Lord Advocate took with the agreement of the Scottish Government in July was timely and appropriate to halt problems with future cases.

I have listened with care to the cabinet secretary and am grateful to him for keeping Opposition parties briefed over the summer, but I am astonished that no consultation has taken place with the Scottish Human Rights Commission on one of the Parliament’s biggest human rights issues. The Scottish Human Rights Commission was set up by the Parliament with exactly the sort of situation that we discussing in mind. Its advice would have been the same as the view of the Law Society of Scotland: that there is no problem with the bill undergoing a proper process of development and consultation. Such discussion as has taken place has been highly unbalanced and has been primarily with the police and prosecution interests. That is an extraordinary fact about a basic civil liberty issue.

I have come to the view that the bill is ill considered, not justified by evidence and unsuitable for emergency legislation. The explanatory notes add nothing to the sum of human knowledge, and the policy memorandum is extraordinarily tentative on the evidence base for extending the six-hour detention period. It refers to “limited empirical statistical evidence”, securing the attendance of responsible adults in juvenile cases—that is adduced as an argument, but is, in fact, irrelevant—and additional options for police investigation by putting forensic evidence to the suspect. All those issues may be valid, but they are no justification whatever for emergency legislation.

Section 1 gives a detained suspect a statutory right to have access to a solicitor, but that right is watered down by defining such access not as a private interview; rather, the right is satisfied by other means such as a telephone call, perhaps even an e-mail exchange, “as may be appropriate”. Appropriate to whom? Subsection (8) of proposed new section 15A of the Criminal Procedure (Scotland) Act 1995 then takes that right away entirely by stipulating that the police can start the interview and questioning anyway with no solicitor present if that is necessary to the interests of the investigation. It seems to me to be questionable at the very least whether that is compliant with the ECHR and the judgment.

Section 3 allows the extension of the period of detention from six to 12 or 24 hours. It is not obvious to me that the net result is an extension of civil liberties, but the extension manifestly requires to be consulted on and justified. Six hours should remain the normal maximum, and the extension to 24 hours should be allowed only with the approval of an independent judicial official, such as a sheriff or magistrate. Richard Baker touched on that.

In summary, Liberal Democrats are unpersuaded of the need for emergency legislation and regard the bill as unnecessary in part and meaningless in part. We regard the need for the extension of the detention period as unproven at best, and wider issues are tackled on by the appeal procedures in sections 5 and 6. Christine Grahame touched on that. I will lodge amendments to tackle the most obvious deficiencies, but the Liberal Democrats will oppose the bill at stage 3 if it is not substantially changed to meet our concerns.
The bill raises vital issues relating to the proper balance between the rights of a suspect and the interests of the public in convicting people who have committed serious criminal acts. I am not convinced that it is ECHR compliant. Those serious matters need proper scrutiny by the Parliament in the normal way.

14:38

Stewart Maxwell (West of Scotland) (SNP): Today, we are in a predicament that has been forced on us by the UK Supreme Court, which is a folly built by Labour and supported by other unionist parties. Creating the Supreme Court took a historical anomaly whereby civil appeal cases were heard in the House of Lords and hard-wired it into the system. There should be no UK Supreme Court, as we simply do not have a single legal system within the UK. We warned those who supported its creation that it would result in a diminution in the independence of Scots law at the very least, and that is what we are now seeing.

Bill Butler: I am slightly concerned by the tone of Mr Maxwell’s opening remarks. Is he saying that the Scottish National Party is now against the ECHR?

Stewart Maxwell: Mr Butler must have misheard me. I said that we are against the UK Supreme Court. We were against it when it was created: we have been against it from the beginning and we are against it now. It is Labour’s folly.

At the point of its creation, we were told that the Supreme Court would deal only with civil cases, yet it is dealing with an issue in a criminal case. The promises that were made about how it would act have been broken. It is time that we rid ourselves of the so-called Supreme Court and returned Scots law to where it belongs: Scotland.

In the past 24 hours, I have heard various reports about the matter, insinuating that, because our law is different from that of England, we are obviously in the wrong. That notion is simply mistaken.

Detention in Scotland is for a maximum of six hours. In England, it is 24 hours and can be extended to 36 hours or even 72 hours. In Scotland, a person can remain silent during detention, with no inference whatever being drawn from that silence. That is not the case in England. In Scotland, all interviews are recorded and, of course, there is the requirement for corroboration. The system is different from that in England and has served us well for decades. Although it is not perfect, it has provided a balance between the various parties’ rights.

David McLetchie (Edinburgh Pentlands) (Con): Will the member give way?

Stewart Maxwell: Sorry, but I do not have time.

In October 2009, seven appellate judges in the High Court of Justiciary in Scotland unanimously ruled that Scots law and practice provide adequate safeguards to protect the interests of suspects during detention. Among the seven judges were the two most senior judges in Scotland—the Lord Justice General and the Lord Justice Clerk. I have more confidence in the decision of seven judges with a lifetime of experience in the law of Scotland than I have in a decision of the UK Supreme Court sitting in London with a majority of English judges.

On that point about English judges ruling on issues of Scots law, I remind members of what the Lib Dems told us back in 2004, when the Supreme Court was being created. Margaret Smith stated:

“If the supreme court is considering a peculiarly Scottish case, there is no question of Scottish judges being in the minority.”—[Official Report, 29 January 2004; c 5300.]

That has been proved to be completely wrong and Margaret Smith should withdraw that wholly inaccurate statement.

Underlying all the difficulties is the relationship between the ECHR and Scottish legislation. If there is an ECHR issue in a case, that should be taken to the European Court of Human Rights to rule on, as happens in any other jurisdiction. If that court rules against our procedures, that should be a matter for the Parliament to deal with, after due consideration. However, we are in the invidious position of having to suffer at the hands of the UK Supreme Court while we have it embedded into our rules that all legislation must be ECHR compliant. That is very different from the situation of every other country and it has the effect of leaving us extremely vulnerable to such cases and to the consequences that follow.

That is not to be against the ECHR; it is to be against the way in which the convention is implemented particularly and peculiarly in Scotland. As things stand, any ruling against us on ECHR grounds has the effect of making our legislation null and void—it is as if it never existed. That is not how the system operates elsewhere and it is not how it should operate in Scotland.

14:42

Bill Butler (Glasgow Anniesland) (Lab): I regret the tenor of Mr Maxwell’s speech, which was unhelpful. We should be considering the issue in terms of the rule of law and not through any nationalistic prism.

Brian Adam (Aberdeen North) (SNP): Will the member give way?
Bill Butler: No, thank you.

Instances of emergency legislation such as the proposed legislation that is before the Parliament are mercifully rare. Given the unicameral nature of this legislature, it is a necessary prerequisite, in all but the most exceptional of circumstances, that legislation should undergo exhaustive examination in committee after a period of extensive public consultation. That is correct and entirely sensible. However, there is little doubt that today is one of those exceptional occasions when circumstances dictate that the Parliament must act swiftly but try to act sensibly in a short space of time.

The UK Supreme Court has overturned a unanimous decision of seven judges sitting in the Scottish appeal court last October. However, two of the senior judges in the Supreme Court were members of the Scottish senate. We should consider the situation as we have it today.

The First Minister (Alex Salmond) rose—

Bill Butler: No, thank you.

The Cadder judgment has to be dealt with, which means that we must act quickly. On that point, I agree with the cabinet secretary. However, I wonder why, when the verdict in the Salduz v Turkey case was made known in 2008, the Government did not use the two years following that to consult the public and to exhaust the parliamentary procedure so that we could have a sensible and timely examination of the serious matters that are before the Parliament today.

Stewart Maxwell rose—

Bill Butler: No, thank you.

Given the few hours that are available to us because of the emergency nature of the proposed legislation, it will be difficult to discharge that important duty to act sensibly, but we must try. In the course of the afternoon’s business, we must test as far as is humanly possible the effectiveness of the proposals and try to ensure that they contain no unintended consequences.

We must try to remedy matters by way of the emergency legislation; there is no other way. Labour is willing to work with the Government to introduce appropriate reforms to deal with the serious issues that need to be addressed following yesterday’s ruling. In particular, I see no reason why agreement cannot be reached on the provision that will introduce a right of access to legal advice before and during questioning in police detention. That is a most sensible provision that is surely worthy of support across the chamber. The provision of an enabling power to allow for the adjustment of legal aid eligibility rules for legal advice and assistance, which will allow new arrangements to be designed for the provision of legal advice at police stations, is an aspect of the bill that seems both necessary and rational and is worthy of support.

However, I am not convinced of the need for the provision that would allow a person to be detained for a further 12 hours, making 24 hours in total, on the say-so of a senior police officer, where necessary and proportionate. I am concerned that such an extension might be disproportionate, with insufficient checks and balances. Perhaps during today’s proceedings the Government will offer some comfort on that aspect of the bill, and I will listen with interest to what ministers have to say on the matter. I hope that they can engage positively on the issue with parties across the chamber, especially with regard to the amendment that will be lodged by my Justice Committee colleague, Robert Brown.

14:46

Patrick Harvie (Glasgow) (Green): On one level, I welcome the eagerness to bring the law into compliance with the ECHR as soon as possible. However, I have concerns about the possible risks that we might run by introducing the bill as emergency legislation. I am also concerned that whenever we discuss human rights legislation, there is a general tendency for some people to view it as an inconvenience to be worked around rather than as an important principle in our society.

It is essential that people have a right to bring a challenge where they feel that human rights violations might have occurred. That is a mark of a civilised society. The cabinet secretary seems concerned that there is some kind of overactive human rights mischievousness going on among a number of lawyers. Even if that concern were valid and the challenge were not the exercise of a necessary right in a human rights-based system, it would only deepen my concern about the haste with which we are legislating. If we make mistakes in a piece of emergency legislation, we could be making law without consultation or considered scrutiny and we might run the risk of further challenges that could be avoided but for a few weeks or months of scrutiny.

On the wider concern about how human rights are considered, and in reply to Stewart Maxwell in particular, we should be proud in Scotland and as members of the Scottish Parliament that Scottish Parliament legislation is not permitted to violate the ECHR—that is the correct relationship between this Parliament and the law. I was surprised that Stewart Maxwell seemed to imply that we should do things the way that Westminster does them, when Westminster so clearly has it wrong.
The First Minister: I will explain briefly why Scotland is in a difficult position. In a normal country, when the Supreme Court and, in our case, the Court of Session—

The Presiding Officer: First, Minister, I am sorry, but I must ask you to speak into the microphone.

The First Minister: If the Court of Session ruled against a person, they would have recourse to the Strasbourg court and we would be able to argue our case in front of that court. The reason why Scotland is uniquely vulnerable is that the system in Scotland does not even allow us the right to argue the case in front of the court in whose name we are required to make the changes to Scots law.

Patrick Harvie: That only makes me wonder further why the criticism seems to be directed at the Supreme Court, but I will pass over that aspect.

An argument has been made about balance. The cabinet secretary’s idea is that, in bringing the law into compliance with the ECHR, we have to do so in a way that offers balance. I see no clear reason why time limits need to be extended in response to the recent case. The cabinet secretary seemed to imply that whatever change is necessary for human rights reasons must, for purely perception-based reasons of balance, be counteracted by a quite separate change in the other direction.

Of course the Association of Chief Police Officers in Scotland says that the time limits ought to be extended. When the Scottish Parliament asks security consultants what we should do, they tell us to spend more money on security measures. When any of us ask a life insurance salesperson whether we should get more life insurance, they say yes. In the same way, if we ask the police whether there are circumstances in which longer time limits would be useful to them, they will say yes. However, that does not mean that it is the right thing to do.

There are wider questions of detail, which we do not have time to go into—that is part of the problem—including concerns about section 7. Even in older cases, there must be the possibility of challenge, as Parliament was reminded only yesterday.

If the bill is passed in its current form, we will run the risk not only of facing further challenges as a result of errors that we might be making but of having to go back and rewrite the whole thing again next year.

Dave Thompson (Highlands and Islands) (SNP): The Criminal Procedure (Legal Assistance, Detention and Appeals) (Scotland) Bill is a very important piece of legislation that we should not even be considering. Unfortunately, the UK Supreme Court did not respect the position and decision of the Scottish criminal appeal court, where seven senior and highly respected Scottish High Court judges, each with a strong grasp and deep understanding of Scottish law, ruled that Scots law pertaining to detention and questioning did not breach the European convention on human rights. That is the response to what Patrick Harvie said: our senior judges made a ruling that Scots law did not breach the ECHR. However, the UK Supreme Court chose to muscle in on our criminal law by using its power under civil law and the ECHR. Importantly, that crucial decision was taken by five Supreme Court judges, only two of whom have a background in Scots law. [ Interruption. ]

The Presiding Officer: Order. Mr Thompson, I would be grateful if you could address more directly the general principles of the bill, which is what we are supposed to be debating at this point.

Dave Thompson: We are dealing with the decision and the ECHR, but I will do that, Presiding Officer.

A court with limited Scottish representation has overruled a court consisting of very senior Scottish judges.

The UK Supreme Court was established in October 2009 to deal with civil matters, despite opposition from the SNP. We warned that it was irrational for a court without a majority of Scottish judges to decide on cases involving Scots law. We also pointed out that the practice of hearing Scots civil cases in the House of Lords was a historical anomaly and that that role should be repatriated to Scotland. What other legal jurisdiction allows its appeals to be heard in another jurisdiction?

Unfortunately, the previous Labour-led Administration failed utterly to stand up to Westminster and protect the independence of Scots law. Cathy Jamieson, the then Minister for Justice, said at the time:

“The proposal for the creation of a new supreme court for the UK does not impact on the integrity and independence of Scots law.”

Unfortunately, she was wrong. Our warning that the UK Supreme Court was a threat to the integrity of Scots law has come to fruition. The complacency of Opposition parties has led us to this situation.

The Presiding Officer: Mr Thompson, could you come now to the general principles of the bill, please?

Dave Thompson: Okay.
Robert Brown mentioned the 12-hour limit. Does he know that in England, under the Lib Dems—where they are in government—the limit is 24 hours? Does he support that?

Mike Rumbles: This is Scotland.

Dave Thompson: Why is Robert Brown arguing against the 12-hour limit here, when the Lib Dems are in favour of a 24-hour limit south of the border?

The Scottish Human Rights Commission has claimed that this is no time for emergency legislation, but it fails to acknowledge that, in anticipation of the Supreme Court finding, the Scottish Government had already prepared emergency legislation that is intended to protect the victims of crime and minimise the possible number of appeals.

Indeed, for more than a year, the Scottish Government, the Crown Office and Procurator Fiscal Service, the Scottish Legal Aid Board and ACPOS have been working on the contingency plans. The Lord Advocate issued interim guidance to the police on 9 June, requiring them to offer detained suspects access to a solicitor before and during an interview in serious cases. That was rolled out to all cases on 8 July. The reality is that the SNP Government has been preparing for all possible decisions and, as a consequence, is ready to act immediately to protect the Scottish legal system and taxpayers alike.

It is ludicrous to suggest that the change should have been introduced a couple of years ago—we had to wait for the decision before we knew what we had to do.

David McLetchie: Will Dave Thompson give way?

The Presiding Officer: No. Dave Thompson must close now, please.

Dave Thompson: The case highlights dangers for the independence and integrity of Scots law.

14:55

Pauline McNeill (Glasgow Kelvin) (Lab): The Scottish Government has the Scottish Labour Party’s full co-operation in examining the bill today, which is all the more reason why the cabinet secretary should be embarrassed by his back benchers’ speeches. Stewart Maxwell should be aware—as I am sure that he is—that, before the Supreme Court was established, more than 300 cases on devolution points were considered under the same mechanism. Does he not know that?

Dave Thompson asked what other country allows another jurisdiction to hear appeals on its cases. If members are not aware of it, I tell them that every country that signs up to the European convention on human rights signs up to the declaration—that there can be a court judgment based on the convention.

Government members’ ignorance is staggering. If the point that the First Minister has made all day is about special leave to appeal to the Supreme Court, which was given in the Cadder case, there is scope for discussion. I do not want the special leave provisions to be used in every case. However, we must be clear that, as we are signed up to the convention on human rights, even if the Cadder case had not gone to the Supreme Court, it would have gone to the European Court of Human Rights. I am pretty certain that that court would have ruled in the same way as the Supreme Court did.

The First Minister: If the case had been heard before the European court, the checks and balances of the Scots system could have been examined before that court.

When the Scotland Act 1998 was passed, no one envisaged that the devolution route of appeal—whether to the House of Lords or now to the Supreme Court—would be used in criminal cases to second-guess the Court of Session. Neither Donald Dewar nor anyone else envisaged that unintended consequence—that is what is wrong.

Pauline McNeill: If that is the Government’s position, why did it say nothing when 300 cases on devolution points went to the Judicial Committee of the Privy Council? Is the First Minister not aware of that system?

I will address the issues that are pertinent to scrutiny in the stage 1 debate. Whether or not we agree with the decision in Cadder v HMA, it is a judgment of the Supreme Court that is based on the court’s view of the convention on human rights. It is down to the Parliament to deliver on that.

New guidelines that relate to the six-hour provision have operated for six months. A pertinent question that the Government should answer in the stage 1 debate is what has gone wrong—if anything—in the six months during which the guidelines have operated and why moving to a 12-hour limit is necessary. I remain open-minded about that, but I want to be convinced that the extension is necessary.

I share the concerns of Richard Baker and other members about allowing the period of detention to be extended to 24 hours in some circumstances. If we are to change the provisions, we must have clarity. The bill says that, if an extension is necessary, a person of inspector level can sign that off, provided that they are not involved in the case. That proposal needs serious scrutiny. The
suggestion that it would be better for a sheriff to decide on an extension is worthy of consideration. A sheriff is available 24/7. Involving a sheriff would build safeguards into the system.

I think back to my experience of when the Parliament debated custody time limits and the Bonomy reforms. Courts are now repeatedly breaching the custody time limits that we in the Parliament set, because of how the legislation is worded. I do not want us to make the same mistake. The detention period must be extended to 24 hours only in exceptional circumstances, and the decision must be taken by someone at an appropriate level.

The Presiding Officer: We come to the closing speeches.

14:59

Mike Pringle (Edinburgh South) (LD): We are, of course, in the chamber today to debate an emergency bill, as a result of an appeal in the 2009 case of McLean v HMA. That was followed by an appeal brought by Peter Cadder in which he claimed that, under European human rights laws, because he had no lawyer present during his police interview, his human rights had been breached. In the McLean appeal, a full bench of seven of Scotland’s most senior judges ruled that the position was not in conflict with human rights laws and that it complied with the ECHR. It was therefore perhaps a surprise to some that the UK court then got involved in the Cadder case. I am pleased that the cabinet secretary will take up the issue of the independence of the criminal law in Scotland with the UK Government. I am concerned about the subject.

The Lord Advocate appeared for the Crown in front of the Supreme Court. She was obviously concerned by what she perceived the result of the process might be. She therefore immediately put into effect interim guidelines under which suspects were allowed to insist on being given legal advice before and while being interviewed. We believe that that approach has worked well in the majority of cases. Of course, we really do not have any information about that, so it would be interesting to know the exact results of the guidelines and how they have worked.

There is concern that we are rushing into this legislation too quickly. This morning, I received an email from Professor Alan Miller, chair of the Scottish Human Rights Commission, in which he shows that concern and from which I think it worth while to quote:

“This is no time for emergency legislation as there is no emergency. The floodgates have not been opened—this decision clearly does not apply to concluded cases. Rather, now it’s time to get it right, and we have the time to get it right.

Interim steps which are already in place provide an adequate basis on which to launch a broad based consultation so that the practical implications of the decision are properly understood before a response is adopted. This should take into account experience so far in implementing the Lord Advocate’s interim guidance as well experience elsewhere in Europe, including our near neighbours, which already have increased access to legal advice for those who are questioned by the police.

The Commission is concerned by a number of elements of the response announced today by the Cabinet Secretary for Justice. Not only does the timetable present no reasonable prospect for a considered response, but the proposed extension of the six hour time limit for detention on reasonable suspicion to twelve and then possibly twenty four hours at the discretion of the police seems a disproportionate response to a decision which was based on the need to recognise the vulnerability of those questioned in police detention.”

Like my colleague Robert Brown and the rest of the Liberal Democrat group, I am a strong supporter of the ECHR. However, we have concerns about rushing through this legislation just 24 hours after the Supreme Court ruling. The new system is likely to be considerably more costly. If the reports are correct, it may add up to £4 million pounds to the legal aid bill. Our greater concern is that it will allow suspects to be locked up for up to 24 hours, which could be a breach of their civil liberties.

I agree that the judgment is binding and that we have to accept it, but, in accepting it, we have to make as good a job of things as we can. As my colleague Robert Brown said, the Liberal Democrats will lodge a number of amendments at stage 2 that we believe will improve the bill.

Scots law stands on its own. There are at least two principles of Scots law: first, that corroboration is needed to get a conviction; and, secondly, that silence is not an admission of guilt and cannot be taken as such. As two lawyers suggested on “Newsnight Scotland” last night, yesterday’s judgment might bring both those principles into question. If that were to be the case, it could result in a fundamental change to Scots law. I am sure that we all would agree that none of us wants that unintended consequence. I am therefore very pleased that Lord Carloway is to conduct a review. I am sure that he will look at both those aspects.

Like Professor Alan Miller, the Liberal Democrats have concerns about our rushing through this legislation the day after the judgment in London. It is too hasty, and a period of reflection and consideration would have been a more considered response.
15:04

Bill Aitken (Glasgow) (Con): This afternoon’s exercise is one of fire fighting. We accept Robert Brown’s point that we are dealing with the matter rather more speedily than was necessary and have some criticisms of the way in which the Government has handled the matter, but it was confronted with a problem and it had to act. We fully accept that, which is why—in general terms—we will support the bill at decision time.

That said, I cannot but respond to some of the issues that Government back benchers have raised. The problem is not yesterday’s judgment or the judgment of the European Court of Human Rights in the original Salduz case, but the fact that we signed up to the European convention on human rights in a manner that has undoubtedly prejudiced Scotland. The Salduz case came from Turkey, which is a jurisdiction in which human rights have been treated in a somewhat cavalier fashion over many years. The case demonstrated oppression: a 16-year-old boy was held for three days for a politically related offence. The justices in Strasbourg had no option but to accept that that was wrong.

Unlike certain Scottish football managers, I do not think that there is much percentage in criticising the referees. Once the decision had been made in Strasbour, it was inevitable that the Supreme Court would reach a similar verdict, as it did yesterday. It is a bit much for members who criticise the Supreme Court not to recognise that the problem arose much earlier, when they enthusiastically committed themselves to including the European convention in Scots law.

We find the bill unobjectionable in many instances. No one wishes anyone to be held in custody for any longer than is necessary, but we must recognise the practicalities. If someone is charged with a section 1 offence on the Isle of Skye, there is no possibility—especially in January—of getting a solicitor there from Inverness, Fort William or wherever within the time limits that have been laid down. We have no option but to extend those limits.

Mike Rumbles: That is complete rubbish.

Bill Aitken: I am sorry, but time is restricted and I cannot take interventions.

There are unresolved issues. I have already mentioned to the cabinet secretary that there is a problem with section 7, which deals with appeals. I intend to lodge amendments, pending clarification of the matter. I hope that it can be resolved.

We must recognise that we are where we are and that there is no possibility of dealing with the matter other than by legislation. There is genuine and unanimous agreement on that. However, I express regret and some resentment at the fact that, as a result of the judgments, the Scottish law system—which, for all of its imperfections, is recognised throughout the world as, if not a paragon, at least one of the best justice systems—is being equated with the legal systems of Turkey and other countries in which human rights are not upheld. The Labour Government was responsible for the Human Rights Act 1998, which was supported by the SNP. That is a matter of considerable regret.

15:08

James Kelly (Glasgow Rutherglen) (Lab): There is no doubt that this is a unique parliamentary occasion. We meet in emergency session as a result of yesterday’s Supreme Court ruling, which has serious implications for the Scottish legal system. The matters that are before us this afternoon require a serious debate. It is regrettable that some of the speeches by nationalist members did not address the issues that are before us in the bill. The cabinet secretary has spoken the language of consensus throughout the process, but Dave Thompson did not address the general principles of the bill and Stewart Maxwell’s speech was akin to something that would be heard at the SNP conference.

Patrick Harvie and Robert Brown expressed fears about passing emergency legislation. The decision that has been made is a landmark ruling that changes a central feature of Scottish law relating to suspects’ access to a solicitor. The Scottish Government is right to act. We have received representations from Alan Miller and others who say that it is wrong for us to rush into legislation, but my view and the view of Scottish Labour is that we cannot operate in a vacuum.

Robert Brown: Will the member take an intervention?

James Kelly: No. I am sorry, I am rushed for time.

In my view, yesterday’s judgment means that our law is incompatible, in this aspect, with ECHR. Taking that view, it is not enough simply to have the guidelines that the Lord Advocate introduced in the summer. There is a vacuum, and we need legislation. We need certainty for the judiciary, for the police and for suspects. Above all, we need to legislate for victims. We must not expose ourselves to unsafe verdicts.

A number of serious representations have been made, and I have reflected on them overnight, but I think that the Government is right to introduce the emergency bill.

A central aspect is the introduction in statute of access to a lawyer. Like other Labour members, I
recognise the guidelines that have been in force concerning the six hours of detention. The bill seeks to increase that to 12 hours. Bill Aitken pinpointed some of the practical issues in that regard, and spoke about the reason for there being support and sympathy for the proposal. As for the move from 12 to 24 hours, I am not unsympathetic to it, but so far I have not been totally convinced by the cabinet secretary’s explanation as to why that needs to be encompassed in emergency legislation.

Margo MacDonald (Lothians) (Ind): Will the member give way?

James Kelly: I am sorry, but I do not have time.

I urge the cabinet secretary to address those concerns, as well as the concerns that Bill Butler, Pauline McNeill and other members have raised regarding further authorisations being built into the bill.

One of the untold stories in this morning’s press is that of the cost implications of the bill. We were told that the potential legal aid costs are £4 million, and that is covered in the financial memorandum. On police costs, there could be £7 million of set-up costs for police consultation rooms. The requirement for the police to be on site to administer the new arrangements will mean that 480 officers will be required—144 sergeants and 336 constables. That will come at a cost of £20 million per year. That is a matter of serious concern, and its implications need to be considered. We need an impact assessment to assess what that means for front-line policing, and that requirement lends weight to demands for early publication of the budget.

The bill is necessary legislation. There are reservations about some aspects of it, but Scottish Labour is pleased to support the general principles of the bill.

15:13

Kenny MacAskill: I am grateful to members for their contributions. It is appropriate to touch on three matters that have been raised in the debate. First is the reason for the urgency; second is the action that is being taken and why it is being taken now; and third is the extension of the period of detention.

On the urgency of the situation, the judgment is clearly not as cataclysmic as one of the scenarios that we planned for. Had the judgment been retrospective, it would have been calamitous—that is accepted. That said, the decision is not simply prospective. There are current, pending and live appeals, so the consequences are still severe. We already have 3,420 devolution minutes relating to the Cadder case, but thankfully, according to the Crown Office, the serious cases number only 120. However, we should not underestimate the significant changes that require to be made to Scots law. The consequences—for victims, the courts, the police and everyone else—require us to act urgently. The world changed at 9.45 am yesterday.

Moving to the action to be taken, we require to clarify some of the points that Pauline McNeill and other members have made. As the First Minister correctly said, the normal situation in most jurisdictions is that there is a final court of appeal. That court of appeal in Scotland is the High Court of appeal, in which the case of McLean v HMA was dealt with. The First Minister was also quite correct to say that when the Scotland Bill was being considered and it was envisaged that human rights would be part of it in the context of the ECHR, nobody anticipated that solicitors would seek to take appeals on criminal law matters to the Supreme Court, which had not even been envisaged at that juncture.

However, we find ourselves having to take action, as happened with Somerville—I was grateful to members, whatever their party, for bringing in the one-year period of limitation, because without that protection from ECHR challenges we were exposed. Equally, in the current circumstances, people can use a devolution minute to deal with matters that are fundamentally meant to be dealt with by the criminal law and the highest court in Scotland.

On Pauline McNeill’s comments, I think that the First Minister made the position clear. The question is whether other jurisdictions are affected and find themselves challenged in respect of the ECHR. The answer is, of course, yes, because those who sign up to the ECHR accept that it is binding. We accept that it is incumbent on us—indeed it is part of our founding principles—to abide by the ECHR. However, other jurisdictions have the opportunity to go to the European Court of Human Rights, put forward their case and reflect on matters. Such an opportunity is precluded for the Government and law officers of Scotland. The decision of the UK Supreme Court was based on an interpretation of a Strasbourg decision. It was not a decision of Strasbourg on Scots law, so we do not have the opportunity to go to Strasbourg.

Bill Butler suggested that we should have addressed matters after Salduz v Turkey in 2008. It is clear that matters relating to Salduz v Turkey were considered in McLean v HMA in October 2009, when, as Stewart Maxwell said, the High Court of Scotland, presided over by the Lord Justice General, who was supported by his deputy the Lord Justice Clerk and by five other High Court judges of significance and stature in Scotland,
found that Scots law in relation to the period of detention and lack of access to a solicitor was not incompatible with the ECHR.

I do not know whether Mr Butler was suggesting that we should have second-guessed the High Court’s decision before October 2009 or that after 2009 the Government should have unilaterally said, “Well, the Lord Justice General has got it wrong.” It would be scandalous for a justice minister to second-guess, never mind criticise, a decision of a supreme court sitting on a criminal appeal matter in Scotland.

David McLetchie: Will the cabinet secretary give way?

Kenny MacAskill: No. I do not have time.

The period of detention clearly requires to be addressed. First and foremost, let us remember the circumstances and where we are being taken by the UK Supreme Court, which is down the road to replicating the position south of the border under the Police and Criminal Evidence Act 1984. South of the border—a Labour Government presided over this situation; I used to meet Jack Straw and others—the period of detention is initially 24 hours, and on cause shown and by request of a senior officer to another senior officer it can be extended to 36 hours. At 36 hours, the case can be put before a magistrate and the period of detention extended to 72 hours.

In Scotland, as I said, there has been a significant change, with a lawyer being in for the interview that takes place. We simply seek to strike a balance by extending the period to 12 hours. Only on cause shown and in the most serious cases and indictable matters will that period be extended. It will not be extended on the basis that a breach of the peace or anything like that is being investigated. However, in cases such as attempted murder, rape and serious assault, there can be forensic and ballistic investigations. Mr Brown should consider that. If someone has been detained for 12 hours in a rape case and forensic and other investigations are taking place, must the person be released because we have not managed to secure a report of significance, which would allow an officer to put questions of fundamental importance to the accused? Is the person to be liberated just because he has been detained for 12 hours?

The question is how the extension is to be signed off. South of the border it is simply a matter of going to an equivalent senior officer. To require the issue to go before a judge or a justice of the peace seems to me to undermine the police investigation. It is a matter of balance, which is why we have introduced the bill as a matter of urgency. The scales of justice require that we acknowledge the importance of having a lawyer in for an interrogation during an investigation. Equally, we must remember the rights of victims and ensure that a fair balance is struck for those who police our communities and prosecute. If there is no extension, we undermine that balance.

The Deputy Presiding Officer (Trish Godman): The question is, that motion S3M-7267, in the name of Kenny MacAskill, on the general principles of the Criminal Procedure (Legal Assistance, Detention and Appeals) (Scotland) Bill, be agreed to. Are we agreed?

Members: No.

The Deputy Presiding Officer: There will be a division. As this is the first division, it will be five minutes.

15:19

Meeting suspended.

15:25

On resuming—

The Deputy Presiding Officer: Members can vote now on the general principles of the bill.

The Minister for Parliamentary Business (Bruce Crawford): On a point of order, Presiding Officer. Can you clarify where we are? I thought that we had been in the process of actually recording our votes.

The Deputy Presiding Officer: No. There was a suspension of five minutes, and we are now in the vote. If you have voted, it is all right. [Interruption.]

Right, can you listen carefully? There has been a slight hiccup. Will everybody vote again, please? The hiccup was not—[Interruption.] That’s it now.

Members: No, it’s not.

The Deputy Presiding Officer: The vote will be rerun.

Bruce Crawford: On a point of order, Presiding Officer. [Interruption.]

The Deputy Presiding Officer: Will members please be quiet? There is a point of order that I would really like to hear.

Bruce Crawford: There is some confusion about where we are in the process. Can we start everything again?

The Deputy Presiding Officer: That is indeed what we are doing. Your vote will be on the general principles of the Criminal Procedure (Legal Assistance, Detention and Appeals) (Scotland) Bill.

Members can vote now. It is working.
For

Adam, Brian (Aberdeen North) (SNP)
Aitken, Bill (Glasgow) (Con)
Alexander, Ms Wendy (Paisley North) (Lab)
Allan, Alasdair (Western Isles) (SNP)
Bailie, Jackie (Dumbarton) (Lab)
Baker, Claire (Mid Scotland and Fife) (Lab)
Baker, Richard (North East Scotland) (Lab)
Boyack, Sarah (Edinburgh Central) (Lab)
Brankin, Rhona (Midlothian) (Lab)
Brocklebank, Ted (Mid Scotland and Fife) (Con)
Brown, Gavin (Lothians) (Lab)
Brown, Keith (Ochil) (SNP)
Brown, Robert (Glasgow) (LD)
Brownlee, Derek (South of Scotland) (Con)
Butler, Bill (Glasgow Anniesland) (Lab)
Campbell, Aileen (South of Scotland) (SNP)
Carlaw, Jackson (West of Scotland) (Con)
Chisholm, Malcolm (Edinburgh North and Leith) (Lab)
Coffey, Willie (Kilmarnock and Loudoun) (SNP)
Constance, Angela (Livingston) (SNP)
Craigie, Cathie (Cumbernauld and Kilsyth) (Lab)
Crawford, Bruce (Stirling) (SNP)
Cunningham, Roseanna (Perth) (SNP)
Don, Nigel (North East Scotland) (SNP)
Doris, Bob (Glasgow) (SNP)
Eadie, Helen (Dunfermline East) (Lab)
Ewing, Fergus (Inverness East, Nairn and Lochaber) (SNP)
Fabian, Linda (Central Scotland) (SNP)
Fergusson, Patricia (Glasgow Maryhill) (Lab)
Finnie, Ross (West of Scotland) (LD)
FitzPatrick, Joe (Dundee West) (SNP)
Foulkes, George (Lothians) (Lab)
Fraser, Murdo (Mid Scotland and Fife) (Con)
Gibson, Kenneth (Cunninghame North) (SNP)
Gibson, Rob (Highlands and Islands) (SNP)
Glen, Marilyn (North East Scotland) (Lab)
Gordon, Charlie (Glasgow Cathcart) (Lab)
Grahame, Christine (South of Scotland) (SNP)
Grant, Rhoda (Highlands and Islands) (Lab)
Harvie, Christopher (Mid Scotland and Fife) (SNP)
Henry, Hugh (Paisley South) (Lab)
Hepburn, Jamie (Central Scotland) (SNP)
Hyslop, Fiona (Lothians) (SNP)
Ingram, Adam (South of Scotland) (SNP)
Johnstone, Alex (North East Scotland) (Con)
Kelly, James (Glasgow Rutherglen) (Lab)
Kerr, Andy (East Kilbride) (Lab)
Kidd, Bill (Glasgow) (SNP)
Lamont, Johann (Glasgow Pollok) (Lab)
Lamont, John ( Roxburgh and Berwickshire) (Con)
Livingstone, Marilyn (Kirkcaldy) (Lab)
Lochhead, Richard (Moray) (SNP)
MacAskill, Kenny (Edinburgh East and Musselburgh) (SNP)
Macdonald, Lewis (Aberdeen Central) (Lab)
Macintosh, Ken (Eastwood) (Lab)
Martin, Paul (Glasgow Springburn) (Lab)
Marwick, Tricia (Central Fife) (SNP)
Matheson, Michael (Falkirk West) (SNP)
Maxwell, Stewart (West of Scotland) (SNP)
McArthur, Liam (Orkney) (LD)
McAveety, Mr Frank (Glasgow Shettleston) (Lab)
McCabe, Tom (Hamilton South) (Lab)
McConnell, Jack (Motherwell and Wishaw) (Lab)
McInnes, Alison (North East Scotland) (LD)
Mckeel, Ian (Lothians) (SNP)
McKelvie, Christina (Central Scotland) (SNP)
McLaughlin, Anne (Glasgow) (SNP)
McLetchie, David (Edinburgh Pentlands) (Con)
McMahon, Michael (Hamilton North and Bellshill) (Lab)
McMillan, Stuart (West of Scotland) (SNP)
McNeil, Duncan (Greenock and Inverclyde) (Lab)
McNeill, Pauline (Glasgow Kelvin) (Lab)
McNuily, Des (Clydebank and Milngavie) (Lab)
Mile, Nanette (North East Scotland) (Con)
Mitchell, Margaret (Central Scotland) (Con)
Mulligan, Mary (Linlithgow) (Lab)
Munro, John Farquhar (Ross, Skye and Inverness West) (LD)
Murray, Elaine (Dumfries) (Lab)
Neil, Alex (Central Scotland) (SNP)
O'Donnell, Hugh (Central Scotland) (LD)
Oldfather, Irene (Cunninghame South) (Lab)
Parker, John (Mid Scotland and Fife) (Lab)
Paterson, Gil (West of Scotland) (SNP)
Peacock, Peter (Highlands and Islands) (Lab)
Peattie, Cathy (Falkirk East) (Lab)
Pringle, Mike (Edinburgh South) (LD)
Purvis, Jeremy (Tweddle, Ettrick and Lauderdale) (LD)
Rumbles, Mike (West Aberdeenshire and Kincardine) (LD)
Russell, Michael (South of Scotland) (SNP)
Salmond, Alex (Gordon) (SNP)
Scanlon, Mary (Highlands and Islands) (Con)
Scott, John (Ayr) (Con)
Simpson, Dr Richard (Mid Scotland and Fife) (Lab)
Smith, Elizabeth (Mid Scotland and Fife) (Con)
Smith, Iain (North East Fife) (LD)
Smith, Margaret (Edinburgh West) (LD)
Somerville, Shirley-Anne (Lothians) (SNP)
Stephen, Nicol (Aberdeen South) (LD)
Stevenson, Stewart (Banff and Buchan) (SNP)
Stewart, David (Highlands and Islands) (Lab)
Stone, Jamie (Caithness, Sutherland and Easter Ross) (LD)
Sturgeon, Nicola (Glasgow Govan) (SNP)
Thompson, Dave (Highlands and Islands) (SNP)
Tolson, Jim (Dunfermline West) (LD)
Watt, Maureen (North East Scotland) (SNP)
Welsh, Andrew (Angus) (SNP)
White, Sandra (Glasgow) (SNP)
Whitefield, Karen (Airdrie and Shotts) (Lab)
Whitton, David (Strathkelvin and Bearsden) (Lab)
Wilson, Bill (West of Scotland) (SNP)
Wilson, John (Central Scotland) (SNP)
Against

Harper, Robin (Lothians) (Green)
Harvie, Patrick (Glasgow) (Green)
MacDonald, Margo (Lothians) (Ind)

The Deputy Presiding Officer: The result of the division is: For 111, Against 3, Abstentions 0.

Motion agreed to,

That the Parliament agrees to the general principles of the Criminal Procedure (Legal Assistance, Detention and Appeals) (Scotland) Bill.
15:27

The Deputy Presiding Officer (Trish Godman): The next item of business is consideration of motion S3M-7275, in the name of John Swinney, on the financial resolution in respect of the Criminal Procedure (Legal Assistance, Detention and Appeals) (Scotland) Bill.

Motion moved,

That the Parliament, for the purposes of any Act of the Scottish Parliament resulting from the Criminal Procedure (Legal Assistance, Detention and Appeals) (Scotland) Bill, agrees to any expenditure of a kind referred to in Rule 9.12.3(b)(iii) of the Parliament’s Standing Orders arising in consequence of the Act.—[Kenny MacAskill.]

Motion agreed to.

The Deputy Presiding Officer: We will move to the next item of business. Members leaving the chamber should do so quietly, because if we do not proceed with the next item now it will give them less time for the later debates. [Interruption.] Please be quiet when you are leaving.
Criminal Procedure (Legal Assistance, Detention and Appeals) (Scotland) Bill

1st Marshalled List of Amendments for Stage 2

The Bill will be considered in the following order—

Sections 1 to 10
Long Title

Amendments marked * are new (including manuscript amendments) or have been altered.

Section 1

Robert Brown
1 In section 1, page 2, line 12, leave out <sent> and insert <made>

Robert Brown
2 In section 1, page 2, line 25, leave out <subsections (8) and> and insert <subsection>

Robert Brown
3 In section 1, page 2, leave out lines 26 to 28

Robert Brown
4 In section 1, page 2, line 26, leave out from <by> to <includes,> in line 27 and insert <in person (at the police station or other premises or place where the suspect is being detained or is attending), except where the suspect requests that alternative means be used (including,)> 

Robert Brown
5 In section 1, page 2, page 35, leave out <sent> and insert <made>

Robert Brown
6 In section 1, page 2, line 36, leave out <sent> and insert <made>

Robert Brown
7 In section 1, page 3, leave out lines 1 to 5
Section 3

Robert Brown

8 In section 3, page 3, line 28, leave out from <section> to end of line 20 on page 4 and insert <sections 14ZA and 14A, detention”.

(2) After section 14 of the 1995 Act, insert—

“14ZA Extension by constable of period of detention under section 14

(1) This section applies in relation to a person who is being detained under section 14 of this Act (“the detained person”).

(2) Before the expiry of the period of 6 hours mentioned in section 14(2), a custody review officer may, subject to subsection (4), authorise that period to be extended in relation to the detained person by a further period of 6 hours.

(3) The further period of 6 hours starts from the time when the period of detention would have expired but for the authorisation.

(4) A custody review officer may authorise the extension under subsection (2) in relation to the detained person only if the officer is satisfied that the detained person wishes to exercise the right mentioned in section 15A(3) but has been unable to do so due to a difficulty in securing the attendance of a solicitor.

(5) Where subsection (4) or (5) of section 14 applies in relation to the detained person, the references in subsection (2) of this section to the period of 6 hours mentioned in section 14(2) are to be read as references to that period as reduced in accordance with subsection (4) or, as the case may be, (5) of section 14.

(6) Where a custody review officer authorises the extension under subsection (2), section 14 has effect in relation to the detained person as if the references in it to the period of 6 hours were references to that period as extended by virtue of the authorisation.

(7) In this section and sections 14A and 14B, “custody review officer” means a constable—

(a) of the rank of inspector or above, and

(b) who has not been involved in the investigation in connection with which the person is detained.

14A Extension by sheriff of period of detention under section 14

(1) This section applies in relation to a person who is being detained under section 14 of this Act (“the detained person”) where the period for which that person may be detained has been extended under section 14ZA.

(2) The sheriff may, on the application of a custody review officer and subject to subsections (3) and (5), by order authorise the period of 12 hours mentioned in section 14(2) (by virtue of section 14ZA(6)) to be extended in relation to the detained person by a further period not exceeding 12 hours.

(3) An—

(a) application,

(b) order,
under subsection (2) may only be made before the expiry of the period of 12 hours mentioned in section 14(2) (by virtue of section 14ZA(6)).

(4) Where the sheriff authorises the extension under subsection (2), the further period not exceeding 12 hours starts from the time when the period of detention would have expired but for that authorisation.

(5) The sheriff may authorise the extension under subsection (2) in relation to the detained person only if satisfied that—

(a) the continued detention of the detained person is necessary to secure, obtain or preserve evidence (whether by questioning the person or otherwise) relating to an offence in connection with which the person is being detained,

(b) an offence in connection with which the detained person is being detained is one that is an indictable offence, and

(c) the investigation is being conducted diligently and expeditiously.

(6) Where subsection (4) or (5) of section 14 applies in relation to the detained person, the references in subsection (2) of this section to the period of 12 hours mentioned in section 14(2) (by virtue of section 14ZA(6)) are to be read as references to that period as reduced by virtue of section 14ZA(5).

Robert Brown

9 In section 3, page 3, line 32, leave out from beginning to end of line 19 on page 5 and insert—

<(1) Subject to subsection (2), the Scottish Minister may by regulations made by statutory instrument specify—

(a) circumstances in which the period of 12 hours mentioned in section 14(2) may be extended,

(b) the procedure to be followed in relation to any such extension.

(2) The period of 12 hours mentioned in section 14(2) may not be extended by more than 12 hours.

(3) Regulations under subsection (1) may make such supplementary or consequential provision in connection with the matters mentioned in paragraphs (a) and (b) of that subsection as the Scottish Ministers consider appropriate.

(4) Regulations are not to be made under subsection (1) unless a draft of the statutory instrument containing the regulations has been laid before and approved by resolution of the Scottish Parliament.>

Robert Brown

10 In section 3, page 3, line 34, leave out subsection (2) and insert—
The sheriff may, on the application of a custody review officer and subject to subsections (2A) and (4), by order authorise the period of 12 hours mentioned in section 14(2) to be extended in relation to the detained person by a further period not exceeding 12 hours.

(2A) An—

(a) application,

(b) order,

under subsection (2) may only be made before the expiry of the period of 12 hours mentioned in section 14(2).>

Robert Brown

11 In section 3, page 3, line 37, leave out <The further period of> and insert <Where the sheriff authorises the extension under subsection (2), the further period not exceeding>

Robert Brown

12 In section 3, page 3, line 39, leave out from beginning to <is> in line 40 and insert <The sheriff may authorise the extension under subsection (2) in relation to the detained person only if>

Robert Brown

13 In section 3, page 4, line 13, leave out <a custody review officer> and insert <the sheriff>

Robert Brown

14 In section 3, page 4, line 22, leave out <a custody review officer> and insert <the sheriff>

Robert Brown

15 In section 3, page 4, line 25, leave out <custody review officer> and insert <sheriff>

Robert Brown

16 In section 3, page 4, line 30, leave out <officer> and insert <sheriff>

Robert Brown

17 In section 3, page 4, line 32, leave out <custody review officer> and insert <sheriff>

Robert Brown

18 In section 3, page 4, line 33, leave out <officer> and insert <sheriff>

Robert Brown

19 In section 3, page 4, line 35, leave out <custody review officer> and insert <sheriff>
Robert Brown

20 In section 3, page 4, line 36, leave out <officer> and insert <sheriff>

Robert Brown

21 In section 3, page 4, line 40, at end insert—
<(: ) the custody review officer who applied for the extension.>

Robert Brown

22 In section 3, page 4, line 42, leave out <custody review officer> and insert <sheriff>

Robert Brown

23 In section 3, page 5, line 10, leave out <officer’s> and insert <sheriff’s>

Section 7

Bill Aitken
Supported by: John Lamont

24 In section 7, page 7, line 38, leave out <may> and insert <must>

Bill Aitken
Supported by: John Lamont

25 In section 7, page 8, line 4, leave out <may> and insert <must>

Christine Grahame
Supported by: Margo MacDonald

26 Leave out section 7

After section 9

Robert Brown

27 After section 9, insert—

<Duration of amendments>
The amendments made by section 3 to section 14 of the 1995 Act expire on—
(a) 31 December 2012, or
(b) such earlier date as may be agreed as the commencement date for a Bill making provisions relating to the rights of suspects under detention introduced after this Act receives Royal Assent.>

Robert Brown

28 In the long title, page 1, line 5, leave out from <extend> to <further> in line 6 and insert <enable the period during which a person may be detained under section 14 of the Criminal Procedure (Scotland) Act 1995 to be>
Groupings of Amendments for Stage 2

This document provides procedural information which will assist in preparing for and following proceedings on the above Bill. The information provided is as follows:

- the list of groupings (that is, the order in which amendments will be debated). Any procedural points relevant to each group are noted;
- the text of amendments to be debated during Stage 2 consideration, set out in the order in which they will be debated. THIS LIST DOES NOT REPLACE THE MARSHALLED LIST, WHICH SETS OUT THE AMENDMENTS IN THE ORDER IN WHICH THEY WILL BE DISPOSED OF.

Groupings of amendments

**Intimation to solicitor**
1, 5, 6

**Power to delay exercise of right to consultation with solicitor**
2, 7

**Method of consultation**
3, 4

*Notes on amendments in this group*
Amendment 3 pre-empts amendment 4

**Period for which person may be detained under section 14 of 1995 Act and extension of that period**
8, 9, 10, 11, 12, 13, 4, 15, 16, 17, 18, 19, 20, 21, 22, 23, 28

*Notes on amendments in this group*
Amendment 8 pre-empts amendments 9 to 13
Amendment 9 pre-empts amendments 10 to 23

**References by the Scottish Criminal Cases Review Commission**
24, 25, 26

**Duration of amendments made by section 3**
27
The meeting opened at 5.00 pm.

Criminal Procedure (Legal Assistance, Detention and Appeals) (Scotland) Bill - Stage 2: The Bill was considered at Stage 2.

Criminal Procedure (Legal Assistance, Detention and Appeals) (Scotland) Bill - Stage 2: The Bill was considered at Stage 2 by a Committee of the Whole Parliament.

The following amendments were disagreed to (by division)—

2 (For 18, Against 100, Abstentions 0)
4 (For 18, Against 102, Abstentions 0)
7 (For 17, Against 102, Abstentions 0)
8 (For 18, Against 102, Abstentions 0)
9 (For 18, Against 101, Abstentions 0)
10 (For 18, Against 61, Abstentions 41)
24 (For 57, Against 63, Abstentions 0)
25 (For 57, Against 63, Abstentions 0)
26 (For 18, Against 101, Abstentions 1)
27 (For 18, Against 61, Abstentions 41)

The following amendments were moved and, with the agreement of the Parliament, withdrawn: 1 and 3.

The following amendments were not moved: 5, 6, 11, 12, 13, 14, 15, 16, 17, 18, 19, 20, 21, 22, 23 and 28.

Sections 1, 2, 3, 4, 5, 6, 7, 8, 9 and 10 and the Long Title were agreed to without amendment.

The Committee of the Whole Parliament completed Stage 2 consideration of the Bill.

The meeting closed at 6.30 pm.
Points of Order

16:26

The Deputy Presiding Officer (Trish Godman): To allow members to consider the amendments that have been lodged at stage 2 of the Criminal Procedure (Legal Assistance, Detention and Appeals) (Scotland) Bill, I will suspend the meeting until 5 o’clock.

Patrick Harvie (Glasgow) (Green): On a point of order, Presiding Officer.

Margo MacDonald (Lothians) (Ind): On a point of order, Presiding Officer.

The Deputy Presiding Officer: I will take Patrick Harvie’s point of order first.

Patrick Harvie: This is the first that we have heard of a change of timing. The amendments that have been lodged were circulated recently to members by e-mail, without any indication that the timing of the process would change. Can you provide an indication of the expected timescale for the rest of the process and indicate at what point it was decided that the time at which stage 2 would start, which was previously 4.20, should change?

The Deputy Presiding Officer: The Presiding Officer took the decision that members would wish to have a bit longer to consider the amendments. I cannot answer the last part of the question—which was not a point of order—at the moment, but I will do so as soon as I can. Does Margo MacDonald have the same point of order?

Margo MacDonald: My point of order refers to the code that is established when members are sworn in as members of Parliament. The clear implication is that we will produce to the best of our ability legislation that is required by the people whom we serve. I suggest that we are not doing that this afternoon. What we produce may be correct, but it will be subject to much less scrutiny than such an important piece of legislation requires. I request that we consult standing orders to see whether there is any other way of treating the matter properly.

The Deputy Presiding Officer: That is not a point of order, but you have put your comments on the record. I suspect strongly that the Presiding Officer has allowed a suspension simply because members want longer to examine the amendments that have been lodged.

Patrick Harvie: Further to my earlier point of order, Presiding Officer, in what way is a query about the timing of decision time not a point of order? If it is not, how are we to find out when decision time will be?

The Deputy Presiding Officer: It was not about decision time—we were about to consider a bill at stage 2. Those proceedings will now start at 5 o’clock.

16:28

Meeting suspended.
Committee of the Whole Parliament

[The Presiding Officer opened the meeting at 17:00]

Criminal Procedure (Legal Assistance, Detention and Appeals) (Scotland) Bill: Stage 2

The Convener (Alex Fergusson): The next item of business is stage 2 proceedings on the Criminal Procedure (Legal Assistance, Detention and Appeals) (Scotland) Bill, which will be considered in a Committee of the Whole Parliament. The occupant of the chair is the convener.

In dealing with amendments, members should have the marshalled list and the groupings that I have agreed. The division bell will sound and proceedings will be suspended for five minutes for the first division this afternoon—I think that it is still afternoon. The period of voting for the first division will be 30 seconds. Thereafter, I will allow a voting period of one minute for the first division after a debate. All other divisions will be 30 seconds.

Section 1—Right of suspects to have access to a solicitor

The Convener: Amendment 1, in the name of Robert Brown, is grouped with amendments 5 and 6.

Robert Brown (Glasgow) (LD): I am conscious that there is a long list of amendments to this difficult emergency legislation; that indicates the problems with trying to pass such legislation so quickly.

The first grouping is pretty minor, and I will explain briefly what it is about. It relates to line 12 on page 2 of the bill, under section 1, which states with regard to the right of the suspect to have access to a solicitor that

“The suspect has the right to have intimation sent to a solicitor”

in certain circumstances. I am quibbling over whether “sent” is the right word in that context. Such things are normally done by telephone, and “made” is perhaps a better word. I would appreciate a response from the Cabinet Secretary for Justice on that point—to which amendments 5 and 6 also relate—with regard to how he anticipates that the intimation would be made in such situations. Would it normally be made by telephone, or does he have in mind—as the wording suggests—a more elaborate procedure in that regard?

I move amendment 1.

The Cabinet Secretary for Justice (Kenny MacAskill): I welcome the spirit in which Robert Brown has lodged amendment 1. However, it is a technical amendment that we believe would achieve nothing in practice, and it might cause confusion. The term “sent” is consistent with the wording in sections 14, 15 and 17 of the Criminal Procedure (Scotland) Act 1995, and to use a different term in the current bill would be likely to cause confusion.

Mr Brown himself will have been—if I can put it in inverted commas—“sent” intimation from his clients in custody. The process is well established; the bill simply uses the legal term for what takes place in a variety of ways. It is custom and practice, and we do not seek to change that in any way. A change of the nomenclature would disturb a pattern that is already settled in the 1995 act.

Robert Brown: Given the cabinet secretary’s response, I seek to withdraw amendment 1.

Amendment 1, by agreement, withdrawn.

The Convener: Amendment 2, in the name of Robert Brown, is grouped with amendment 7.

Robert Brown: Amendment 2 is a paving amendment for amendment 7, which is the substantial amendment that refers to lines one to five on page 3, under section 1. Again, it relates to the right of suspects to have access to a solicitor.

It is worth reading out the phrasing in subsection (8) of proposed new section 15A of the 1995 act. It states:

“A constable may delay the suspect’s exercise of the right under subsection (3)”

—that is, the right to have a solicitor present—

“so far as it is necessary in the interest of the investigation or the prevention of crime or the apprehension of offenders that the questioning of the suspect by a constable begins or continues without the suspect having had a private consultation with a solicitor.”

If ever I saw a clause that gave a right with one hand and took it away with the other, that is it. I question whether the Government has got that particular matter right.

I refer members to the decision in the Cadder case, which went into the matter in some detail and made clear that the right of a suspect to the presence of a solicitor was an absolute right. The right was certainly subject to the procedures that surround it in the individual jurisdiction, but it was not intended that there should be a systematic exception to it. Lord Hope made all sorts of observations in that regard. He made it clear that the grand chamber of the European Court of Human Rights
"was determined to tighten up the approach that must be taken to protect a detainee against duress or pressure of any kind that might lead him to incriminate himself."

He also made it clear that, although there would be an interval of time before the arrival of the solicitor, and arrangements would be made for that,

"there is no hint anywhere in its judgment that"

the European court

"had in mind that the question ... will depend on the arrangements the particular jurisdiction has made".

He said that it does not permit a "systematic departure" from the requirement. That was his major objection and difficulty with the decision in Her Majesty’s Advocate v McLean.

I suggest to the Parliament and particularly to the minister that the provision as it is worded at present goes significantly beyond the Cadder decision, establishes a systematic exception to the right, and is therefore questionably compliant with the European convention on human rights. More to the point, it seems to me that any policeman worthy of his salt could readily justify an extension of the time for detention just by reference to the needs of the investigation of the case. The provision is not specific, adds nothing to the substance, gives no criteria of real meaning, and is exactly the sort of thing that requires further detailed examination before we go in that direction. Against that background, I strongly suggest to the Parliament that subsection (8) of proposed new section 15A of the 1995 act should be removed from the bill.

I move amendment 2.

Mike Rumbles (West Aberdeenshire and Kincardine) (LD): I support amendment 2. I would like to hear from the justice secretary an explanation of subsection (8). The reason why we have the legislation is to give people the right to consult a solicitor. Subsection (8) states:

“A constable may delay the suspect’s exercise of the right ... so far as it is necessary in the interest of the investigation or the prevention of crime or the apprehension of offenders”.

Are those not the reasons why people are detained in the first place? In other words, what is the purpose of the provision? When a suspect is brought to a police station, it is for those reasons and no other, is it not?

MacAskill: I can understand why, at first glance, Robert Brown would have raised his eyebrows and seen some cause for concern, but the provision is necessary. It replicates a high test that is already contained in section 15 of the 1995 act, under which intimation can be delayed. It is nothing new because it is already in that act. I point out to Mr Rumbles that it will be exercised only in compelling circumstances but will be necessary in some serious cases. I assure him that it is ECHR compliant.

Mike Rumbles: Will the minister take an intervention?

Kenny MacAskill: Not at the moment. Moreover, I do not know whether Mr Rumbles had read the judgment, but I doubt it—

Mike Rumbles: There was no time.

Kenny MacAskill: It was published at 9.45 yesterday.

Mike Rumbles: Oh, great.

The Convener: Order.

Kenny MacAskill: Lord Rodger accepts at paragraph 95 that there may be compelling reasons to restrict the right, and he quotes a similar matter. Amendment 2 would take away the ability of the police to delay access to a solicitor. There are instances in which the interests of justice could be jeopardised, somebody could evade capture, some further witness could be threatened, or vital evidence could be interfered with. Such cases are very rare. They are few and far between, but the provision replicates what we already have in section 15 of the 1995 act to ensure that we protect the interests of justice. It is an extremely high test that has been used but sparingly by our police. That is why it is necessary.

Mike Rumbles: Will the minister take an intervention?

Kenny MacAskill: By all means.

Mike Rumbles: I thank the cabinet secretary for taking an intervention. I would accept everything that he says if he had said that in the bill that we are considering, but it does not say that in subsection (8). It states:

“A constable may”.

There is nothing about exceptional circumstances. Under the law that he is asking us to pass today, we are giving people the right to legal representation, but in subsection (8) we are taking it away again.

Kenny MacAskill: The Government just does not accept that. Indeed, I argue that Mr Rumbles is in danger of putting the police at a disadvantage and jeopardising victims, witnesses and, in the most serious cases, the opportunity to apprehend and detain people and ensure that they are brought to justice.

Robert Brown: I find the cabinet secretary’s tone unfortunate. This problem has arisen because we are having to deal with legislation that he and his Government are seeking to force through today. Had we had the time to consider
the issue properly, as we should have been able to, we would not be in this position.

As for Lord Rodger’s comments, which the cabinet secretary rightly referred to, I point out that he did not say that section 15 of the 1995 act should be continued. Indeed, there must be a question mark over that in light of the decision. Lord Rodger says that the type of circumstances in section 15 “could perhaps constitute compelling reasons”, but we need to go a bit further and define what we are talking about here. The provision does not relate to exceptional circumstances, substantial reasons or any other criteria beyond the reason for having the person there in the first place, which is the investigation of the crime. Although I accept that in certain cases a delay might be possible, we should remember that, under the cabinet secretary’s proposals, it will be possible to extend the time for detention at a later time. This provision is designed to allow the police to question someone without the presence of the solicitor concerned, which is the significant issue that was raised in the Cadder case. Frankly, the cabinet secretary has not responded to that point properly and I certainly do not think that subsection (8) responds to it either.

Against that background, I am afraid to say that I will press amendment 2.

The Convener: The question is, that amendment 2 be agreed to. Are we agreed?

Members: No.

The Convener: There will be a division. As it is the first division in the proceedings, we will have a five-minute suspension.

17:11

Meeting suspended.

17:16

On resuming—

The Convener: Before we come to the vote, I inform members that, thanks to Bill Kidd, who has generously agreed to postpone it, the members’ business debate will not be held this evening.

Members: Aw!

The Convener: I agree.

We move to the division on amendment 2.

For

Brown, Robert (Glasgow) (LD)
Finnie, Ross (West of Scotland) (LD)
Harper, Robin (Lothians) (Green)
Harvie, Patrick (Glasgow) (Green)
MacDonald, Margo (Lothians) (Ind)

McArthur, Liam (Orkney) (LD)
McInnes, Alison (North East Scotland) (LD)
O’Donnell, Hugh (Central Scotland) (LD)
Pringle, Mike (Edinburgh South) (LD)
 Purvis, Jeremy (Tweeddale, Ettrick and Lauderdale) (LD)
Rumbles, Mike (West Anderdeenshire and Kincardine) (LD)
Scott, Tavish (Shetland) (LD)
Smith, Iain (North East Fife) (LD)
Smith, Margaret (Edinburgh West) (LD)
Stephen, Nic (Aberdeen South) (LD)
Stone, Jamie (Caithness, Sutherland and Easter Ross) (LD)
Tolson, Jim (Dumfriesshire West) (LD)
White, Sandra (Glasgow) (SNP)

Against

Adam, Brian (Aberdeen North) (SNP)
Aitken, Bill (Glasgow) (Con)
Alexander, Ms Wendy (Paisley North) (Lab)
Allan, Alasdair (Western Isles) (SNP)
Baillie, Jackie (Dumbarton) (Lab)
Baker, Richard (North East Scotland) (Lab)
Boyack, Sarah (Edinburgh Central) (Lab)
Brankin, Rhona (Midlothian) (Lab)
Brocklebank, Ted (Mid Scotland and Fife) (Con)
Brown, Gavin (Lothians) (Con)
Brown, Keith (Ochil) (SNP)
Brownlee, Derek (South of Scotland) (Con)
Butter, Bill (Glasgow Anniesland) (Lab)
Campbell, Aileen (South of Scotland) (SNP)
Carlaw, Jackson (West of Scotland) (Con)
Chisholm, Malcolm (Edinburgh North and Leith) (Lab)
Coffey, Willie (Kilmarnock and Loudoun) (SNP)
Constance, Angela (Livingston) (SNP)
Craigie, Cathie (Cumbernauld and Kilsyth) (Lab)
Crawford, Bruce (Stirling) (SNP)
Cunningham, Roseanna (Perth) (SNP)
Don, Nigel (North East Scotland) (SNP)
Doris, Bob (Glasgow) (SNP)
Edie, Helen (Dumfriesshire East) (Lab)
Ewing, Fergus (Inverness East, Nairn and Lochaber) (SNP)
Fabiani, Linda (Central Scotland) (SNP)
Ferguson, Patricia (Glasgow Maryhill) (Lab)
FitzPatrick, Joe (Dundee West) (SNP)
Foulkes, George (Lothians) (Lab)
Fraser, Murdo (Mid Scotland and Fife) (Con)
Gibson, Kenneth (Cunninghame North) (SNP)
Gibson, Rob (Highlands and Islands) (SNP)
Glen, Marilyn (North East Scotland) (Lab)
Godman, Trish (West Renfrewshire) (Lab)
Goldie, Annabel (West of Scotland) (Con)
Gordon, Charlie (Glasgow Cathcart) (Lab)
Graham, Christine (South of Scotland) (SNP)
Grant, Rhoda (Highlands and Islands) (Lab)
Harvie, Christopher (Mid Scotland and Fife) (SNP)
Henry, Hugh (Paisley South) (Lab)
Hepburn, Jamie (Central Scotland) (SNP)
Hyslop, Fiona (Lothians) (SNP)
Ingram, Adam (South of Scotland) (SNP)
Johnstone, Alex (North East Scotland) (Con)
Kelly, James (Glasgow Rutherglen) (Lab)
Kerr, Andy (East Kilbride) (Lab)
Lamont, Johann (Glasgow Pollok) (Lab)
Lamont, John (Roxburgh and Berwickshire) (Con)
Livingstone, Marilyn (Kirkcaldy) (Lab)
Lochhead, Richard (Moray) (SNP)
MacAskill, Kenny (Edinburgh East and Musselburgh) (SNP)
Macdonald, Lewis (Aberdeen Central) (Lab)
Macintosh, Ken (Eastwood) (Lab)
Martin, Paul (Glasgow Springburn) (Lab)
Marwick, Tricia (Central Fife) (SNP)
Matheson, Michael (Falkirk West) (SNP)
Robert Brown: I have lodged two alternative amendments, as the issue is difficult. I think that most of us would regard consultation with a solicitor as involving a private meeting with that solicitor in a room in a police station, or something of that sort. Conversation by telephone or perhaps by e-mail or carrier pigeon for all I know seems to me to be a slightly odd concept when we are talking about the protection of a suspect in custody. The provision refers to “consultation ... as may be appropriate”.

Appropriate to whom? That is an issue. Who would decide what might be appropriate in the circumstances?

I propose that the provision is not necessary, as consultation with a solicitor is well understood and does not need to be defined in the bill. The only purpose behind the Government trying to define it in the bill is to narrow its scope. Alternatively, if the Government thinks that consultation has to be defined, it must be defined rather more narrowly than has been proposed. I accept that there could be a distance problem, for example, or exceptional circumstances in which there might have to be some other form of contact. Perhaps provision could be made for that, but that should not suborn the whole section. Therefore, amendment 4 suggests that the normal thing would be consultation in person at the police station or other place where the suspect is being detained, “except where the suspect requests that alternative means be used”.

I do not know what those alternatives might be, but I can envisage that there might be something in that regard.

Amendment 3 would pre-empt amendment 4.

Primarily—although subject to the cabinet secretary’s comments—I seek to delete subsection (5) of proposed new section 15A of the 1995 act. However, if there is merit in what I say and there are circumstances in which a meeting in person is not the only possibility, I am open to a slightly broader approach. I am interested in the cabinet secretary’s responses on that.

I move amendment 3.

Kenny MacAskill: Of course there is merit in what Robert Brown asks us to do, but the issue is covered by the existing proposals. The issue is about providing the right balance between ensuring that there is access to a solicitor and allowing the accused to make an informed choice on certain occasions as to whether a solicitor’s presence is required. There will be cases in which the accused will be reluctant to wait. As Mr Aitken said, the lawyer might have to come from Inverness or Fort William to Portree, but the accused might well decide that they do not want to wait that long and might say, “Can we just get on
with it and get it over with?” However, he will have to have the opportunity to take advice. The solicitor might say, “Don’t be so daft—wait until I get there,” or they might say, “That’s fine—this is what I advise you to do and if you want to get on with it, feel free to do so.”

That is one example. There will be instances in which somebody is not sure whether they need advice. In some instances, they will not need advice, but they should at least have the opportunity to speak to a solicitor and be told what they think. The accused might be persuaded that they need advice or be satisfied that they do not.

There are other practical matters. For example, there could be force majeure. There could be a landslip on a road that means there is no access. Such things occasionally happen in Scotland. The time limit would be expiring and it might be that the matters could be dealt with by telephone. Equally, as I am sure all members know, we are looking to move towards the use of new technology, such as Skype and videoconferencing or whatever. We must take it into account that, in some instances, as well as a telephone call being offered, some other new form of technology might be available.

There is a legitimate question to be raised, but I hope that Mr Brown accepts that the issue is about allowing an informed choice for the accused, while ensuring that he has the opportunity to access a solicitor. If, because of the circumstances or by his own choice, he does not want to access a solicitor, the police can press on.

Robert Brown: I want to clarify the issue of whose choice it is. The bill talks about “consultation by such means as may be appropriate”, but it does not say that it is the suspect’s choice. Rather, it indicates that it is the choice of the authorities in a general sense. We need clarity on that point.

Kenny MacAskil: The accused will have access to a solicitor, apart from in the situations that we have already discussed in relation to amendment 2. The police would ask the accused whether he wanted to speak to his agent or whoever. That is a matter of discussion between the suspect and the police. The police would not say that it is a phone call only. In some instances—if for example the suspect declined—the police would ask the accused whether they wanted to clarify anything and inform them that they could speak to a solicitor. The accused might just want to get on with it, but the police, for good reason—to minimise appeals—might say, “Actually, you should speak to the solicitor in the first place.” Some of the issue must be left to common sense and discussion, with the balance that matters can be appealed.

Pauline McNeill (Glasgow Kelvin) (Lab): It is helpful to have clarification of the meaning of the provisions. I support what the cabinet secretary has said so far. Is it clear that it is a matter for the accused to determine what form access to a lawyer would take and that it is for the accused to determine whether a lawyer is present during the interview? Who makes that determination?

Kenny MacAskil: That has to be a matter of balance. I talked about force majeure. If a solicitor is on their way but there has been a landslip on the A-whatever-it-is and he cannot come, he can speak to the suspect on the phone. I do not think that it would be legitimate if justice were to be circumvented in that situation. As I said, if the process is not satisfactory, that will be borne in mind by the procurator fiscal when matters are reported and, ultimately, the issues will be clarified by the High Court. It cannot be an absolute mandatory choice for an accused to say, “I’m not doing anything other than having a solicitor here,” if, for example, there are good reasons why a solicitor cannot get there in time and some alternative method has been suggested.

That said, it is clear from where the Association of Chief Police Officers in Scotland is heading in its guidance that police will ask the accused how they want to deal with matters. There must be some flexibility and pragmatism to take into account a variety of eventualities. Those eventualities will be rare, but they might well arise.

Robert Brown: I have listened to what the cabinet secretary has said and there is obviously a lot of content to it. However, frankly, I do not think that it deals with the point, as Pauline McNeill said. There is an important issue to do with where the rights of the matter lie that cannot be dealt with by ACPOS guidance. That is the substance of the issue, or so it seems to me.

In the circumstances, I will seek leave to withdraw amendment 3 and press amendment 4. There might be some advantage in defining “consultation”. I am not entirely certain that amendment 4 does the trick, but I am definitely unhappy with the current phraseology of the section. At least amendment 4 arrives at the point at which it is up to the suspect. The suspect does not have to have legal advice; he has the right to have legal advice or not, and nothing takes away his right to refuse legal advice if he wants to do that.

I am certain that the police will make arrangements for telephone conversations when that is appropriate. However, the central point is that the normal situation will still be a face-to-face, private meeting in a cell or a meeting room of some sort at the police station. That must be reflected in the statute and, against that background, I will press amendment 4.
Amendment 3, by agreement, withdrawn.

Amendment 4 moved—[Robert Brown].

The Convener: The question is, that amendment 4 be agreed to. Are we agreed?

Members: No.

The Convener: There will be a division.

For
Brown, Robert (Glasgow) (LD)
Finnie, Ross (West of Scotland) (LD)
Harper, Robin (Lothians) (Green)
Harvie, Patrick (Glasgow) (Green)
MacDonald, Margo (Lothians) (Ind)
McArthur, Liam (Orkney) (LD)
McInnes, Alison (North East Scotland) (LD)
Munro, John Farquhar (Ross, Skye and Inverness West) (LD)
O'Donnell, Hugh (Central Scotland) (LD)
Pringle, Mike (Edinburgh South) (LD)
Purvis, Jeremy (Tweeddale, Ettrick and Lauderdale) (LD)
Rumbles, Mike (West Aberdeenshire and Kincardine) (LD)
Scott, Tavish (Shetland) (LD)
Smith, Iain (North East Fife) (LD)
Smith, Margaret (Edinburgh West) (LD)
Stephen, Nicol (Aberdeen South) (LD)
Stone, Jamie (Caithness, Sutherland and Easter Ross) (LD)
Tolson, Jim (Dunfermline West) (LD)

Against
Adam, Brian (Aberdeen North) (SNP)
Aitken, Bill (Glasgow) (Con)
Alexander, Ms Wendy (Paisley North) (Lab)
Allan, Alasdair (Western Isles) (SNP)
Bailie, Jackie (Dumbarton) (Lab)
Baker, Richard (North East Scotland) (Lab)
Boyack, Sarah (Edinburgh Central) (Lab)
Brocklebank, Ted (Mid Scotland and Fife) (Con)
Brown, Gavin (Lothians) (Con)
Brown, Keith (Ochil) (SNP)
Brownlee, Derek (South of Scotland) (Con)
Butler, Bill (Glasgow Anniesland) (Lab)
Campbell, Aileen (South of Scotland) (Lab)
Carlaw, Jackson (West of Scotland) (Con)
Chisholm, Malcolm (Edinburgh North and Leith) (Lab)
Coffey, Willie (Kilmarnock and Loudoun) (SNP)
Constance, Angela (Livingston) (SNP)
Craigie, Cathie (Cumbernauld and Kilsyth) (Lab)
Crawford, Bruce (Stirling) (SNP)
Cunningham, Roseanna (Perth) (SNP)
Don, Nigel (North East Scotland) (SNP)
Doris, Bob (Glasgow) (SNP)
Eadie, Helen (Dunfermline East) (Lab)
Ewing, Fergus (Inverness East, Nairn and Lochaber) (SNP)
Fabiani, Linda (Central Scotland) (SNP)
Ferguson, Patricia (Glasgow Maryhill) (Lab)
FitzPatrick, Joe (Dundee West) (SNP)
Foulkes, George (Lothians) (Lab)
Fraser, Murdo (Mid Scotland and Fife) (Con)
Gibson, Kenneth (Cunninghame North) (SNP)
Gibson, Rob (Highlands and Islands) (SNP)
Glen, Marilyn (North East Scotland) (Lab)
Godman, Trish (West Renfrewshire) (Lab)
Goldie, Annabel (West of Scotland) (Con)
Gordon, Charlie (Glasgow Cathcart) (Lab)
Grahame, Christine (South of Scotland) (SNP)
Grant, Rhoda (Highlands and Islands) (Lab)
Gray, Iain (East Lothian) (Lab)

Harvie, Christopher (Mid Scotland and Fife) (SNP)
Henry, Hugh (Paisley South) (Lab)
Hepburn, Jamie (Central Scotland) (SNP)
Hyslop, Fiona (Lothians) (SNP)
Ingram, Adam (South of Scotland) (SNP)
Johnstone, Alex (North East Scotland) (Con)
Kelly, James (Glasgow Rutherglen) (Lab)
Ken, Andy (East Kilbride) (Lab)
Kidd, Bill (Glasgow) (SNP)
Lamont, Johann (Glasgow Pollok) (Lab)
Lamont, John (Roxburgh and Berwickshire) (Con)
Livingstone, Marilyn (Kirkcaldy) (Lab)
Lochhead, Richard (Moray) (SNP)
MacAskill, Kenny (Edinburgh East and Musselburgh) (SNP)
Macdonald, Lewis (Aberdeen Central) (Lab)
Macintosh, Ken (East) (SNP)
Martin, Paul (Glasgow Springburn) (Lab)
Marwick, Tricia (Central Fife) (SNP)
Matheson, Michael (Falkirk West) (SNP)
Maxwell, Stewart (West of Scotland) (SNP)
McAveety, Mr Frank (Glasgow Shettleston) (Lab)
McCabe, Tom (Hamilton South) (Lab)
McConnell, Jack (Motherwell and Wishaw) (Lab)
McGrigor, Jamie (Highlands and Islands) (Con)
McKee, Ian (Lothians) (SNP)
McKelvie, Christina (Central Scotland) (SNP)
McLaughlin, Anne (Glasgow) (SNP)
McLetchie, David (Edinburgh Pentlands) (Con)
McMahon, Michael (Hamilton North and Bellshill) (Lab)
McMillan, Stuart (West of Scotland) (SNP)
McNeil, Duncan (Greenock and Inverclyde) (Lab)
McNeill, Pauline (Glasgow Kelvin) (Lab)
McNulty, Des (Clydebank and Milngavie) (Lab)
Milne, Nanette (North East Scotland) (Con)
Mitchell, Margaret (Central Scotland) (Con)
Morgan, Alasdair (South of Scotland) (SNP)
Mulligan, Mary (Linthgow) (Lab)
Murray, Elaine (Dumfries) (Lab)
Neil, Alex (Central Scotland) (SNP)
Oldfather, Irene (Cunninghame South) (Lab)
Park, John (Mid Scotland and Fife) (Lab)
Paterson, Gil (West of Scotland) (SNP)
Peacock, Peter (Highlands and Islands) (Lab)
Peattie, Cathy (Falkirk East) (Lab)
Russell, Michael (South of Scotland) (SNP)
Salmond, Alex (Gordon) (SNP)
Scanlon, Mary (Highlands and Islands) (Con)
Scott, John (Ayr) (Con)
Simpson, Dr Richard (Mid Scotland and Fife) (Lab)
Smith, Elizabeth (Mid Scotland and Fife) (Con)
Somerville, Shirley-Anne (Lothians) (SNP)
Stevenson, Stewart (Banff and Buchan) (SNP)
Stewart, David (Highlands and Islands) (Lab)
Sturgeon, Nicola (Glasgow Govan) (SNP)
Swinney, John (North Tayside) (SNP)
Thompson, Dave (Highlands and Islands) (SNP)
Watt, Maureen (North East Scotland) (SNP)
Welsh, Andrew (Angus) (SNP)
White, Sandra (Glasgow) (LD)
Whitefield, Karen (Airdrie and Shotts) (Lab)
Wilkie, Bill (West of Scotland) (SNP)
Williams, Lesley (North East Scotland) (SNP)
Wilson, John (Central Scotland) (SNP)

The Convener: The result of the division is: For 18, Against 102, Abstentions 0.

Amendment 4 disagreed to.

Amendments 5 and 6 not moved.

Amendment 7 moved—[Robert Brown].
The Convener: The question is, that amendment 7 be agreed to. Are we agreed?

Members: No.

The Convener: There will be a division.

For
Finnie, Ross (West of Scotland) (LD)
Harper, Robin (Lothians) (Green)
Harvie, Patrick (Glasgow) (Green)
MacDonald, Margo (Lothians) (Ind)
McArthur, Liam (Orkney) (LD)
McInnes, Alison (North East Scotland) (LD)
Munro, John Farquhar (Ross, Skye and Inverness West) (LD)
O’Donnell, Hugh (Central Scotland) (LD)
Pringle, Mike (Edinburgh South) (SNP)
Purvis, Jeremy (Tweeddale, Ettrick and Lauderdale) (LD)
Rumbles, Mike (West Aberdeen and Kincardine) (LD)
Scott, Tavish (Shetland) (LD)
Smith, Iain (North East Fife) (LD)
Smith, Margaret (Mid Scotland and Fife) (LD)
Stephen, Nicola (Aberdeen South) (LD)
Stone, Jamie (Caithness, Sutherland and Easter Ross) (LD)
Tolson, Jim (Dunfermline West) (LD)

Against
Adam, Brian (Aberdeen North) (SNP)
Aitken, Bill (Glasgow) (Con)
Alexander, Ms Wendy (Paisley North) (Lab)
Allan, Alasdair (Western Isles) (SNP)
Bailie, Jackie (Dumbarton) (Lab)
Baker, Richard (North East Scotland) (Lab)
Boyack, Sarah (Edinburgh Central) (Lab)
Brankin, Rhona (Midlothian) (Lab)
Brocklebank, Ted (Mid Scotland and Fife) (Con)
Brown, Gavin (Lothians) (Con)
Brown, Keith (Ochil) (SNP)
Brownlee, Derek (South of Scotland) (Con)
Butler, Bill (Glasgow Anniesland) (Lab)
Campbell, Aileen (South of Scotland) (SNP)
Carlaw, Jackson (West of Scotland) (Con)
Chisholm, Malcolm (Edinburgh North and Leith) (Lab)
Coffey, Willie (Kilmarnock and Loudoun) (SNP)
Constance, Angela (Livingston) (SNP)
Craigie, Cathie (Cumbernauld and Kilsyth) (SNP)
Crawford, Bruce (Stirling) (SNP)
Cunningham, Roseanna (Perth) (SNP)
Don, Nigel (North East Scotland) (SNP)
Doris, Bob (Glasgow) (SNP)
Edie, Helen (Dunfermline East) (Lab)
Ewing, Fergus (Inverness East, Nairn and Lochaber) (SNP)
Fabiani, Linda (Central Scotland) (SNP)
Ferguson, Patricia (Glasgow Maryhill) (Lab)
FitzPatrick, Joe (Dundee West) (SNP)
Foulkes, George (Lothians) (Lab)
Fraser, Murdo (Mid Scotland and Fife) (Con)
Gibson, Kenneth (Cunninghame North) (SNP)
Gibson, Rob (Highlands and Islands) (SNP)
Glen, Marilyn (North East Scotland) (Lab)
Godman, Trish (West Renfrewshire) (Lab)
Goldie, Annabel (West of Scotland) (Con)
Gordon, Charlie (Glasgow Cathcart) (Lab)
Graham, Christine (South of Scotland) (SNP)
Grant, Rhoda (Highlands and Islands) (Lab)
Gray, Iain (East Lothian) (Lab)
Harvie, Christopher (Mid Scotland and Fife) (SNP)
Henry, Hugh (Paisley South) (Lab)
Hepburn, Jamie (Central Scotland) (SNP)
Hyslop, Fiona (Lothians) (SNP)
Ingram, Adam (South of Scotland) (SNP)
Johnstone, Alex (North East Scotland) (Con)
Kelly, James (Glasgow Rutherglen) (Lab)
Kerr, Andy (East Kilbride) (Lab)
Kidd, Bill (Glasgow) (SNP)
Lamont, Johann (Glasgow Pollok) (Lab)
Lamont, John (Roxburgh and Berwickshire) (Con)
Livingstone, Marilyn (Kirkcaldy) (Lab)
Lochhead, Richard (Moray) (SNP)
MacAskill, Kenny (Edinburgh East and Musselburgh) (SNP)
Macdonald, Lewis (Aberdeen Central) (Lab)
Macintosh, Ken (Eastwood) (Lab)
Martin, Paul (Glasgow Springburn) (Lab)
Marwick, Tricia (Central Fife) (SNP)
Matheson, Michael (Falkirk West) (SNP)
Maxwell, Steward (West of Scotland) (SNP)
McAveety, Mr Frank (Glasgow Shettleston) (Lab)
McCabe, Tom (Hamilton South) (Lab)
McConnell, Jack (Motherwell and Wishaw) (Lab)
McGrigor, Jamie (Highlands and Islands) (Con)
McKee, Ian (Lothians) (SNP)
McKelvie, Christina (Central Scotland) (SNP)
McLaughlin, Anne (Glasgow) (SNP)
McLetchie, David (Edinburgh Pentlands) (Con)
McMahon, Michael (Hamilton North and Bellshill) (Lab)
McMillan, Stuart (West of Scotland) (SNP)
McNeil, Duncan (Greenock and Inverclyde) (Lab)
McNeill, Pauline (Glasgow Kelvin) (Lab)
McNulty, Des (Claydwell and Milngavie) (Lab)
Milne, Nanette (North East Scotland) (Con)
Mitchell, Margaret (Central Scotland) (Con)
Morgan, Alasdair (South of Scotland) (SNP)
Mulligan, Mary (Linlithgow) (Lab)
Murray, Elaine (Dumfries) (Lab)
Neil, Alex (Central Scotland) (SNP)
Oldfather, Irene (Cunninghame South) (Lab)
Park, John (Mid Scotland and Fife) (Lab)
Paton, Gill (West of Scotland) (SNP)
Peacock, Peter (Highlands and Islands) (Lab)
Peattie, Cathy (Falkirk East) (Lab)
Russell, Michael (South of Scotland) (SNP)
Salmond, Alex (Gordon) (SNP)
Scanlon, Mary (Highlands and Islands) (Con)
Scott, John (Ayr) (Con)
Simpson, Dr Richard (Mid Scotland and Fife) (Lab)
Smith, Elizabeth (Mid Scotland and Fife) (Con)
Somervell, Shirley-Anne (Lothians) (SNP)
Stevenson, Stewart (Banff and Buchan) (SNP)
Stewart, David (Highlands and Islands) (Lab)
Sturgeon, Nicola (Glasgow Govan) (SNP)
Swinney, John (North Tayside) (SNP)
Thomson, Dave (Highlands and Islands) (SNP)
Watt, Maureen (North East Scotland) (SNP)
Welsh, Andrew (Angus) (SNP)
White, Sandra (Glasgow) (SNP)
Whitefield, Karen (Airdrie and Shotts) (Lab)
Whilton, David (Strathkelvin and Bearsden) (Lab)
Wilson, Bill (West of Scotland) (SNP)

The Convener: The result of the division is: For 29623, Against 102, Abstentions 0.

Amendment 7 disagreed to.

Section 1 agreed to.

Section 2 agreed to.
Section 3—Extension of period of detention under section 14 of 1995 Act

The Convener: Amendment 8, in the name of Robert Brown, is grouped with amendments 9 to 23 and amendment 28, as shown in the groupings. I should point out to members that the amendment that is shown between numbers 13 and 15 on the groupings paper should read “14” and not “4”. I think that that is a satisfactory explanation. I also call members’ attention to the pre-emption information on the groupings.

17:30

Robert Brown: Perhaps that shows the potential for deficiencies creeping into the bill by accident during this sort of procedure.

Section 3 is perhaps the most substantial part of the bill because it relates to arrangements for the extension of the six-hour period of detention under section 14 of the Criminal Procedure (Scotland) Act 1995. I have tried to subject the cabinet secretary’s proposals to a degree of critical, but I hope friendly, scrutiny.

Amendment 8 relates to the six-hour period of detention. The only reason why we should be considering the extension of the period today is the result of the Cadder case and any difficulties that there might be in securing the attendance of a solicitor at a police station to provide the support that is required. Any other agenda that might exist behind the scenes to extend periods of detention for other reasons should be dismissed from our minds during this debate.

Through subsection (4) of proposed new section 14ZA of the 1995 act, which amendment 8 would insert, I have tried to give the police—in this instance, it is the police who should make the decision—the authority in exceptional circumstances to extend the period of detention from six hours to 12 hours, “if the officer is satisfied that the detained person wishes to exercise the right ... but has been unable to do so due to a difficulty in securing the attendance of a solicitor.”

That is straightforward enough. As with the principal act, we are talking about an officer of the rank of inspector or above.

There is also the situation with the period of detention going beyond 12 hours, which I am trying to tighten up significantly. I have two suggestions to make, one of which would pre-empt the other. Amendment 9 is my substantive amendment, through which I seek to suggest that there is no hurry on this matter. It is perfectly able to be examined at leisure by the Justice Committee.

Dave Thompson (Highlands and Islands) (SNP): Does Robert Brown accept that the regulations for which amendment 9 would provide would take at least two months—maybe a bit longer—to go through Parliament? For that time, the 12-hour period alone would be set. Is not there a danger that forensic evidence in the case of an accused rapist or paedophile would not necessarily be available within 12 hours and that therefore such an accused person could be released if amendment 9 were agreed to?

Robert Brown: I suggest to Mr Thompson that he has not listened to what I said. I said that it was important to distinguish the reason for the emergency legislation today—the need to deal with Cadder—from more general arguments of the sort that he makes. There might well be a case for the argument that Mr Thompson makes in general terms, but if there is—we are talking about individuals’ civil liberties—it should be dealt with properly by legislation through this Parliament, not as a by-blown, and it should not be used as an excuse to take things forward in that way. Mr Thompson is approaching the matter in the wrong way altogether.

Margo MacDonald (Lothians) (Ind): Would Robert Brown’s remarks apply equally if more than one person were being detained? I am thinking of a smaller police facility in which a number of people were being detained for 12 hours or more.

Robert Brown: I take the point, but I am bound to say that the Scottish Government has been in power since 2007. If it thought that that was such a compelling issue—on the advice of the Lord Advocate, who engages with the Government from time to time on such matters—then I am at something of a loss to understand why we have not had legislation since then to deal with that particular point. Even the emergency arrangements that have been made by the Lord Advocate continue the six-hour provision—obviously she could do only that. They have operated reasonably satisfactorily over the summer. Things operated that way before the Cadder decision was made and would otherwise—but for the bill—have continued to operate after the decision was made. If there are arguments about the point that Margo MacDonald makes, they have to be examined properly by substantive legislation on a different basis.

The point that I was making on amendment 9 was that we could move forward to the 12-hour period if the Government wishes, but that, through the Justice Committee following the statutory instrument process, the amendment would ensure that the more substantial change from the 12-hour period to the 24-hour period would benefit from proper examination by the Parliament. The process would allow the committee to conduct that
examination, to hear people’s views and to make a more considered and proper decision about what is required. That would be the best way of tackling the matter.

However, if amendment 9 does not find favour, my amendment 10 offers the Parliament the option that the extension of a detention period to 24 hours would be sanctioned by a sheriff and not by a police officer. That proposal is pretty important. In all sorts of situations, warrants are sought from sheriffs and other judicial officers when the police require to do searches or obtain information. To involve a sheriff is the obvious way to proceed. Apart from anything else, that would protect the police from allegations that funny things went on in the police office and that the inspector simply rubber-stamped the request to extend the time.

All the other amendments in the group are consequential, so I need not deal with them in detail.

I move amendment 8.

Richard Baker (North East Scotland) (Lab): In the stage 1 debate, we asked whether applications to extend the detention time should be agreed by sheriffs rather than by police officers of the rank of inspector or above, which Robert Brown has just discussed. We welcome his raising the issue for debate.

We accept that, in England and Wales, senior police officers consider such applications. However, that will be a substantial change to our system, so we should consider the best checks and balances for us. We have sought to look further into the matter and we have met the Lord Advocate in doing so.

It is regrettable that we have no evidence beyond the ACPOS advice, but we cannot obtain such evidence because of the strictures that we are under. We have been told that securing permissions from sheriffs would involve practical difficulties in rural areas. On the parliamentary timescale, we cannot gainsay that claim, so—most regrettably—we will not support amendment 8. However, we will have to return to the matter when Parliament properly scrutinises legislation on the issues later. In other circumstances, we might well have supported Robert Brown’s amendment.

Iain Smith (North East Fife) (LD): I am slightly at a loss. If we pass the emergency bill today, it will become a statute of the country on Friday, when it will receive royal assent. When will Parliament have a chance to return to the provisions? I presume that that would require a new bill from the next Government. To say that a future Parliament can consider the matter, if we have got it wrong, is the wrong way of operating. We need to get the bill right today, because it will be law on Friday.

Richard Baker: Our not taking action today might have unintended consequences. However, Mr Smith is right: the issue needs to be the subject of new legislation—probably from a new Government after the next election. When such legislation is introduced, we will be able to debate the points fully. That is the right way to proceed.

We have sympathy with Robert Brown’s amendment 9, which would give the Justice Committee new opportunities to debate the matters on a shorter timescale. However, agreeing to it would mean removing the bill’s current provisions on extending detention times, and we are concerned about what would happen in the interim. The best way to proceed is for me to speak further with Robert Brown before stage 3 to consider whether there is any way to give effect to the proposed mechanism after the provisions in the bill are passed. I hope to have further dialogue with him on that before stage 3.

Bill Aitken (Glasgow) (Con): Robert Brown’s amendments are arguable and have some merits. They are based on his wish—which every one of us has, I am sure—for people to be detained in custody for the minimum possible period before being charged. I have no difficulty in going along with that. The problem is with the practicalities.

No difficulty should arise in 99.9 per cent of cases, because they occur in urban areas, where no problems are experienced in getting hold of solicitors. I have no doubt that figures will be produced in the fullness of time to show that the vast majority of people are charged and released or are kept in custody after consulting a solicitor.

I do not think that the problem should arise very often. The practicality element falls down in cases such as that on the Isle of Skye, which I cited earlier. Under Mr Brown’s amendment 9, it would be impossible to guarantee access to a solicitor within the period. If we were to agree to his consequential amendment 10, a sheriff would be involved in having to agree on the cause shown to extend the period. It is highly unlikely that that would be practicable. Sheriffs do not always live in rural areas. I assume that Mr Brown wants the sheriff to have the deponent—namely the custody officer—come before him to put him on oath. On the basis of what is said, the sheriff will either extend or refuse to extend the period. Practicality is not with Robert Brown in this instance. What he proposes is well meant, but it is simply not workable.

Kenny MacAskill: I understand the points that Richard Baker made. Yesterday, when we held the meeting subsequent to the announcement, I said that I would encourage discussion—indeed, ACPOS is also quite willing to discuss matters. There is legitimate reason to ensure that we get right the provisions. Equally, I know that Mr Baker
has had discussions with the Lord Advocate, who is monitoring the matter. Again, she will be more than happy to co-operate. Finally, we give the assurance that Lord Carloway will review the matter.

The Government feels that it is necessary to resist amendments 8 to 10 and we support Bill Aitken’s comments in this respect. The six hours that Robert Brown proposes in amendment 8 are simply not enough to deal with serious cases. We have information from ACPOS on a variety of scenarios that have occurred since the introduction of the Lord Advocate’s guidelines. We have been told of instances, including of multiple accused or people being held in different geographic areas, and of solicitors who have turned up to see multiple accused and who have refused to deal with them collectively—which is understandable in many instances. Nonetheless, the six-hour time limit was threatened in all of those. Six hours is entirely inappropriate. The scales of justice have been tipped. The requirement is now for a solicitor to be present for the interview. A change to the period of detention therefore needs to be made and the period before review that we propose is shorter than that which applies in England and Wales. In many instances, the safeguards that we propose are similar to those in England and Wales; in some instances, they go beyond them.

I turn to amendment 9. As Richard Baker correctly flagged up, we do not believe that we can wait. The amendment would require us to wait for royal assent and to bring to the Parliament regulations under affirmative procedure. As Dave Thompson correctly pointed out, we could be approaching Christmas before we could do that and, in the interim, no one could be detained beyond the 12 hours. As I said, serious criminals could evade capture or jurisdiction. As Dave Thompson said, if someone was detained in Portree or Inverness and forensic or ballistic evidence was required, the 12 hours could be up by the time the information became available. That is unacceptable—

Mike Rumbles: Will the cabinet secretary give way?

Kenny MacAskill: I need to make progress.

Safeguards are appropriate. As I said, Lord Carloway will review the matter. Delay is entirely unacceptable. We need the legislation and we need it now.

Mike Rumbles: I am a bit concerned about the language that the cabinet secretary is using. We are passing criminal law and the cabinet secretary keeps referring to “criminals”. Surely someone who is detained in a police station is a suspect and not a criminal.

Kenny MacAskill: What we are trying to address is serious legislation of fundamental affect to the people of our country. The pedantry and nomenclature that Mr Rumbles is employing ill befits him.

I turn to amendment 10. The period of detention that we propose before review is shorter than that which applies in England and Wales, I remind Mr Brown and Mr Rumbles. The position that we suggest for Scotland, which ACPOS supports given the review that it has undertaken, are 12 and 24 hours. The 12 hours can be extended by an officer of at least inspector rank and only in serious cases of an indictable nature. The situation in England and Wales under the UK Government—the Liberal Democrats are part of that coalition Government—is a mandatory 24 hours that can be extended by an officer or someone of similar rank to 36 hours. A magistrate can extend the period to 72 hours, but a magistrate is not even on a par with a sheriff in Scotland.

Mr Aitken’s points on the difficulties in accessing sheriffs are correct. We require to work with the Lord Advocate who will work with the Parliament and the police to develop the guidelines. We need sheriffs to focus on what is their best use of judicial time. We also need to ensure that unnecessary matters do not interfere with the due process of law and we need to let the police get on with their investigations.

The bill strikes the correct balance. The scales of justice have been tipped by the Supreme Court’s decision in Cadder v HMA. We must ensure that the police are armed equally to the solicitors who are there to assist the accused. That is why I oppose Mr Brown’s amendments.

17:45

Robert Brown: This has been an interesting and important debate on an issue that is at the core of the bill. The cabinet secretary is scratching about a bit if he is blaming the current coalition Government, which has been in power for only five months, for the legislative situation at Westminster. I am not sure what he expected us to do about the situation within that period, even if it became an issue.

Mike Rumbles was right to say that there is an issue of language that affects the approach that is taken. As I said in the stage 1 debate, the cabinet secretary has consulted people on the prosecution side: the Crown Office, the Lord Advocate and ACPOS, which has been brought into the debate. There is a balance to be struck when one is dealing with criminal legislation. Mike Rumbles was right to say that we are dealing with people who are suspects—people who are accused of
crimes but who may or may not have committed them.

I am saying not that there should be no extension of the detention period but that, over the summer, since the Lord Advocate’s guidelines have been in place, we have had a bit of experience of one or two of the issues relating to timescales and so on that may be thrown up. That may justify extension of the detention period to 12 hours, for the sake of argument, but it does not necessarily follow from that that we must do so immediately, without the possibility of detailed consideration of the implications.

The cabinet secretary indicated that some information about possible problems is coming through from ACPOS. The Parliament has no knowledge of that, bar a throwaway paragraph—in fact, a subordinate clause—in the policy memorandum. We do not have the details and nor do we know the strength of the information. We do not know the extent of the problem or how often it occurs. The suggestion that, because there may be a problem on the Isle of Skye, we must change the legislation completely to deal with that, seems peculiar. Clearly, we must deal with the problem on the Isle of Skye, but the normal position ought to be one that is applicable and reasonable in the rest of Scotland. There ought to be further discussion of the issue, as we are talking about periods of six, 12 and 24 hours’ detention.

I accept the point that Bill Aitken made about sheriffs not living in rural areas, but we live in an era in which there are such things as e-mails and telephones and it is possible to transmit information to a distant point. Surely it is possible, in the exceptional circumstances that have been described, to deal with matters in a satisfactory way. I do not pretend to know the answer, but situations that are relatively exceptional should be dealt with as such.

The bill is a criminal statute that will allow the prosecution authorities—in particular, the police—to lock up people for longer than has hitherto been possible. There may be good cause for that, but it should not be done without careful consideration and examination. Amendment 9 offers the Parliament the opportunity to consider the issue with a degree of leisure after the detention period has been extended to 12 hours, if members are so minded.

We are dealing with a significant matter of civil liberties. The position should not be changed by way of a by-blown, and the bill should not take on board all of the other issues that members have raised. The Government could have dealt with those in other ways, if it had concerns about them. Due consideration should be given to the matter. Against that background, I will press the amendments in my name.

*The Convener: The question is, that amendment 8 be agreed to. Are we agreed?*

*Members: No.*

*The Convener: There will be a division.*
Hyslop, Fiona (Lothians) (SNP)
Ingram, Adam (South of Scotland) (SNP)
Johnstone, Alex (North East Scotland) (Con)
Kelly, James (Glasgow Rutherglen) (Lab)
Kerr, Andy (East Kilbride) (Lab)
Kidd, Bill (Glasgow) (SNP)
Lamont, Johann (Glasgow Pollok) (Lab)
Lamont, John (Roxburgh and Berwickshire) (Con)
Livingstone, Marilyn (Kirkcaldy) (Lab)
Lochhead, Richard (Moray) (SNP)
MacAskill, Kenny (Edinburgh East and Musselburgh) (SNP)
Macdonald, Lewis (Aberdeen Central) (Lab)
Macintosh, Ken (Eastwood) (Lab)
Martin, Paul (Glasgow Springfield) (Lab)
Marwick, Tricia (Central Fife) (SNP)
Matheson, Michael (Inverclyde) (SNP)
Maxwell, Stewart (West of Scotland) (SNP)
McAveety, Mr Frank (Glasgow Shettleston) (Lab)
McCabe, Tom (Hamilton South) (Lab)
McConnell, Jack (Motherwell and Wishaw) (Lab)
McGrigor, Jamie (Highlands and Islands) (Con)
McKee, Ian (Lothians) (SNP)
McKellar, Christina (Central Scotland) (SNP)
McLaughlin, Anne (Glasgow) (SNP)
McLetchie, David (Edinburgh Pentlands) (Lab)
McMahon, Michael (Hamilton North and Bellshill) (Lab)
McMillan, Stuart (West of Scotland) (SNP)
McNeil, Duncan (Greenock and Inverclyde) (Lab)
McNeill, Pauline (Glasgow Kelvin) (Lab)
McNulty, Des (Clydebank and Milngavie) (Lab)
Milne, Nanette (North East Scotland) (Con)
Mitchell, Margaret (Central Scotland) (Con)
Morgan, Alasdair (South of Scotland) (SNP)
Mulligan, Mary (Linlithgow) (Lab)
Murray, Elaine (Dumfries) (Lab)
Neat, Alex (Central Scotland) (SNP)
Oldfather, Irene (Cunninghame South) (Lab)
Park, John (Mid Scotland and Fife) (Lab)
Paterson, Gil (West of Scotland) (SNP)
Peacock, Peter (Highlands and Islands) (Lab)
Peattie, Cathy (Falkirk East) (Lab)
Russell, Michael (South of Scotland) (SNP)
Salmond, Alex (Gordon) (SNP)
Scanlon, Mary (Highlands and Islands) (Con)
Scott, Jo (Ayr) (Con)
Simpson, Dr Richard (Mid Scotland and Fife) (Lab)
Smith, Elizabeth (Mid Scotland and Fife) (Con)
Somerville, Shirley-Anne (Lothians) (SNP)
Stevenson, Stewart (Banff and Buchan) (SNP)
Stewart, David (Highlands and Islands) (Lab)
Sturgeon, Nicola (Glasgow Govan) (SNP)
Swinney, John (North Tayside) (SNP)
Thompson, Dave (Highlands and Islands) (SNP)
Watt, Maureen (North East Scotland) (SNP)
Welsh, Andrew (Angus) (SNP)
White, Sandra (Glasgow) (SNP)
Whitefield, Karen (Airdrie and Shotts) (Lab)
Whitton, David (Strathkelvin and Bearsden) (Lab)
Wilson, Bill (West of Scotland) (SNP)
Wilson, John (Central Scotland) (SNP)

The Convener: The question is, that amendment 9 be agreed to. Are we agreed?

Members: No.

The Convener: There will be a division.

For
Brown, Robert (Glasgow) (LD)
Finnie, Ross (West of Scotland) (LD)
Harper, Robin (Lothians) (Green)
Harvie, Patrick (Glasgow) (Green)
MacDonald, Margo (Lothians) (Ind)
McArthur, Liam (Orkney) (LD)
McInnes, Alison (North East Scotland) (LD)
Munro, John Farquhar (Ross, Skye and Inverness West) (LD)
O'Donnell, Hugh (Central Scotland) (LD)
Pringle, Mike (Edinburgh South) (LD)
Purvis, Jeremy (Tweeddale, Ettrick and Lauderdale) (LD)
Rumbles, Mike (West Aberdeenshire and Kincardine) (LD)
Scott, Tavish (Shetland) (LD)
Smith, Iain (North East Fife) (LD)
Smith, Margaret (Edinburgh West) (LD)
Stephen, Nicol (Aberdeen South) (LD)
Stone, Jamie (Caithness, Sutherland and Easter Ross) (LD)
Tolson, Jim (Dunfermline West) (LD)

Against
Adam, Brian (Aberdeen North) (SNP)
Aitken, Bill (Glasgow) (Con)
Alexander, Ms Wendy (Paisley North) (Lab)
Allan, Alasdair (Western Isles) (SNP)
Baillie, Jackie (Dumbarton) (Lab)
Baker, Richard (North East Scotland) (Lab)
Boyack, Sarah (Edinburgh Central) (Lab)
Brankin, Rhona (Midlothian) (Lab)
Brocklebank, Ted (Mid Scotland and Fife) (Con)
Brown, Gavin (Lothians) (Con)
Brown, Keith (Ochil) (SNP)
Brownlee, Derek (South of Scotland) (Con)
Butler, Bill (Glasgow Anniesland) (Lab)
Campbell, Aileen (South of Scotland) (SNP)
Carlaw, Jackson (West of Scotland) (Con)
Chisholm, Malcolm (Edinburgh North and Leith) (Lab)
Coffey, Willie (Kilmarnock and Loudoun) (SNP)
Constance, Angela (Livingston) (SNP)
Craigmyle, Cathie (Cumbernauld and Kilsyth) (Lab)
Crawford, Bruce (Stirling) (SNP)
Cunningham, Roseanna (Perth) (SNP)
Don, Nigel (North East Scotland) (SNP)
Doris, Bob (Glasgow) (SNP)
Eadie, Helen (Dunfermline East) (Lab)
Ewing, Fergus (Inverness East, Nairn and Lochaber) (SNP)
Fabiani, Linda (Central Scotland) (SNP)
Ferguson, Patricia (Glasgow Maryhill) (Lab)
FitzPatrick, Joe (Dundee West) (SNP)
Foulkes, George (Lothians) (Lab)
Fraser, Murdo (Mid Scotland and Fife) (Con)
Gibson, Kenneth (Cunninghame North) (SNP)
Gibson, Rob (Highlands and Islands) (SNP)
Glen, Marilyn (North East Scotland) (Lab)
Godman, Trish (West Renfrewshire) (Lab)
Goldie, Annabel (West of Scotland) (Con)
Gordon, Charlie (Glasgow Cathcart) (Lab)
Graham, Christine (South of Scotland) (SNP)
Grant, Rhoda (Highlands and Islands) (Lab)
Gray, Iain (East Lothian) (Lab)
Harvie, Christopher (Mid Scotland and Fife) (SNP)
Henry, Hugh (Paisley South) (Lab)
Hepburn, Jamie (Central Scotland) (SNP)

Amendment 8 disagreed to.

The Convener: The result of the division is: For 18, Against 102, Abstentions 0.
The Convener: The result of the division is: For 81, Against 101, Abstentions 0.

Amendment 9 disagreed to.

Amendment 10 moved—[Robert Brown].

The Convener: The question is, that amendment 10 be agreed to. Are we agreed?

Members: No.

The Convener: There will be a division.
Scott, John (Ayr) (Con)
Smith, Elizabeth (Mid Scotland and Fife) (Con)
Somerville, Shirley-Anne (Lothians) (SNP)
Stevenson, Stewart (Banff and Buchan) (SNP)
Sturgeon, Nicola (Glasgow Govan) (SNP)
Swinney, John (North Tayside) (SNP)
Thompson, Dave (Highlands and Islands) (SNP)
Watt, Maureen (North East Scotland) (SNP)
Welsh, Andrew (Angus) (SNP)
White, Sandra (Glasgow) (SNP)
Wilson, Bill (West of Scotland) (SNP)
Wilson, John (Central Scotland) (SNP)

Abstentions
Alexander, Ms Wendy (Paisley North) (Lab)
Baillie, Jackie (Dunbarton) (Lab)
Baker, Richard (North East Scotland) (Lab)
Boyack, Sarah (Edinburgh Central) (Lab)
Brankin, Rhona (Midlothian) (Lab)
Butler, Bill (Glasgow Anniesland) (Lab)
Chisholm, Malcolm (Edinburgh North and Leith) (Lab)
Craige, Cathie (Cumbernauld and Kilsyth) (Lab)
Eadie, Helen (Dunfermline East) (Lab)
Ferguson, Patricia (Glasgow Maryhill) (Lab)
Foulkes, George (Lothians) (Lab)
Glen, Marlyn (North East Scotland) (Lab)
Godman, Trish (West Renfrewshire) (Lab)
Gordon, Charlie (Glasgow Cathcart) (Lab)
Grant, Rhoda (Highlands and Islands) (Lab)
Gray, Iain (East Lothian) (Lab)
Henry, Hugh (Paisley South) (Lab)
Kelly, James (Glasgow Rutherglen) (Lab)
Kerr, Andy (East Kilbride) (Lab)
Lamont, Johann (Glasgow Pollok) (Lab)
Livingstone, Marilyn (Kirkcaldy) (Lab)
Macdonald, Lewis (Aberdeen Central) (Lab)
Macintosh, Ken (Eastwood) (Lab)
Martin, Paul (Glasgow Springfield) (Lab)
McAveety, Mr Frank (Glasgow Shettleston) (Lab)
McCabe, Tom (Hamilton South) (Lab)
McConnell, Jack (Motherwell and Wishaw) (Lab)
McMahon, Michael (Hamilton North and Bellshill) (Lab)
McNeil, Duncan (Greenock and Inverclyde) (Lab)
McNeill, Pauline (Glasgow Kelvin) (Lab)
McNulty, Des (Clydebank and Milngavie) (Lab)
Mulligan, Mary (Linthgow) (Lab)
Murray, Elaine (Dumfries) (Lab)
Oldfather, Irene (Cunninghame South) (Lab)
Park, John (Mid Scotland and Fife) (Lab)
Peacock, Peter (Highlands and Islands) (Lab)
Peattie, Cathy (Falkirk East) (Lab)
Simpson, Dr Richard (Mid Scotland and Fife) (Lab)
Stewart, David (Highlands and Islands) (Lab)
Whitefield, Karen (Airdrie and Shotts) (Lab)
Whitton, David (Strathkelvin and Bearsden) (Lab)

The Convener: The result of the division is: For 18, Against 61, Abstentions 41.

Amendment 10 disagreed to.

Robert Brown: You might be relieved to know, convener, that I do not propose to move the rest of the amendments in this group.

The Convener: I am perfectly content, Mr Brown, and I think that members in the rest of the chamber are, too.

Amendments 11 to 23 not moved.

Section 3 agreed to.

Sections 4 to 6 agreed to.

Section 7—References by the Scottish Criminal Cases Review Commission

The Convener: Amendment 24, in the name of Bill Aitken, is grouped with amendments 25 and 26.

Bill Aitken: Amendments 24 to 26 would all amend section 7, and relate to the appeal process—specifically to references by the Scottish Criminal Cases Review Commission. From time to time in the course of the debate, we have indicated that there must be finality in the legal process. Everyone is entitled to a fair trial, and everyone is entitled to appeal where there are grounds to do so—no one could possibly object to that—and that is to maintain the standards of human rights that we in Scotland support.

However, under section 7(4), the issue is left open to some strange interpretation. As it stands, the bill states:

“Where the Commission—”

that is, the Scottish Criminal Cases Review Commission—

“has referred a case to the High Court under”

the relevant section of the earlier legislation,

“the High Court may ... reject the reference if the Court considers that it is not in the interests of justice that any appeal arising from the reference should proceed.”

Frankly, that is a pretty fatuous piece of legislation. If proceeding with the appeal would not be in the interests of justice, why would it be allowed to proceed? That should be the end of the matter, pure and simple.

One can continue with the appeal process only so far, and I would be very surprised if the High Court were ever to hear an appeal when it was not in the interests of justice to do so. Why would we want legislation that said that that would be appropriate? There should be a prohibiter in section 7(4), which would be achieved by changing “may” to “must”. Amendment 25 takes that approach.

I suspect that amendment 26, in Christine Grahame’s name, is predicated on her involvement in the Megrahi case. I do not share Ms Grahame’s views in that respect, but she is perfectly entitled to put them forward.

We can allow an appeal process to continue only so far. The interests of justice demand that appeals be heard, and heard appropriately. The current wording of the bill will leave us in an extremely anomalous position, which will be profoundly unhelpful in respect of future determinations.
I move amendment 24.

Christine Grahame (South of Scotland) (SNP): Amendment 26 is a probing amendment, which is supplementary to my intervention during the cabinet secretary’s opening speech in the stage 1 debate and further develops my concern about section 7. There has been a focus on the Supreme Court’s role, the Scottish criminal legal system and the period of detention during which representation is required, and the ramifications of section 7 have been overlooked, in the main. I intend to redress that problem.

The current position is that if, after consideration, the SCCRC thinks that there might have been a miscarriage of justice, it will make a referral to the High Court if an appeal is in the interests of justice—full stop. Section 7(3)(b) will insert a further test, which can override the current criteria. The test is:

“the need for finality and certainty in the determination of criminal proceedings.”

Therefore, the interests of justice can be outweighed by the need for finality and certainty. Finality for whom? Certainty for whom? In whose interest?

Further to that substantial change to the SCCRC’s remit, section 7(4) will introduce for the High Court the power to reject a referral if it is not in the interests of justice, having regard to

“the need for finality and certainty”—

that phrase again. The current position is that when the SCCRC makes a referral to the High Court, the court must accept it—it has no discretion in the matter. The approach in section 7(4) is a substantial change. The court of appeal will be able to reject the referral, even if the case has met the test in section 7(3)(b).

Bill Aitken referred to the Megrahi case, so I will use that case as an example. Let us suppose that on Abdelbaset al-Megrahi’s death a third party steps into a dead man’s shoes and applies to the SCCRC for referral to the court of appeal, and the SCCRC says—even though the finality and certainty test has been introduced—“Yes, we agree to that referral to the High Court.” However, the High Court says, “No, we do not think that it is in the interests of justice that the referral is taken up by us; that is not in the interests of finality and certainty.” The problem is that the judges who make that decision are the very judges whose previous judgment is being challenged. There is a conflict of interest, which compounds the problem.

I referred to the Megrahi case because Bill Aitken mentioned it. Let us consider the general purpose of the SCCRC. In 2010, 97 cases were referred to the High Court. Of those, the High Court determined 73, with 44 appeals granted, 20 refused and nine abandoned. The success rate was therefore 60 per cent. If two extra hurdles are put in place—that the SCCRC and then the High Court must say that the appeal is in the interests of justice, having regard to the need for finality and certainty—how many cases will proceed in 2011?

My concern is that the provision not only deals with the Cadder case but affects all cases that are referred to the SCCRC and we have had no evidence on it. It is a substantial change to what the SCCRC can do and to the powers of the court of appeal, but not one shred of evidence have we been able to hear on it. It also follows that the amendments that the Conservatives propose would make the situation worse by taking away discretion and making the exercise of the power mandatory.

I look forward to hearing what the cabinet secretary has to say—it is important to put that on the record—and I hope that, if the provision is agreed to, the Megrahi case does not follow the path that I suspect it might if it is taken to the SCCRC.

18:00

James Kelly (Glasgow Rutherglen) (Lab): One of the striking points about yesterday’s judgment was the need for finality and certainty. The judgment specifically referred to cases that were referred to the Scottish Criminal Cases Review Commission. One of the many concerns is that cases that would come into the retrospective category would go to the commission and might be reopened.

The important point about section 7 is that it addresses that loophole and limits the exposure on certain of the cases that have been discussed in the media of late. From that point of view, the section is essential, therefore I do not support Christine Grahame’s amendment 26.

The Conservative amendments 24 and 25 seem logical, in that, if the commission comes to the view that continuing a case is not in the interests of justice, it should make an absolute referral on it instead of leaving it open, as is the case with the way in which the bill is drafted.

In summary, I oppose Christine Grahame’s amendment and support the Conservative ones.

Robert Brown: I have some difficulty with section 7. I must confess that when I first read the bill, my attention was on its earlier sections, and I took at face value the cabinet secretary’s assurance that sections 6 and 7 were designed to deal with the need to avoid additional cases going into the pool. We have representations from a number of legal sources about the difficulties of
the matter, and the more I hear about it the more I am unhappy with the direction of travel.

To a degree, it might be argued that at least part of section 7 should make little difference to the Scottish Criminal Cases Review Commission, because the questions of finality and the interests of justice should be part of its remit and process in any event. However, the commission exists for a purpose—to provide a long stop against injustice that has gone on for a period—and has fulfilled a useful role in that regard.

Christine Grahame is right: the issues that section 7 raises go far beyond sorting out the Cadder judgment and show again why it is so difficult to draft emergency legislation that is confined to a particular issue. In practical terms, we are dealing with the remit of the Scottish Criminal Cases Review Commission and its relationship with the Scottish court of criminal appeal. We should not touch that important and sensitive relationship ill-advisedly and without full examination of the consequences. In section 7, we are not only sorting out issues that arise from Cadder—and I am not sure that it will make that much difference to the Cadder implications—but going far beyond that and affecting the commission’s operation, which is highly undesirable.

Christine Grahame is entirely right to raise the issue. Her recommendations to the cabinet secretary should be supported, and I will be interested to hear what he has to say in reply. The Liberal Democrats were concerned about the pool of cases, but I am not satisfied that section 7 makes enough difference to the pool to allow us to override the other, important issues.

Patrick Harvie (Glasgow) (Green): James Kelly seems confident and certain that the provisions in section 7 will prevent from coming into play only cases that would have come into play had yesterday’s judgment been retrospective, but it seems clear to me that section 7 is not specific—it is general and will apply in all cases in which a reference might be made to the SCCRC. That point was debated over a long period and after proper, in-depth parliamentary scrutiny when we considered the original legislation.

I have some sympathy with the comments that Christine Grahame made in speaking to her amendment 26. In general terms, both Bill Aitken and the Government are trying to change the general procedures in the referral of cases. Why should we consider a general change to the procedure as an emergency? That speaks to my concern about the whole bill. Even if, as the Government argues, some aspects of the bill need to be treated as an emergency, why is a change to the general operation of the commission such a question of emergency?

Kenny MacAskill: Amendments 24 and 25 are almost diametrically opposed by amendment 26. Although we have more sympathy with Mr Aitken, the fact that we have two conflicting proposals makes us think that our suggested course of action is the one that members should initially follow.

I will deal first with Christine Grahame’s amendment 26. James Kelly was correct to make the points that he did. Lord Hope and Lord Rodger made it clear in their judgment that there are difficulties and that we require finality and certainty. As members will know if they have had the opportunity to read the judgment, those difficulties are predicated not on matters relating to the Supreme Court and Scotland or the position of the SCCRC but on matters that are almost universal to other jurisdictions. That is why the major case that they referred to was from the Supreme Court of Ireland—the case of A v The Governor of Arbour Hill Prison. The Supreme Court of Ireland made it clear that we have to have finality and certainty and that matters cannot subsequently be vastly changed, with the great difficulties that would follow. That is required in any jurisdiction and is not related to any one case or specifically to Scotland. It is what all sensible jurisdictions do to ensure that we have finality and certainty. I agree with James Kelly on those points.

To reassure Christine Grahame, I point out that the interests of justice cannot be overridden by the additional test. It is not meant to be an either/or; the bill introduces an additional and parallel test. We are saying to the SCCRC that, as well as looking at the interests of justice, it should also bear in mind the requirements for finality and certainty. On the question of judges, I can also assure her that the judge who considers a referral from the SCCRC will always be different from the original trial judge. She can have no doubts about that.

I have some sympathy with Bill Aitken’s points and where he is coming from, but the current provision in the bill is reasonable and proportionate. We believe that the existing provision is and will be acceptable to the High Court. We also have great faith in and trust the High Court’s judgment—it is not likely to act in a contrary manner. We have great sympathy for it, and we think that it will bear in mind all the issues.

We are happy again to give an undertaking that the provision will be reviewed by Lord Carloway, which provides an appropriate balance in relation to the positions taken by Patrick Harvie, Robert Brown and Christine Grahame. The bill provides an interim measure to bring in a parallel test so that the test is not simply the interests of justice. We provide for the requirement for finality and
certainty that Lords Hope and Rodger correctly flagged up in their judgment, but we undertake that the provision will be reviewed by Lord Carloway and could be amended thereafter.

**Patrick Harvie:** If the cabinet secretary regards the provisions in the bill as an interim measure, why is there no sunset clause?

**Kenny MacAskill:** I will be happy to address that point when we come to the next amendment. I think that the convener would rather that I hold my fire until then—unless he wishes otherwise.

**The Convener:** I call Bill Aitken to wind up.

**Bill Aitken:** I will largely adhere to my earlier arguments. Despite what the cabinet secretary has said, I am still not persuaded that section 7 is appropriate. Indeed, if we are to have finality and certainty, we cannot have it with section 7.

With regard to some of the appeals that have repeatedly come before the High Court and which have required an ever-increasing bench each time, I was tempted to think that, by means of arithmetic progression, we will run out of available judges to hear cases and that the High Court of Justiciary will become a cast of thousands. Every time that there is a bigger bench, there will be fewer judges to hear the case who have not previously been involved in it.

There must be certainty and an underlining of the judicial process. We cannot have a situation whereby appeals that are not in the interests of justice proceed.

**The Convener:** The question is, that amendment 24 be agreed to. Are we agreed?

**Members:** No.

**The Convener:** There will be a division.

**For**

Aitken, Bill (Glasgow) (Con)
Alexander, Ms Wendy (Paisley North) (Lab)
Bailie, Jackie (Dumbarton) (Lab)
Baker, Richard (North East Scotland) (Lab)
Boyack, Sarah (Edinburgh Central) (Lab)
Brankin, Rhona (Midlothian) (Lab)
Brocklebank, Ted (Mid Scotland and Fife) (Con)
Brown, Gavin (Lothians) (Con)
Brownlee, Derek (South of Scotland) (Con)
Butler, Bill (Glasgow Anniesland) (Lab)
Carlaw, Jackson (West of Scotland) (Con)
Chisholm, Malcolm (Edinburgh North and Leith) (Lab)
Craigie, Cathie (Cumbernauld and Kilsyth) (Lab)
Eadie, Helen (Dunfermline East) (Lab)
Ferguson, Patricia (Glasgow Maryhill) (Lab)
Foulkes, George (Lothians) (Lab)
Fraser, Murdo (Mid Scotland and Fife) (Con)
Glen, Marilyn (North East Scotland) (Lab)
Godman, Trish (West Renfrewshire) (Lab)
Goldie, Annabel (West of Scotland) (Con)
Gordon, Charlie (Glasgow Cathcart) (Lab)
Grant, Rhoda (Highlands and Islands) (Lab)
Gray, Iain (East Lothian) (Lab)
Henry, Hugh (Paisley South) (Lab)
Johnstone, Alex (North East Scotland) (Con)
Kelly, James (Glasgow Rutherglen) (Lab)
Kerr, Andy (East Kilbride) (Lab)
Lamont, Johann (Glasgow Pollok) (Lab)
Lamont, John (Roxburgh and Berwickshire) (Con)
Livingstone, Marilyn (Kirkcaldy) (Lab)
Macdonald, Lewis (Aberdeen Central) (Lab)
Macintosh, Ken (Eastwood) (Lab)
Martin, Paul (Glasgow Springburn) (Lab)
Mcaveety, Mr Frank (Glasgow Shettleston) (Lab)
McCabe, Tom (Hamilton South) (Lab)
McConnell, Jack (Motherwell and Wishaw) (Lab)
McGrigor, Jamie (Highlands and Islands) (Con)
McLeitchie, David (Edinburgh Pentlands) (Con)
McMahon, Michael (Hamilton North and Bellshill) (Lab)
McNeil, Duncan (Greenock and Inverclyde) (Lab)
McNeill, Pauline (Glasgow Kelvin) (Lab)
Mcnulty, Des (Clydebank and Milngavie) (Lab)
Milne, Nanette (North East Scotland) (Con)
Mitchell, Margaret (Central Scotland) (Con)
Mulligan, Mary (Linlithgow) (Lab)
Murray, Elaine (Dumfries) (Lab)
Oldfather, Irene (Cunninghame South) (Lab)
Park, John (Mid Scotland and Fife) (Lab)
Peatlie, Cathy (Falkirk East) (Lab)
Scanlon, Mary (Highlands and Islands) (Con)
Scott, John (Ayr) (Con)
Simpson, Dr Richard (Mid Scotland and Fife) (Lab)
Smith, Elizabeth (Mid Scotland and Fife) (Con)
Stewart, David (Highlands and Islands) (Lab)
Whitefield, Karen (Airdrie and Shotts) (Lab)
Whitton, David (Strathkelvin and Bearsden) (Lab)

**Against**

Adam, Brian (Aberdeen North) (SNP)
Allan, Alasdair (Western Isles) (SNP)
Brown, Keith (Ochil) (SNP)
Brown, Robert (Glasgow) (LD)
Campbell, Alieen (South of Scotland) (SNP)
Coffey, Willie (Kilmarnock and Loudoun) (SNP)
Constance, Angela (Livingston) (SNP)
Crawford, Bruce (Stirling) (SNP)
Cunningham, Roseanna (Perth) (SNP)
Don, Nigel (North East Scotland) (SNP)
Doris, Bob (Glasgow) (SNP)
Ewing, Fergus (Inverness East, Nairn and Lochaber) (SNP)
Fabiani, Linda (Central Scotland) (SNP)
Finnie, Ross (West of Scotland) (LD)
FitzPatrick, Joe (Dundee West) (SNP)
Gibson, Kenneth (Cunninghame North) (SNP)
Gibson, Rob (Highlands and Islands) (SNP)
Grahame, Christine (South of Scotland) (SNP)
Harper, Robin (Lothians) (Green)
Harvie, Christopher (Mid Scotland and Fife) (SNP)
Harvie, Patrick (Glasgow) (Green)
Hepburn, Jamie (Central Scotland) (SNP)
Hyslop, Fiona (Lothians) (SNP)
Ingram, Adam (South of Scotland) (SNP)
Kidd, Bill (Glasgow) (SNP)
Lochhead, Richard (Moray) (SNP)
MacAskill, Kenny (Edinburgh East and Musselburgh) (SNP)
MacDonald, Margo (Lothians) (Ind)
Marwick, Tricia (Central Fife) (SNP)
Matheson, Michael (Falkirk West) (SNP)
Maxwell, Stewart (West of Scotland) (SNP)
McArthur, Liam (Orkney) (LD)
McInnes, Alison (North East Scotland) (LD)
Mckee, Ian (Lothians) (SNP)
McKelvie, Christina (Central Scotland) (SNP)
McLaughlin, Anne (Glasgow) (SNP)
McMillan, Stuart (West of Scotland) (SNP)
Morgan, Alasdair (South of Scotland) (SNP)
Munro, John Farquhar (Ross, Skye and Inverness West) (LD)
Neil, Alex (Central Scotland) (SNP)
O'Donnell, Hugh (Central Scotland) (LD)
Paterson, Gill (West of Scotland) (SNP)
Pringle, Mike (Edinburgh South) (LD)
Purvis, Jeremy (Tweeddale, Ettrick and Lauderdale) (LD)
Rumbles, Mike (West Aberdeenshire and Kincardine) (LD)
Russell, Michael (South of Scotland) (SNP)
Salmond, Alex (Gordon) (SNP)
Scott, Tavish (Shetland) (LD)
Smith, Iain (North East Fife) (LD)
Smith, Margaret (Edinburgh West) (LD)
Somerville, Shirley-Anne (Lothians) (SNP)
Stephen, Nicol Aberdeen South) (LD)
Stevenson, Stewart (Banff and Buchan) (SNP)
Stone, Jamie (Caithness, Sutherland and Easter Ross) (LD)
Sturgeon, Nicola (Glasgow Govan) (SNP)
Swinney, John (North Tayside) (SNP)
Thomson, Dave (Highlands and Islands) (SNP)
Tolson, Jim (Dunfermline West) (LD)
Watt, Maureen (North East Scotland) (SNP)
Welsh, Andrew (Angus) (SNP)
White, Sandra (Glasgow) (SNP)
Wilson, Bill (West of Scotland) (SNP)
Wilson, John (Central Scotland) (SNP)

The Convener: The result of the division is: For 57, Against 63, Abstentions 0.
Amendment 24 disagreed to.
Amendment 25 moved—[Bill Aitken].

The Convener: The question is, that amendment 25 be agreed to. Are we agreed?

Members: No.

The Convener: There will be a division.

For
Aitken, Bill (Glasgow) (Con)
Alexander, Ms Wendy (Paisley North) (Lab)
Bailie, Jackie (Dumbarton) (Lab)
Baker, Richard (North East Scotland) (Lab)
Boyack, Sarah (Edinburgh Central) (Lab)
Branik, Rhona (Midlothian) (Lab)
Brocklebank, Ted (Mid Scotland and Fife) (Con)
Brown, Gavin (Lothians) (Con)
Brownlee, Derek (South of Scotland) (Con)
Butler, Bill (Glasgow Anniesland) (Lab)
Carlaw, Jackson (West of Scotland) (Con)
Chisholm, Malcolm (Edinburgh North and Leith) (Lab)
Craieig, Cathie (Cumbernauld and Kilsyth) (Lab)
Eadie, Helen (Dunfermline East) (Lab)
Ferguson, Patricia (Glasgow Maryhill) (Lab)
Foulkes, George (Lothians) (Lab)
Fraser, Murdo (Mid Scotland and Fife) (Con)
Glen, Marilyn (North East Scotland) (Lab)
Godman, Trish (West Renfrewshire) (Lab)
Goldie, Annabel (West of Scotland) (Con)
Gordon, Charlie (Glasgow Cathcart) (Lab)
Grant, Rhoda (Highlands and Islands) (Lab)
Gray, Iain (East Lothian) (Lab)
Henry, Hugh (Paisley South) (Lab)
Johnstone, Alex (North East Scotland) (Con)
Kelly, James (Glasgow Rutherglen) (Lab)
Kerr, Andy (East Kilbride) (Lab)
Lamont, Johann (Glasgow Pollok) (Lab)

Against
Adam, Brian (Aberdeen North) (SNP)
Allan, Alasdair (Western Isles) (SNP)
Brown, Keith (Ochil) (SNP)
Brown, Robert (Glasgow) (LD)
Campbell, Aileen (South of Scotland) (SNP)
Coffey, Willie (Kilmarnock and Loudoun) (SNP)
Constance, Angela (Livingston) (SNP)
Crawford, Bruce (Stirling) (SNP)
Cunningham, Roseanna (Perth) (SNP)
Don, Nigel (North East Scotland) (SNP)
Doris, Bob (Glasgow) (SNP)
Ewing, Fergus (Inverness East, Nairn and Lochaber) (SNP)
Fabiani, Linda (Central Scotland) (SNP)
Finnie, Ross (West of Scotland) (LD)
FitzPatrick, Joe (Dundee West) (SNP)
Gibson, Kenneth (Cunninghame North) (SNP)
Gibson, Rob (Highlands and Islands) (SNP)
Graham, Christine (South of Scotland) (SNP)
Harper, Robin (Lothians) (Green)
Harvie, Christopher (Mid Scotland and Fife) (SNP)
Harvie, Patrick (Glasgow) (Green)
Hepburn, Jamie (Central Scotland) (SNP)
Hyslop, Fiona (Lothians) (SNP)
Ingram, Adam (South of Scotland) (SNP)
Kidd, Bill (Glasgow) (SNP)
Lochhead, Richard (Moray) (SNP)
MacAskill, Kenny (Edinburgh East and Musselburgh) (SNP)
MacDonald, Margo (Lothians) (Ind)
Marwick, Tricia (Central Fife) (SNP)
Matheson, Michael (Falkirk West) (SNP)
Maxwell, Stewart (West of Scotland) (SNP)
McArthur, Liam (Orkney) (LD)
McInnes, Alison (North East Scotland) (LD)
McKee, Ian (Lothians) (SNP)
McKelvie, Christina (Central Scotland) (SNP)
McLaughlin, Anne (Glasgow) (SNP)
McMillan, Stuart (West of Scotland) (SNP)
Morgan, Alasdair (South of Scotland) (SNP)
Munro, John Farquhar (Ross, Skye and Inverness West) (LD)
Neil, Alex (Central Scotland) (SNP)
Amendment 25 disagreed to.

Amendment 26 moved—[Robert Brown].

The Convener: The result of the division is: For 57, Against 63, Abstentions 0.

The Convener: The question is, that amendment 26 be agreed to. Are we agreed?

Members: No.

The Convener: There will be a division.

For
Brown, Robert (Glasgow) (LD)
Finnie, Ross (West of Scotland) (LD)
Harper, Robin (Lothians) (Green)
Harvie, Patrick (Glasgow) (Green)
MacDonald, Margo (Lothians) (Ind)
McArthur, Liam (Orkney) (LD)
McInnes, Alison (North East Scotland) (LD)
Munro, John Farquhar (Ross, Skye and Inverness West) (LD)
O’Donnell, Hugh (Central Scotland) (LD)
Pringle, Mike (Edinburgh South) (LD)
Purvis, Jeremy (Tweeddale, Ettrick and Lauderdale) (LD)
Rumbles, Mike (West Aberdeenshire and Kincardine) (LD)
Scott, Tavish (Shetland) (LD)
Smith, Iain (North East Fife) (LD)
Smith, Margaret (Edinburgh West) (LD)
Somerville, Shirley-Anne (Lothians) (SNP)
Stephen, Nicol (Aberdeen South) (LD)
Sturgeon, Nicola (Glasgow Gowan) (SNP)
Swinney, John (North Tayside) (SNP)
Thompson, Dave (Highlands and Islands) (SNP)
Tolson, Jim (Dunfermline West) (LD)
Watt, Maureen (North East Scotland) (SNP)
Welsh, Andrew (Angus) (SNP)
White, Sandra (Glasgow) (SNP)
Wilson, Bill (West of Scotland) (SNP)
Wilson, John (Central Scotland) (SNP)

Against
Adam, Brian (Aberdeen North) (SNP)
Aitken, Bill (Glasgow) (Con)
Alexander, Ms Wendy (Paisley North) (Lab)
Allan, Alasdair (Western Isles) (SNP)
Baille, Jackie (Dumbarton) (Lab)
Baker, Richard (North East Scotland) (Lab)
Boyack, Sarah (Edinburgh Central) (Lab)
Brankin, Rhona (Midlothian) (Lab)
Brocklebank, Ted (Mid Scotland and Fife) (Con)
Brown, Gavin (Lothians) (Con)
Brown, Keith (Ochil) (SNP)
Brownlee, Derek (South of Scotland) (Con)
Butler, Bill (Glasgow Anniesland) (Lab)
Campbell, Aileen (South of Scotland) (SNP)
Carlaw, Jackson (West of Scotland) (Con)
Chisholm, Malcolm (Edinburgh North and Leith) (Lab)
Coffey, Willie (Kilmarnock and Loudoun) (SNP)
Constance, Angela (Livingston) (SNP)
Craigie, Cathie (Cumbernauld and Kilsyth) (Lab)
Crawford, Bruce (Stirling) (SNP)
Cunningham, Roseanna (Perth) (SNP)
Don, Nigel (North East Scotland) (SNP)
Doris, Bob (Glasgow) (SNP)
Eddie, Helen (Dunfermline East) (Lab)
Ewing, Fergus (Inverness East, Nairn and Lochaber) (SNP)
Fabian, Linda (Central Scotland) (SNP)
Ferguson, Patricia (Glasgow Maryhill) (Lab)
FitzPatrick, Joe (Dundee West) (SNP)
Foulkes, George (Lothians) (Lab)
Fraser, Murdo (Mid Scotland and Fife) (Con)
Gibson, Kenneth (Cunninghame North) (SNP)
Gibson, Rob (Highlands and Islands) (SNP)
Glen, Marlyn (North East Scotland) (Lab)
Godman, Trish (West Renfrewshire) (Lab)
Goldie, Annabel (West of Scotland) (Con)
Gordon, Charlie (Glasgow Cathcart) (Lab)
Grant, Rhoda (Highlands and Islands) (Lab)
Gray, Iain (East Lothian) (Lab)
Harvie, Christopher (Mid Scotland and Fife) (SNP)
Henry, Hugh (Paisley South) (Lab)
Hepburn, Jamie (Central Scotland) (SNP)
Hyslop, Fiona (Lothians) (SNP)
Ingram, Adam (South of Scotland) (SNP)
Johnstone, Alex (North East Scotland) (Con)
Kelly, James (Glasgow Rutherglen) (Lab)
Kerr, Andy (East Kilbride) (Lab)
Kidd, Bill (Glasgow) (SNP)
Lamont, Johann (Glasgow Pollok) (Lab)
Lamont, John (Roxburgh and Berwickshire) (Con)
Livingstone, Marilyn (Kirkcaldy) (Lab)
Lochhead, Richard (Moray) (SNP)
MacAaskill, Kenny (Edinburgh East and Musselburgh) (SNP)
Macdonald, Lewis (Aberdeen Central) (Lab)
Macintosh, Ken (Eastwood) (Lab)
Martin, Paul (Glasgow Springburn) (Lab)
Marwick, Tricia (Central Fife) (SNP)
Matheson, Michael (Falkirk West) (SNP)
Maxwell, Stewart (West of Scotland) (SNP)
Mavecetsy, Mr Frank (Glasgow Shettleston) (Lab)
McCabe, Tom (Hamilton South) (Lab)
McConnell, Jack (Motherwell and Wishaw) (Lab)
McGrigor, Jamie (Highlands and Islands) (Con)
McKee, Ian (Lothians) (SNP)
McKelvie, Christina (Central Scotland) (SNP)
McLaughlin, Anne (Glasgow) (SNP)
McLetchie, David (Edinburgh Pentlands) (Con)
McMahon, Michael (Hamilton North and Bellshill) (Lab)
McMillan, Stuart (West of Scotland) (SNP)
McNeil, Duncan (Greenock and Inverclyde) (Lab)
McNeill, Pauline (Glasgow Kelvin) (Lab)
McNulty, Des (Clydebank and Milngavie) (Lab)
Mile, Nanette (North East Scotland) (Con)
Mitchell, Margaret (Central Scotland) (Con)
Morgan, Alasdair (South of Scotland) (SNP)
Mulligan, Mary (Linlithgow) (Lab)
Murray, Elaine (Dumfries) (Lab)
Neil, Alex (Central Scotland) (SNP)
Oldfather, Irene (Cunninghame South) (Lab)
Park, John (Mid Scotland and Fife) (Lab)
Paterson, Gil (West of Scotland) (SNP)
Peacock, Peter (Highlands and Islands) (Lab)
Peatlie, Cathy (Falkirk East) (Lab)
Russell, Michael (South of Scotland) (SNP)
Salmond, Alex (Gordon) (SNP)
Scanlon, Mary (Highlands and Islands) (Con)
Scott, John (Ayr) (Con)
Simpson, Dr Richard (Mid Scotland and Fife) (Lab)
Smith, Elizabeth (Mid Scotland and Fife) (Con)
Somerville, Shirley-Anne (Lothians) (SNP)
Stevenson, Stewart (Banff and Buchan) (SNP)
Stewart, David (Highlands and Islands) (Lab)
Sturgeon, Nicola (Glasgow Govan) (SNP)
Swinney, John (North Tayside) (SNP)
Thompson, Dave (Highlands and Islands) (SNP)
Watt, Maureen (North East Scotland) (SNP)
Welsh, Andrew (Angus) (SNP)
White, Sandra (Glasgow) (SNP)
Whitefield, Karen (Airdrie and Shotts) (Lab)
Whitton, David (Strathkelvin and Bearsden) (Lab)
Wilson, Bill (West of Scotland) (SNP)
Wilson, John (Central Scotland) (SNP)

Abstentions
Grahame, Christine (South of Scotland) (SNP)

The Convener: The result of the division is: For 18, Against 101, Abstentions 1.
Amendment 26 disagreed to.
Section 7 agreed to.
Sections 8 and 9 agreed to.

After section 9

The Convener: Amendment 27, in the name of Robert Brown, is in a group on its own.

Robert Brown: We move to the eve of proceedings at this point. Amendment 27 would introduce a sunset clause, such as was referred to earlier. It refers to the implications of the extension of the detention periods in section 3. As things stand at the moment, the chamber has seen fit to reject a number of changes to the cabinet secretary’s proposals in that regard. We will, therefore, be bringing into effect a number of extensions to custody periods—a significant civil liberties issue that has not been examined by the Justice Committee or through the procedures of the Parliament. I welcome the setting up of the review group by Lord Carloway to look at such issues and I hope that the cabinet secretary—[Interruption.]

The Convener: Order. Can members keep the background noise down, please?

18:15

Robert Brown: I hope that the cabinet secretary will take on board some of the concerns that have been expressed in the debate today about this issue and others, and that he will have Lord Carloway examine them in more detail.

It seems to me that, given that this is emergency legislation and contains provisions that have not been examined in detail by the Parliament, it is appropriate that its duration should be limited. I have suggested that the legislation’s duration be limited to 31 December 2012—or earlier, should other legislation be put in place, perhaps following Lord Carloway’s review, which I understand the cabinet secretary wants to be under way before the next Scottish Parliament elections. That seems to me to be both a reasonable period and a reasonable proposition.

We have not made too much use of sunset clauses in this Parliament—indeed, I cannot think of one that has been passed in the way that we are discussing. However, I think that, in this context, it is an important consideration and will put pressure on the Government to ensure that the matter is examined properly as evidence develops in these areas and that the issues are dealt with properly by the Parliament. It will also help to ensure that more substantial legislation can be produced that will deal with the matter more satisfactorily.

I move amendment 27.

Richard Baker: I have given particular consideration to the issue of a sunset clause, in light of the reasonable comments that Robert Brown has made and which Patrick Harvie made to me earlier. We would all hope that it is possible to ensure that full legislation is in place before mid-2012, but I have a concern that, if there is an unforeseen delay—or for unforeseen reasons—we could end up rushing through legislation again or, indeed, find ourselves in contravention of European Union law. I recognise that those circumstances are remote possibilities and I want to make it clear that it would be our intention to legislate within that timescale. However, we will not oppose the amendment; rather, we will abstain.

Patrick Harvie: Is Richard Baker actually saying that he thinks that we could pass legislation in a more rushed fashion than we are doing today?

Richard Baker: It is hard to see how that could be a possibility, and I concede that point to Patrick Harvie. What I am saying is that I do not think that it is entirely impossible that we could be in a situation in which we were rushing through legislation again, although perhaps not to this extent. I accept that that might be a remote possibility, but we have to take on board that important consideration when passing this statute today. Therefore, we have to take a cautious approach. I take on board the intention of what is being proposed, but I think that there are issues over practical implementation.

However, the issues that Robert Brown raised earlier around the need for fuller scrutiny of certain issues, particularly that of the extension of detention periods, are a different matter, and
perhaps further measures can be introduced in that regard at stage 3.

Kenny MacAskill: I understand members’ concerns. We have come to the Parliament with emergency legislation only reluctantly. We said at the outset that we did not wish to be in this position. However, the decision that was published at 9.45 yesterday has brought us to this point, and we are required to act. As I said, it would have been preferable if we had been able to take more time, but I think that the points that Richard Baker made are correct. Like him, I do not think that amendment 27 is necessary. The Government is doing its utmost to ensure that there is a full discussion of the relevant matters, whether that is with ACPOS or the Lord Advocate. Equally, we are giving an assurance that Lord Carloway will deal with the matters in the bill and with many others.

As I said, those who are welcoming a great advancement of civil liberties in Scotland may very well reap what they sow. I can only refer them to certain articles, whether by Paul McBride or Lord McCluskey, about what the outcome of this situation might be. I do not necessarily see the ruling as representing a great advance for civil rights in Scotland.

Richard Baker is also correct to say that we cannot tie the hands of a future Administration, although we can argue over who that should be. We have given an undertaking that Lord Carloway will come back to Parliament on the issues, which means that they can be debated and discussed after May 2011 and that the next Administration can consider them at that point. However, if a situation arose in which, for example, the required legislation were to be dealt with as part of a wider bill that took longer than expected to pass, we might end up in a situation in which the sunset clause wiped out what we will pass today before the new legislation could be enacted. We cannot afford for that to happen. That would be fundamentally dangerous, but the situation could arise as a result of the timetable of any future Administration or because the legislation was tied in with other issues.

In the interests of good governance, and with the assurance that Lord Carloway is going to review matters and that, as all members have accepted, the status quo that we create today will be in place only temporarily, until we can reflect on it as a community and legislate on the issues at a later date, I urge members not to support amendment 27.

Robert Brown: I will press amendment 27, as it is rather important. It is a sensible stricture on Government; I say to Richard Baker that his exchange with Patrick Harvie was perhaps not his finest moment in making a compelling argument.

We are taking an important decision today. We are putting through legislation that is said to be temporary, but which will manifestly be permanent in its implications. It is highly unlikely that we will roll back that legislation in the future, and certainly not—it would appear—under the direction of the current cabinet secretary.

These are important civil liberties issues and we need to get them right. However, we have not had the opportunity to do so, because hardly anyone has been properly consulted until now. The Parliament in particular has not been consulted in the sense of the legislation going through the proper arrangements for justice in the Parliament. That is an important issue, and we should not lose track of it in the rush to pass the bill.

The bill has many implications for police practice, the rights of suspects, the way in which solicitors operate and many other aspects of the criminal justice system, some of which are not immediately obvious. It has not had the advantage of undergoing Justice Committee scrutiny and being examined in the detailed way that it ought to be. In my view the approach that has been taken was not necessary, given the limited retrospective effect of the Cadder judgment, and amendment 27 would at least provide a stricture on any future Government of whatever complexion to ensure that it comes back to the legislation within a certain period.

Frankly, if emergency legislation can be produced within 24 hours, it should not be beyond the wit of members in the chamber and of any Government that is elected next May to do something to sort out the matter by 31 December 2012.

Against that background, I press amendment 27.

The Convener: The question is, that amendment 27 be agreed to. Are we agreed?

Members: No.

The Convener: There will be a division.

For

Brown, Robert (Glasgow) (LD)
Finnie, Ross (West of Scotland) (LD)
Harper, Robin (Lothians) (Green)
Harvie, Patrick (Glasgow) (Green)
MacDonald, Margo (Lothians) (Ind)
McArthur, Liam (Orkney) (LD)
McInnes, Alison (North East Scotland) (LD)
 Munro, John Farquhar (Ross, Skye and Inverness West) (LD)
O’Donnell, Hugh (Central Scotland) (LD)
Pringle, Mike (Edinburgh South) (LD)
 Purvis, Jeremy (Tweeddale, Ettrick and Lauderdale) (LD)
Rumbles, Mike (West Aberdeenshire and Kincardine) (LD)
Scott, Tavish (Shetland) (LD)
Smith, Iain (North East Fife) (LD)
Smith, Margaret (Edinburgh West) (LD)
Stephen, Nicol (Aberdeen South) (LD)
Stone, Jamie (Caithness, Sutherland and Easter Ross) (LD)
Tolson, Jim (Dunfermline West) (LD)

Against
Adam, Brian (Aberdeen North) (SNP)
Altkin, Ben (Glasgow) (Con)
Al lan, Alasdair (Western Isles) (SNP)
Brocklebank, Ted (Mid Scotland and Fife) (Con)
Brown, Gavin (Lothians) (Con)
Brown, Keith (Ochil) (SNP)
Brownlee, Derek (South of Scotland) (Con)
Campbell, Aileen (South of Scotland) (SNP)
Carl Lawson, Jackson (West of Scotland) (Con)
Coffey, Willie (Kilmarnock and Loudoun) (SNP)
Constance, Angela (Livingston) (SNP)
Crawford, Bruce (Stirling) (SNP)
Cunningham, Roseanna (Perth) (SNP)
Don, Nigel (North East Scotland) (SNP)
Doris, Bob (Glasgow) (SNP)
Ewing, Fergus (Inverness East, Nairn and Lochaber) (SNP)
Fabiani, Linda (Central Scotland) (SNP)
FitzPatrick, Joe (Dundee West) (SNP)
Fraser, Murdo (Mid Scotland and Fife) (Con)
Gibson, Kenneth (Cunninghame North) (SNP)
Gibson, Rob (Highlands and Islands) (SNP)
Goldie, Annabel (West of Scotland) (Con)
Graham, Christine (South of Scotland) (SNP)
Harvie, Christopher (Mid Scotland and Fife) (SNP)
Hepburn, Jamie (Central Scotland) (SNP)
Hyslop, Fiona (Lothians) (SNP)
Ingram, Adam (South of Scotland) (SNP)
Johnstone, Alex (North East Scotland) (Con)
Kidd, Bill (Glasgow) (SNP)
Lamont, John (Roxburgh and Berwickshire) (Con)
Lochhead, Richard (Moray) (SNP)
MacAskill, Kenny (Edinburgh East and Musselburgh) (SNP)
Marwick, Tricia (Central Fife) (SNP)
Matheson, Michael (Falkirk West) (SNP)
Maxwell, Stewart (West of Scotland) (SNP)
McGrigor, Jamie (Highlands and Islands) (Con)
McKee, Ian (Lothians) (SNP)
McKelvie, Christina (Central Scotland) (SNP)
McLaughlin, Anne (Glasgow) (SNP)
McLetchie, David (Edinburgh Pentlands) (Con)
McMillan, Stuart (West of Scotland) (SNP)
Miline, Nanette (North East Scotland) (Con)
Mitchell, Margaret (Central Scotland) (Con)
Morgan, Alasdair (South of Scotland) (SNP)
Neil, Alex (Central Scotland) (SNP)
Paterson, Gil (West of Scotland) (SNP)
Russell, Michael (South of Scotland) (SNP)
Salmond, Alex (Gordon) (SNP)
Scanlon, Mary (Highlands and Islands) (Con)
Scott, John (Ayr) (Con)
Smith, Elizabeth (Mid Scotland and Fife) (Con)
Somerville, Shirley-Anne (Lothians) (SNP)
Stevenson, Stewart (Banff and Buchan) (SNP)
Sturgeon, Nicola (Glasgow Govan) (SNP)
Swinney, John (North Tayside) (SNP)
Thompson, Dave (Highlands and Islands) (SNP)
Watt, Maureen (North East Scotland) (SNP)
Welsh, Andrew (Angus) (SNP)
White, Sandra (Glasgow) (SNP)
Wilson, Bill (West of Scotland) (SNP)
Wilson, John (Central Scotland) (SNP)

Abstentions
Alexander, Ms Wendy (Paisley North) (Lab)
Baillie, Jackie (Dumbarton) (Lab)
Baker, Richard (North East Scotland) (Lab)
Boyack, Sarah (Edinburgh Central) (Lab)

Brankin, Rhona (Midlothian) (Lab)
Butler, Bill (Glasgow Anniesland) (Lab)
Chisholm, Malcolm (Edinburgh North and Leith) (Lab)
Craige, Cathie (Cumbernauld and Kilsyth) (Lab)
Eadie, Helen (Dunfermline East) (Lab)
Ferguson, Patricia (Glasgow Maryhill) (Lab)
Foulkes, George (Lothians) (Lab)
Glen, Marilyn (North East Scotland) (Lab)
Godman, Trish (West Renfrewshire) (Lab)
Gordon, Charlie (Glasgow Cathcart) (Lab)
Grant, Rhoda (Highlands and Islands) (Lab)
Gray, Iain (East Lothian) (Lab)
Henry, Hugh (Paisley South) (Lab)
Kelly, James (Glasgow Rutherglen) (Lab)
Kerr, Andy (East Kilbride) (Lab)
Lamont, Johann (Glasgow Pollok) (Lab)
Livingstone, Marilyn (Kirkcaldy) (Lab)
Macdonald, Lewis (Aberdeen Central) (Lab)
Macintosh, Ken (Eastwood) (Lab)
Martin, Paul (Glasgow Springburn) (Lab)
McAveety, Mr Frank (Glasgow Shettleston) (Lab)
McCabe, Tom (Hamilton South) (Lab)
McConnell, Jack (Motherwell and Wishaw) (Lab)
McMahon, Michael (Hamilton North and Bellshill) (Lab)
McNeil, Duncan (Greenock and Inverclyde) (Lab)
McNeill, Pauline (Glasgow Kelvin) (Lab)
McNulty, Des (Clydebank and Milngavie) (Lab)
Mulligan, Mary (Linthgow) (Lab)
Murray, Elaine (Dumfries) (Lab)
Oldfather, Irene (Cunninghame South) (Lab)
Park, John (Mid Scotland and Fife) (Lab)
Peacock, Peter (Highlands and Islands) (Lab)
Peatlie, Cathy (Falkirk East) (Lab)
Simpson, Dr Richard (Mid Scotland and Fife) (Lab)
Stewart, David (Highlands and Islands) (Lab)
Whitefield, Karen (Airdrie and Shotts) (Lab)
Whiton, David (Strathkelvin and Bearsden) (Lab)

The Convener: The result of the division is: For 18, Against 61, Abstentions 41.

Amendment 27 disagreed to.

Section 10 agreed to.

Amendment 28 not moved.

Long title agreed to.

The Convener: That ends stage 2 consideration of the bill.

It has been intimated during stage 2 that members may wish to lodge amendments at stage 3. I will now suspend proceedings for five minutes in order to allow them to discuss whether they will do so. If there are to be amendments at stage 3, I will require a further suspension. I ask members who wish to lodge amendments to come to the well of the chamber to discuss the matter with the clerks.

Meeting closed at 18:23.
Criminal Procedure (Legal Assistance, Detention and Appeals) (Scotland) Bill

Marshalled List of Amendments for Stage 3

The Bill will be considered in the following order—

Sections 1 to 10  Long Title

Amendments marked * are new (including manuscript amendments) or have been altered.

Section 1

Robert Brown

1  In section 1, page 3, line 1, at beginning insert <In exceptional circumstances,>
Note: (DT) signifies a decision taken at Decision Time.

The meeting reconvened at 6.59 pm.

Criminal Procedure (Legal Assistance, Detention and Appeals (Scotland) Bill - Stage 3: The Bill was considered at Stage 3.

Amendment 1 was agreed to (without division).

Criminal Procedure (Legal Assistance, Detention and Appeals) (Scotland) Bill: The Cabinet Secretary for Justice (Kenny MacAskill) moved S3M-7268—That the Parliament agrees that the Criminal Procedure (Legal Assistance, Detention and Appeals) (Scotland) Bill be passed.

After debate, the motion was agreed to ((DT) by division: For 97, Against 18, Abstentions 0).
Scottish Parliament

18:30

On resuming—

The Deputy Presiding Officer (Alasdair Morgan): I advise members, for their guidance, that proceedings will be suspended until 7 o’clock.

18:30

Meeting suspended.

18:59

On resuming—

Motion without Notice

The Deputy Presiding Officer (Alasdair Morgan): I am minded to take without notice a motion to suspend rule 2.2.5(c) of the standing orders to allow the Parliament to continue beyond 7 pm.

Motion moved,

That Rule 2.2.5(c) be suspended to allow the Parliament to continue beyond 7 pm.—[Bruce Crawford.]

Motion agreed to.

Criminal Procedure (Legal Assistance, Detention and Appeals) (Scotland) Bill: Stage 3

18:59

The Deputy Presiding Officer (Alasdair Morgan): We come to stage 3 of the Criminal Procedure (Legal Assistance, Detention and Appeals) (Scotland) Bill. The Presiding Officer has accepted one manuscript amendment. Members will find the marshalled list on their desks.

Amendment 1, in the name of Robert Brown, is in a group on its own.

Robert Brown (Glasgow) (LD): The chamber will be glad to know that amendment 1 is the only amendment in the stage 3 process; nevertheless, it is an important amendment. I refer members to what I said earlier about problems with section 1(8). I said that the section undermines the right of a suspect to access a solicitor, given that it indicates that a constable can continue the interrogation of a suspect without a solicitor being present. The circumstances that are given are quite elaborate. The Cabinet Secretary for Justice was kind enough to say that he envisaged that the provision would be used in exceptional circumstances. Amendment 1 proposes to add to section 1(8) the words “in exceptional circumstances”. I anticipate with confidence that the cabinet secretary will be able to accept the amendment.

Bill Aitken (Glasgow) (Con): I am anxious to have a definition, even by means of example, of what constitutes “exceptional circumstances”.

Robert Brown: I am hastily trying to think of what the circumstances might be. It could well be where there is information about other terrorist suspects or drug people—something of that sort. It is difficult to know exactly what the position would be. My difficulty is that I am not clear what the cabinet secretary had in mind in having the section so drafted in the first place.

Patrick Harvie (Glasgow) (Green): Given that we are, apparently, about to pass very rushed legislation, we may find many errors in the bill—errors that we do not have time to correct before the bill goes to the final vote. If we accept Robert Brown’s amendment 1, could legitimate challenge be made if the practice became regular and routine? If that were to happen, could people say, “This is not being used in exceptional circumstances. This is being used routinely.” Surely that would provide a reasonable safety lock to the provision becoming standard practice.

Robert Brown: Patrick Harvie’s intervention is helpful. Certainly, that is the intention of the
amendment. In the circumstances under section 1(8), we have to have confidence to a degree in the ability of the court to interpret things reasonably, given the set of circumstances that may arise. Patrick Harvie got to the nub of the matter. As he said, we do not want the situation to arise where the rights that Cadder purports to give to people—following on from Salduz and the European convention on human rights considerations—are taken away by routine avoidance of the requirements.

Bill Aitken: I am still having a little bit of difficulty with the proposal, but I think that Robert Brown can clear things up for me. I asked him for an example. I know that it is late in the evening and that it is difficult to come up with a spontaneous response. That said, the example that he cited of terrorism, of course, comes under United Kingdom terrorism legislation under which the powers of detention are much firmer. As such, the example is not an apposite one.

Robert Brown: I take the rebuke. The point is correctly made. The central core of my argument is that, under the ECHR arrangements, people should have a right of access to a solicitor to advise them during questioning while they are under police detention. My central point is that that ought not to be aborted routinely. If we add into the bill the wording “in exceptional circumstances”, it makes it clear that justification of a substantial kind—the kind of justification that would stand up in court—is required. All of this is likely to be the subject of comment by courts at various levels, if people object to what happens in particular situations. Clearly, there will be no issue if people see no difficulty or if they have agreed certain things and are happy with what has been said or done. However, if accused persons’ solicitors take the view that what has taken place has denied them their rights or has affected the outcome of the case in a substantial way, they will have an objection. Earlier I made the point that I thought that the bill might not be compatible with the European convention on human rights, given the terms in which the Cadder judgment was expressed. Bill Aitken may accept that point.

I am interested in the cabinet secretary’s response to the amendment, which is a genuine attempt to improve the bill in relation to an issue about which we have made valuable points without our amendments having been successful so far. Amendment 1 is a valid amendment that could be accepted. Given the cabinet secretary’s earlier comments, I hope that he will view it favourably.

I move amendment 1.

The Cabinet Secretary for Justice (Kenny MacAskill): The Government is happy to accept the amendment. I have had an opportunity to speak to both the Association of Chief Police Officers in Scotland and the Crown Office, which confirm that it merely puts on the face of the bill what is common practice. Mr Graham from ACPOS made it clear that the police would utilise the power only in exceptional circumstances, but we are happy to state that in the bill.

Patrick Harvie can rest assured that agents will use the amendment to challenge the practice that he describes, in the few instances where that happens. Doubtless the High Court will set guidance and guidelines at that stage. We cannot be too precise—I have every sympathy with Mr Brown in that regard—and will have to wait and see what exceptional circumstances arise. However, we accept the spirit in which the amendment has been lodged. The amendment confirms what is happening in reality. Mr Brown and Mr Harvie can be assured that the police and the Crown already acknowledge that but are happy for it to be stated in the bill.

Robert Brown: I am grateful to the cabinet secretary for accepting the amendment. He referred to ACPOS. An important distinction must be made throughout between ACPOS guidance, which is not the law, and the law of the land, which the Parliament is passing. On a number of occasions this afternoon, the cabinet secretary has elided that difference. We are debating a provision that will be included in the bill. I am grateful to the cabinet secretary for accepting the amendment, which will make a reasonably significant difference to understanding the procedure in this matter.

Amendment 1 agreed to.
Criminal Procedure (Legal Assistance, Detention and Appeals) (Scotland) Bill

The Deputy Presiding Officer (Alasdair Morgan): The next item of business is a debate on motion S3M-7268, in the name of Kenny MacAskill, that the Criminal Procedure (Legal Assistance, Detention and Appeals) (Scotland) Bill be passed.

19:07

The Cabinet Secretary for Justice (Kenny MacAskill): I thank members for their forbearance; it has been a long day and a fairly gruelling couple of days. I am grateful to members, as this is an important matter that we must address. I put on record my thanks to all the staff involved, especially those in the bill drafting team. The bill had to be drafted at breakneck pace. Although preparations were made and scenarios were planned for, details were not available or known about until 9.45 yesterday—[Interruption.]

The Deputy Presiding Officer: Order. Far too many conversations are going on that could, if necessary, take place outside the chamber.

Kenny MacAskill: Members of the bill team, the justice department, my private office and people in the Parliament have worked above and beyond the call of duty to ensure that essential and necessary legislation is passed. They have the Government’s thanks for the efforts that they have made to ensure that we have been able to deal with these matters.

There has not been the usual delay of many weeks, if not months, since stage 1, so many of the issues have already been discussed. Given the time, I will not seek to inflict those points yet again on Parliament. Suffice it to say that the Government did not wish to find itself in this position, which is the result of a decision by the Supreme Court. We have had debates about constitutional matters, which will be continued elsewhere. However, we are grateful that the Parliament has worked with us to respond to the decision in the way that is required.

Pauline McNeill (Glasgow Kelvin) (Lab): The cabinet secretary said that he did not want to repeat any of the points that were made earlier. I apologise for repeating my point, but before we vote on the bill I want to be clear about who will decide on the nature of the representation that is provided. Will it be the accused or the Scottish Legal Aid Board?

Kenny MacAskill: I struggle to understand the point. We are having to change things—the matter was raised with us by the criminal law committee of the Legal Aid Board. Previously, there would always have been a nominated solicitor. The Legal Aid Board and legal aid lawyers do not wish to be troubled in the middle of the night on many an occasion, and this is at their request—they are asking for the arrangements to be changed so as to involve a directed solicitor. That is done on the agreement—

Pauline McNeill: Will the cabinet secretary give way?

Kenny MacAskill: If I could just finish the point. One of the worries that lawyers used to have—and I practised in that profession myself—was that if they did not have access and could not deal with the situation, they might lose their client to somebody else. It is fair to say that the legal profession is now striking a balance: lawyers do not wish to be disturbed at all hours of the night to deal with their clients, so there will be a solicitor who is directed by the Legal Aid Board. However, that solicitor will not necessarily be the one who will appear should the person subsequently be brought into court. It will be a matter of the Legal Aid Board making that direction, and that would be done with the consent of the criminal lawyers, but on the basis that the person who attends at the police station is not necessarily the person who will be the lawyer thereafter. I do not know whether that clarifies the point for the member.

Pauline McNeill: I refer to a point that Robert Brown raised earlier. We discussed whether or not a phone call would be held in private, or whether there would be a private consultation. Who decides whether the accused gets access to the lawyer via a phone call or through a private consultation? That is what I meant.

Kenny MacAskill: The assumption is that it will be a private consultation, unless there is some good reason for things to be otherwise. That good reason might come from the client—the individual who is detained—who might not want to wait for two hours, say, for the lawyer to come and see them. They might be happy to take their chances, and they might not have much to say, so they might ask simply to get on with it rather than wait. Sometimes, they will be happy to speak to their lawyer on the phone rather than waiting two hours for them to arrive, and to discuss the situation that way. There might be occasions involving force majeure or whatever, when the lawyer cannot get there and time ticks on. Such situations are a matter of balance.

There is the ultimate caveat that, if any admission is made, it will not be a factor that is considered at the trial before any presiding sheriff or at any appeal. It is not a matter of either/or—it is a matter of circumstances. The initial view is that the right of access is there, but there can be circumstances that overcome it.
Pauline McNeill has reminded me of the question about constitutional matters and what aspects the Government had worked on beforehand regarding matters going before the Privy Council and the House of Lords. When we instructed Professor Neil Walker to carry out an investigation into questions around the Supreme Court and ultimate appeals in Scotland, he looked into that aspect, and it is contained in his report. The matter was flagged up to us by the Crown.

The issues have been canvassed, and we accept that the change in the law of Scotland is a significant one. It has been brought upon us, and the Government sees, with perhaps the same heavy heart that Paul McBride and Lord McCluskey referred to, a pyrrhic victory on the part of those who view the developments as a great advancement of civil liberties in Scotland. It might very well be so, if that is how people see it—I have to say that I do not see it that way. The downside could be significant, and it could be a change for the worse.

That is where we are, and we have had to deal with the situation. We have provided what is necessary within the European convention on human rights; we have balanced the provisions with the extension of periods of detention; we have ensured that those who are required to attend are provided for with legal aid funding; we have dealt with the question of the certainty of appeals; and we have dealt with matters in respect of the Scottish Criminal Cases Review Commission. The Parliament, especially those members in other parties who have some concerns, have the assurance that all those matters will be reviewed by Lord Carloway. They will have to be the subject of primary legislation after May 2011. If Lord Carloway or others flag up some issues, there is the possibility of returning to the matter. I do not see that as being the situation, however.

The bill is a temporary fix that allows us to deal with the consequences of Cadder v HMA. In due course, the Parliament post 2011, however it is constituted, will have a bill dealing not simply with the aspects that we have touched on today but with deeper, more fundamental matters. At that stage, many of us might ask whether it was worth the candle as far as Cadder v HMA was concerned. However, this is the position that we find ourselves in.

I move,

That the Parliament agrees that the Criminal Procedure (Legal Assistance, Detention and Appeals) (Scotland) Bill be passed.

19:14

Richard Baker (North East Scotland) (Lab):
This has been a constrained but important process, in which key issues for our justice system and Scots law were raised, the most important of which for us is that we act for the benefit of justice and our legal system.

We heard the debate on the necessity for and quality of the bill, and I remain persuaded by the cabinet secretary’s arguments on the need to support it, notwithstanding the efforts of some Scottish National Party backbenchers to persuade me otherwise during the stage 1 debate, when they tried to turn the matter into a debate on independence. Their arguments were odd, given their party’s support for legislation on ECHR and enthusiasm for Scotland in Europe.

We must be realistic, and it is not realistic to suggest that we should not be treated in the same way as Belgium, Ireland and the Netherlands, which face exactly the same situation, are treated. We heard the point that the First Minister made, but a hearing by the European Court of Human Rights would have only delayed matters, not changed them.

All the evidence is that situations such as the one that we face are best addressed expeditiously, so we agree that it is right to move quickly to ensure that our provisions on access to legal representation during detention are compliant with European law, in statute as well as in practice. It is not evident that not moving to such a position would not carry a risk of further legal challenge. It is right to be cautious and accept what the cabinet secretary said.

I agree that it is necessary that the SCCRC considers finality when it deals with applications. That could make a material difference in the number of cases that will be affected by the Cadder judgment.

We had some sympathy with the idea of a sunset clause and with the idea that extensions to detention should be approved by sheriffs. If we had had more time, we might have come to different conclusions, particularly on the latter point, but due to the issues of practicality, which we are not currently in a position to gainsay, we supported the Government position.

However, I remind members that the issues will be fully debated when we consider new legislation on all those matters, which should happen as soon as is practicable and sensible. Labour is committed to bringing forward legislation, if we are in a position to do so, on the most feasible, sensible and expeditious timescale. The problem with a sunset clause is that we do not know what is in the future. Any Parliament can face unforeseen circumstances and it is not acceptable that we should potentially again face a situation in which we must rush through legislation or in which we are not compliant with European law.
That is why I stand by our position on amendment 27.

The process will be informed by a much fuller debate on a bill, subsequent to Lord Carloway’s important review, which we welcome. Even at this late hour, I want to inject optimism into the debate—as Ed Miliband said, “We are the optimists”. We should not accept that it is inevitable that at the end of the process we will have a worse legal system. The process might ultimately provide an opportunity to seek improvement, as a consequence of Lord Carloway’s review. We did not seek to review the arrangements, but we do so now and we might end up with better law and better legislation. We should at least look forward to that happening—it might not be inevitable but it is surely possible.

The process has been somewhat traumatic, but today we did what needed to be done as an interim measure. The Government was right to introduce the bill on that basis. We look forward to further debate on and full legislative scrutiny of the matters in the fullness of time.

19:19

John Lamont (Roxburgh and Berwickshire) (Con): I am pleased that the Parliament will vote in favour of the bill at decision time—I hope that it will do so.

Notwithstanding the European convention on human rights and the Human Rights Act 1998, I would argue that, in the past, Scotland has gone above and beyond what is required to protect its citizens’ rights. Despite the Supreme Court’s ruling, we have a fair justice system. The third verdict of not proven and the need for corroboration are just two ways in which the Scottish system achieves justice and respects individuals’ rights.

We should not forget that the consequences of the Salduz v Turkey case, which was brought to the European Court of Human Rights, are the reason for the emergency bill that we are considering. In that case, a juvenile had not been granted the right to see a lawyer during the first few hours of interrogation, during which he self-incriminated.

In light of the circumstances of Salduz, I find it remarkable that the case can now be used through the human rights convention to influence Scots law in the way that it has. Salduz was convicted of participating in a demonstration for an organisation that Turkey had deemed to be illegal and for hanging an illegal banner. Was the real injustice committed by Turkey when it denied him the right to a lawyer during his interrogation or when it denied him the right to participate in a demonstration? The human rights convention argues that the right to a lawyer is a fundamental human right, but is the right to speech, protest and association not far more fundamental?

It would not be our job to determine the validity of Turkish law, but the consequences of the case are felt here today because of the Supreme Court’s decision and the decision of others to incorporate the human rights convention into Scots law in the way that they did. As we heard from many speakers over the afternoon, the impacts of the decision will be far reaching. The costs to the public purse will increase significantly and the police fear that our relatively high conviction rates will be compromised.

The decision has also significantly shifted the balance of our justice system in favour of the criminal rather than the victim and the law-abiding majority in Scottish society. Scottish criminal law will never be the same again. Scotland has lost control of its criminal justice system, not as a result of the UK Supreme Court’s decision but because other political parties decided to incorporate the European convention on human rights into Scots law through the Scotland Act 1998.

We have heard much nonsense from some Scottish National Party back benchers. They say that, in an independent Scotland, things would be much different, but we would still be subject to the convention through the European Court of Human Rights and we would still be living with the consequences of the decision to incorporate the convention into Scots law.

The Conservatives are pleased to support the bill and will participate fully in the review of Scotland’s criminal law and practice.

Alex Johnstone (North East Scotland) (Con): Well said, John.

Jeremy Purvis (Tweeddale, Ettrick and Lauderdale) (LD): The conscience of the Tory party is at the back of the chamber.

The Deputy Presiding Officer: Order.

19:21

Robert Brown (Glasgow) (LD): The emergency bill process has been fairly long, but this has nevertheless been an important event and the Parliament has risen to theoccasion.

The dispute is about a major issue of civil liberties, rights and detention periods. Normally, I take a cautious approach on such matters. As I think the cabinet secretary will concede, when we have dealt with justice bills in the past I have often been prepared to accept his position, backed as it is by Government resources. However, in this
case I am not by a long, long straw convinced of
the position that he has taken.

Obviously, I do not object to the fact that there
must be legislation and that action must be taken
to deal with the results of the Cadder decision; my
concern arises from the fact that it has been so
rushed—unnecessarily. The Lord Advocate rightly
put in place interim arrangements to deal with the
position from July. I am not clear that any
additional cases would have been produced had
we not legislated on the matter today, but taken
the bill through the Parliament properly.

The debate has drawn out the fact that the bill
gives rise to a lot of issues. For example, there is
the fairly arcane but important debate about the
attempt to adjust the balance between the Scottish
Criminal Cases Review Commission and the High
Court. Some of the issues could not be developed
in the time available. Alison McInnes made an
interesting point about the effects on children. The
point was not taken further, but it emerged that the
detention periods for children who are in
custody—in the context of the bill, children are
people aged under 18—will be the same as for
adults. The Parliament has not examined that.

We heard some issues about consultation. It
became clear that the cabinet secretary consulted
primarily prosecution interests. The interests that
take a broader view, such as the Law Society of
Scotland and the Scottish Human Rights
Commission, take the view that it would have been
possible to go ahead with legislation in the normal
way, given the precaution that the cabinet
secretary put in place.

I am not clear about the position that the cabinet
secretary and the SNP Government take on the
European convention on human rights. They seem
to have considerable qualms about the Cadder
decision. Not to beat about the bush, I understand
where they come from on that—I share some of
them—but it is clear from a reading of the
judgment, which, as I have said before, had two
significant Scottish lawyers as the lead judges,
that whether the decision was by the UK Supreme
Court or by the European Court of Human Rights
is academic; it was obvious what was going to
happen. The result would have been the same
even if the decision had been taken in another
jurisdiction. Any other argument is a red herring.

We have a decision that we have to follow up.
The cabinet secretary recognised that if we had
not taken action on it we would have left Scotland
exposed as one of the only countries in Europe
that did not afford the level of protection that the
European convention provides in other European
countries. That is not a position that I would like to
be in.

Against that background and the Government’s
failure to accept a number of points—the need for
a sheriff to certify detention periods, to change the
detention period and to allow a bit of time on some
of the issues, and the uncertainty on section 1—
Liberal Democrats will vote against the bill tonight.
We do not do that easily; we do it because we are
convinced that major issues in the bill have not
been satisfactorily dealt with. Indeed, in this
process they could not have been, which means
that we will be subject to further challenges if we
are not careful and the implications of the major
changes the bill makes have not been worked
through.

The Deputy Presiding Officer: The member
should finish.

Robert Brown: I will come to an end on that
point. There are major issues that still need to be
dealt with and which will come back to haunt us in
the weeks and months to come.

Mike Rumbles (West Aberdeenshire and
Kincardine) (LD): I am extremely concerned at
how the Government has used this emergency bill
to change the criminal law of Scotland in ways that
have no relevance to the emergency that we
faced. Our justice minister has been keen to
quadruple, from the current six hours to 24 hours,
the time that suspects can be detained by the
police before charge or release. That is simply
wrong.

I have been somewhat alarmed by the justice
minister’s use of language in the debate—

Kenny MacAskill: For goodness’ sake.

Mike Rumbles: That intervention is indicative of
the justice minister’s attitude to the issue. I am
disappointed that, even now, from a sedentary
position, he dismisses my comments in that way.

The justice minister consistently referred to
criminals being detained by the police and the risk
of criminals escaping justice. I ignored it at first
because I thought it was a slip of tongue, but it
was not and I intervened to point it out to him at
stage 2. It is indicative of the justice secretary’s
approach that, when I pointed it out, he did not
understand the difference between a criminal and
a suspect. I find that extremely worrying.

What is more, the justice secretary says that he
has consulted, but he has consulted only the
police, the Association of Chief Police Officers in
Scotland, the prosecution and the Lord Advocate.

Kenny MacAskill: Has the member made any
representations to his colleagues in Westminster
about what will happen when people are warned
about, and sometimes detained for, making false
applications for social security benefits because they did not understand the form? Does it concern him that people could lose their benefits, or is this a case of him being more sympathetic to those who are charged with serious offences than to those who are the poorest and most vulnerable?

Mike Rumbles: That intervention says everything about the attitude of our so-called justice secretary. I think that he should be ashamed of what he has just said and of the approach that he has taken to the debate. It is entirely wrong.

I am a member of the Scottish Parliament, as is the justice secretary. We should take the passing of criminal legislation in this Parliament extremely seriously—not smile and laugh about it and dismiss it, but take it seriously. I made the point—

Kenny MacAskill: That is pathetic.

Mike Rumbles: The minister said that that is pathetic.

Kenny MacAskill: Yes.

Mike Rumbles: Well, I am making what I think to be reasonable and serious points, and I would hope that our justice secretary would listen to them carefully. He may not like what I am saying, but that is my job as an MSP. I represent the people of West Aberdeenshire and Kincardine. I want to represent them properly in this Parliament to ensure that no innocent people are detained for 24 hours without charge. It might come as a surprise to the justice secretary that innocent people are arrested by the police. The police do a really good job, but not everybody they arrest is a criminal, and I am shocked that the justice secretary has a problem with that. We are facing a fundamental issue.

In my view, it is simply wrong to use an emergency bill to increase so dramatically—to 24 hours—the time that innocent citizens can be detained without charge. Let us not forget that the emergency bill was intended to allow suspects legal representation. The Government has misused the process. What we have now is a bill that changes the law without our having any evidence before us. This is a bad bill. It has been an unsatisfactory process that has produced a bad law, and the Liberal Democrats will not support it.

19:30

Patrick Harvie (Glasgow) (Green): We have really not shown ourselves at our best today, in terms of our process and the muddle that always comes with rush. I am sorry to say that I also do not think that the cabinet secretary has shown himself at his best. He knows that, when he has previously taken very controversial decisions and been attacked by Opposition parties, I have not taken an opportunistic oppositional position. I have been prepared to back him on some controversial issues in the past. However, I am prepared to say that the cabinet secretary has not shown himself at his best today either on points of process—for example, he acknowledges that the bill is an interim measure but opposes the idea of a sunset clause precisely because the legislation will be temporary: an argument that makes no sense—or on points of substance.

There are times when we feel that being challenged by Mike Rumbles is an indication that we are on sure ground—but today was not one of them. The point that Mike Rumbles made in his most recent speech was significant. At one point in his speech, the cabinet secretary dismissed the distinction between criminals and suspects as “pedantry”—he dismissed the presumption of innocence as pedantry. I hope that he comes to regret that intertemperate remark.

The cabinet secretary and the Government have made a poor show of arguing either that there is an urgent need to change the period of detention—indeed, to quadruple the period of detention in some circumstances—or that there is an urgent need to change the remit of the SCCRC. They have made a poor show of arguing that there is no need for a sunset clause, and I would say that they have made a poor show of arguing that the bill should be treated as emergency legislation at all. In his first speech in the stage 1 debate, Bill Aitken described the bill as a form of firefighting. I am sorry to say that I think that we are firefighting while nothing is burning down. This is not an emergency, and there are slower, calmer and more considered ways of dealing with the situation.

There are members of all parties who are a bit tired and annoyed at having had to cancel other plans that they had for this evening. There are, no doubt, community groups around the country that have been deprived of our fine presence this evening. I had a pleasant evening planned, so, in compensation, I will be going to the bar after the debate. If any member wants to join me there, I will offer a wager. I will wager a drink—a double if they are a minister—that, within a year, we will come to regret some detail of this bill; some detail that we cannot fully understand because there has been no scrutiny to date. I will offer a further wager that, in the next session, we will have to rewrite the whole thing.

Like the Liberal Democrats, the Greens will vote against the bill at decision time.

19:34

Robert Brown: I will make just a couple of comments because I appreciate that members
have heard a lot from me today, but what I have to say is not unimportant. The central point of the debate on the bill has been the lack of evidence that has been brought forward by the Scottish Government to justify not legislation, but legislation at this particular point in time. That is the point on which it is hung up today.

I have two points to make on that. First, during the course of the debate, I received an e-mail—not in the chamber, but when I went back to my office—from the president of the Glasgow Bar Association. In response to the point that was made about six people being seen by a solicitor, he pointed out that a solicitor should not see more than one accused in custody anyway, according to the code of conduct. He said that, therefore, there would be no danger of their exhausting six hours by interviewing multiple accused. I do not know the ins and outs of it, but I seem to recall that changes that were made to the relevant provisions separated out representation of such matters a little while ago. Whatever the rights and wrongs of that might be, it is an example of the sort of point that has not been addressed in the debate, but which should have been the subject of proper consultation that would have enabled us to find out the precise reality of the situation.

There is no need to legislate quickly. There is no evidence that there will be a flood of other cases because of the lack of retrospectivity of the decision. At the end of the day, this is an important issue. There used to be a sort of theme that criminal statutes were strictly construed—in other words, that one had to establish a case before one could do things that would interfere with the liberty of the subject. That is a good rule, which ought to be applied to this bill. Unfortunately, it has not been and, against that background, the bill ought to be defeated when we vote on it tonight.

19:35

Bill Aitken (Glasgow) (Con): It has famously been said that people should be careful what they wish for. All of us in the chamber are uncomfortable because, today, we have simultaneously taken away some of the civil rights that people regarded as being acceptable—namely on detention by the police beyond the prescribed time—and, undoubtedly, made life easier for the criminal elements. That has resulted because of the original case in Turkey, a country on account of whose appalling human rights record we are now suffering.

The blame for that, as I said earlier, lies not with the courts in Europe or London, or with the High Court in Scotland, which got it entirely correct in relation to the McLean case, but with the fact that, under the Human Rights Act 1998, we were tied into the ECHR. As far as I am aware, everyone in this chamber believes in human rights. However, the European conception of human rights is exceptionally dangerous and has been proved dangerous because of its one-cap-fits-all requirement. What was appropriate in respect of the Turkish case to ensure that human liberties were protected there could surely not apply in Scotland. Those who signed up so enthusiastically in 1998 are in fact the authors of our current misfortunes.

I note Patrick Harvie’s offer. I would have been a little bit more impressed if he had offered a drink rather than a wager, but nevertheless he made his point. He said that I referred to today’s duties as firefighting duties. I reiterate that, because we have had to act. There are many imperfections in what we have had to do, but the fact is that Lord Carloway will now carry out the appropriate review. If there had not been that provision, we would have been very tempted indeed to vote for a sunset clause. However, the fact that it will happen has safeguarded the position.

Mike Rumbles: Bill Aitken said that in his opinion the bill will make it easier for the criminal. In that case, is he going to vote for it?

Bill Aitken: I am forced to vote for it, because it is the only thing that will protect wider society. It will make it easier for the criminal. Throughout this procedure, the point that has been omitted is that the existing situation, which had been in place for many years, had caused absolutely no difficulties whatever. The court ruling has put that in jeopardy, which is why I and every other responsible member of the Parliament has to vote for the bill at decision time.

19:38

James Kelly (Glasgow Rutherglen) (Lab): There is no doubt that this has been a long and, at times, difficult afternoon, but the process has been absolutely necessary. As a direct consequence of yesterday’s judgment, there is no doubt that the Government had to act. I do not think that we could have continued with a situation in which certain elements of Scottish law were not compatible with the ECHR. Therefore, with some reservations, the Labour Party supports the bill at stage 3.

On the key elements that have been discussed this afternoon, the Government clearly had to address the issue of giving suspects the right to access to a solicitor. That was a direct consequence of the judgment.

There was a great deal of controversy around the extension of time periods. The current guidelines, which the Lord Advocate issued in July, set the time limit at only six hours. The provision in the bill moves that to 12 hours, with
the potential for an application for an extension to 24 hours to be made.

There is reasonable justification for the move to 12 hours, and some practical examples have been given during today’s debate. A lot of members have expressed reservations about the move to 24 hours, and some discussions took place prior to the lodging of stage 2 amendments. To an extent, we have taken assurances from law officers and the Government on trust, so we will see how that process pans out.

Certain elements of the bill are necessary in order to close loopholes. There has not been much mention of the provisions in the bill for bills of advocation and suspension under summary procedures. The bill introduces procedures to deal with that and sets a 21-day limit, which will, I hope, put a cap on any challenges that emerge under those provisions.

The issue of finality and certainty, which was cited in the judgment and which we discussed earlier, had to be addressed; it could not have been left aside. As such, the provisions under section 7 of the bill are relevant.

I remain concerned, as I said earlier, about the costs of the legislation. The financial memorandum states that there will be costs of £30 million. A police summit took place earlier in the week that was attended by the cabinet secretary and other justice spokespersons. A direct consequence of the legislation would be £20 million of police costs, which would have an implication for front-line policing. The Government must carry out an impact assessment on that.

It is welcome that the judgment was not retrospective, and there has been some debate about how many live cases the Government is potentially exposed on. It is hoped that the provisions that we will progress today will limit the number of cases that can be challenged.

We will engage constructively with the work that Lord Carloway will undertake, because it is absolutely key. It will examine some central features of Scottish law, such as corroboration, and will provide an opportunity to review the bill that will be passed today and to assess any changes that may be required. That will, I hope, give some comfort to members who have reservations.

I emphasise that Labour supports the bill at stage 3. We have engaged constructively with the Government; SNP back benchers who lined up to attack the Labour Party in their speeches should perhaps remember that. We have put a certain element of trust in the Government, so we will look closely at how the provisions work in practice and bring forward changes in the future if they are required.

Kenny MacAskill: I reiterate my thanks to all those involved today—not simply to members, who have been delayed and stayed late, but to the staff in the Government, in Opposition parties and in the Parliament in particular.

I will clarify a couple of matters. All members of the Government—and indeed all members in the chamber—accept the justification for signing up to the ECHR. We disagree on why it is contained in the Scotland Act 1998, imposing powers and obligations on us that are not replicated elsewhere. It is, therefore, not the ECHR that we view as the problem. In the chamber, we are, perhaps, occasionally gobsmacked by some interpretations of it, just as people outwith the chamber are sometimes outraged about payments that are made in respect of slopping out or other such issues. Members share concerns, but nobody doubts the requirement for the ECHR.

As I have said, the issue is not the ruling of the European Court of Human Rights on Salduz but the interpretation made by the United Kingdom Supreme Court.

Robert Brown: After the whole debate and after reading the judgment, is the cabinet secretary seriously maintaining that the European Court of Human Rights would have made a different decision from the United Kingdom Supreme Court on the matter?

Kenny MacAskill: Well, we do not know. What we do know is that, in October 2009, a court of seven judges, presided over by the Lord Justice General and assisted by the Lord Justice Clerk, considered the case of Salduz v Turkey and held that the system under Scots law was perfectly compatible with the ECHR. The difficulty that we now face is that the UK Supreme Court has taken a decision that it is incompatible. It has turned Scottish criminal law on its head.

David McLetchie (Edinburgh Pentlands) (Con): Scottish judges.

Kenny MacAskill: Reference has been made to Scottish judges.

David McLetchie: Exactly.

The Presiding Officer (Alex Fergusson): Order, Mr McLetchie.

Kenny MacAskill: However, as was pointed out, Mr McLetchie, the self-same judges—Lord Hope and Lord Rodger—sat in Scotland for more than 30 years. I started practising in 1980 and they were on the bench then. Indeed, they were in law officer positions and they did not see any problem. That point has been much more eruditely pointed out by Lord McCluskey. Something or other seems to have happened between when they sat on the
bench or as law officers in Scotland and when they took on the—I was going to say ermine, but I will not say that as they appear in their lounge suits down there.

We do face a challenge and we are grateful to others for rising to it. I regret that Patrick Harvie does not view the matter as significant. A fundamental change was wreaked upon the Scottish legislative position yesterday.

Patrick Harvie: Will the minister give way?

Kenny MacAskill: No. Time is moving on.

The fact of the matter is that there is a fundamental change—lawyers will now require to be in for interviews with detainees. As I have said, that changes matters. It has always been the case that the scales of justice have to be balanced. That is why, as soon as that became required within Scots law, we required to act to deal with other consequential matters, including the lengthening of the period of detention.

Finally, let me deal with the question of the Liberal Democrats. I understand that they intend to vote against the bill. As I pointed out earlier, it is rather remiss that they do not seem to have any care or concern for the vulnerable who are affected south of the border but they do seem to worry about those who are affected by the change here. [Interruption.]

The Presiding Officer: Order.

Kenny MacAskill: I say quite clearly to Mr Rumbles that the next time I meet the Scottish Police Federation or the police in Grampian, I will point out to them that I believe that police officers in Scotland do not detain people on a whim or a fancy and that we have the checks and balances of the procurator fiscal acting in the public interest. For him to express the view that, somehow or other, police officers the length and breadth of Scotland are out arresting innocent people—

Mike Rumbles: They do arrest innocent people.

Kenny MacAskill: —is frankly a ridiculous, scurrilous attack on hard-working officers who often put their lives on the line. Mr Rumbles can rest assured that we will be transmitting this debate to the Police Federation.

In winding up, I reiterate my thanks. I regret having to introduce the bill, but it is necessary because of what happened south of the border, which was pronounced upon at 9.45 yesterday.
Decision Time

The Presiding Officer: The next question is, that motion S3M-7268, in the name of Kenny MacAskill, on the Criminal Procedure (Legal Assistance, Detention and Appeals) (Scotland) Bill, be agreed to. Are we agreed?

Members: No.

The Presiding Officer: There will be a division.

For

Adam, Brian (Aberdeen North) (SNP)
Aitken, Bill (Glasgow) (Con)
Alexander, Ms Wendy (Paisley North) (Lab)
Allan, Alasdair (Western Isles) (SNP)
Baillie, Jackie (Dumbarton) (Lab)
Baker, Richard (North East Scotland) (Lab)
Boyack, Sarah (Edinburgh Central) (Lab)
Brankin, Rhona (Midlothian) (Lab)
Brocklebank, Ted (Mid Scotland and Fife) (Con)
Brown, Gavin (Lothians) (Con)
Brown, Keith (Ochil) (SNP)
Brownlee, Derek (South of Scotland) (Con)
Butler, Bill (Glasgow Anniesland) (Lab)
Carlaw, Jackson (West of Scotland) (Con)
Chisholm, Malcolm (Edinburgh North and Leith) (Lab)
Coffey, Willie (Kilmarnock and Loudoun) (SNP)
Constance, Angela (Livingston) (SNP)
Crawford, Bruce (Stirling) (SNP)
Cunningham, Roseanna (Perth) (SNP)
Don, Nigel (North East Scotland) (SNP)
Doris, Bob (Glasgow) (SNP)
Eadie, Helen (Dunfermline East) (Lab)
Ewing, Fergus (Inverness East, Nairn and Lochaber) (SNP)
Fabian, Linda (Central Scotland) (SNP)
Fergusson, Patricia (Glasgow Maryhill) (Lab)
FitzPatrick, Joe (Dundee West) (SNP)
Foulkes, George (Lothians) (Lab)
Fraser, Murdo (Mid Scotland and Fife) (Con)
Gibson, Rob (Highlands and Islands) (SNP)
Glen, Martyn (North East Scotland) (Lab)
Godman, Trish (West Renfrewshire) (Lab)
Goldie, Annabel (West of Scotland) (Con)
Gordon, Charlie (Glasgow Cathcart) (Lab)
Grahame, Christine (South of Scotland) (SNP)
Grant, Rhoda (Highlands and Islands) (Lab)
Gray, Iain (East Lothian) (Lab)
Harvie, Christopher (Mid Scotland and Fife) (SNP)
Henry, Hugh (Paisley South) (Lab)
Hepburn, Jamie (Central Scotland) (SNP)
Hyslop, Fiona (Lothians) (SNP)
Ingram, Adam (South of Scotland) (SNP)
Johnstone, Alex (North East Scotland) (Con)
Kelly, James (Glasgow Rutherglen) (Lab)
Kerr, Andy (East Kilbride) (Lab)
Kidd, Bill (Glasgow) (SNP)
Lamont, Johann (Glasgow Pollok) (Lab)
Lamont, John (Roxburgh and Berwickshire) (Con)
Livingstone, Marilyn (Kirkcaldy) (Lab)
Lochhead, Richard (Moray) (SNP)
MacAskill, Kenny (Edinburgh East and Musselburgh) (SNP)
Macdonald, Lewis (Aberdeen Central) (Lab)
Macintosh, Ken (Eastwood) (Lab)
Martin, Paul (Glasgow Springfield) (Lab)
Marwick, Tricia (Central Fife) (SNP)
Matheson, Michael (Falkirk West) (SNP)
Maxwell, Stewart (West of Scotland) (SNP)
McAveety, Mr Frank (Glasgow Shettleston) (Lab)
McCabe, Tom (Hamilton South) (Lab)
McGrigor, Jamie (Highlands and Islands) (Con)
Mckee, lan (Lothians) (SNP)
McKelvie, Christina (Central Scotland) (SNP)
McLaughlin, Anne (Glasgow) (SNP)
McLetchie, David (Edinburgh Pentland) (Con)
McMahon, Michael (Hamilton North and Bellshill) (Lab)
McMillan, Stuart (West of Scotland) (SNP)
McNeil, Duncan (Greenock and Inverclyde) (Lab)
McNeill, Pauline (Glasgow Kelvin) (Lab)
McNulty, Des (Clydebank and Milngavie) (Lab)
Milne, Nanette (North East Scotland) (Con)
Mitchell, Margaret (Central Scotland) (Con)
Morgan, Alasdair (South of Scotland) (SNP)
Mulligan, Mary (Linthgow) (Lab)
Murray, Elaine (Dumfries) (Lab)
Neil, Alex (Central Scotland) (SNP)
Oldfather, Irene (Cunninghame South) (Lab)
Park, John (Mid Scotland and Fife) (Lab)
Paterson, Gil (West of Scotland) (SNP)
Peacock, Peter (Highlands and Islands) (Lab)
Peatie, Cathy (Falkirk East) (Lab)
Russell, Michael (South of Scotland) (SNP)
Salmond, Alex (Gordon) (SNP)
Scanlon, Mary (Highlands and Islands) (Con)
Scott, John (Ayr) (Con)
Simpson, Dr Richard (Mid Scotland and Fife) (Lab)
Smith, Elizabeth (Mid Scotland and Fife) (Con)
Stevenson, Stewart (Banff and Buchan) (SNP)
Stewart, David (Highlands and Islands) (Lab)
Sturgeon, Nicola (Glasgow Govan) (SNP)
Thompson, Dave (Highlands and Islands) (SNP)
Watt, Maureen (North East Scotland) (SNP)
Welsh, Andrew (Angus) (SNP)
White, Sandra (Glasgow) (SNP)
Whitefield, Karen (Airdrie and Shotts) (Lab)
Wilson, Bill (West of Scotland) (SNP)
Wilson, John (Central Scotland) (SNP)

Against

Brown, Robert (Glasgow) (LD)
Finnie, Ross (West of Scotland) (LD)
Harper, Robin (Lothians) (Green)
Harvie, Patrick (Glasgow) (Green)
MacDonald, Margo (Lothians) (Ind)
McArthur, Liam (Orkney) (LD)
McInnes, Alison (North East Scotland) (LD)
Munro, John Farquhar (Ross, Skye and Inverness West) (LD)
O'Donnell, Hugh (Central Scotland) (LD)
Pringle, Mike (Edinburgh South) (LD)
Purvis, Jeremy (Tweeddale, Ettrick and Lauderdale) (LD)
Rumbles, Mike (West Aberdeenshire and Kincardine) (LD)
Scott, Tavish (Shetland) (LD)
Smith, Iain (North East Fife) (LD)
Smith, Margaret (Edinburgh West) (LD)
Stephen, Nicol (Aberdeen South) (LD)
Stone, Jamie (Caithness, Sutherland and Easter Ross) (LD)
Tolson, Jim (Dunfermline West) (LD)

The Presiding Officer: The result of the division is: For 97, Against 18, Abstentions 0.

Motion agreed to,

That the Parliament agrees that the Criminal Procedure (Legal Assistance, Detention and Appeals) (Scotland) Bill be passed.
Criminal Procedure (Legal Assistance, Detention and Appeals) (Scotland) Bill
[AS PASSED]

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Amendments to the Bill since the previous version are indicated by sidelining in the right margin. Wherever possible, provisions that were in the Bill as introduced retain the original numbering.

Criminal Procedure (Legal Assistance, Detention and Appeals) (Scotland) Bill
[AS PASSED]

An Act of the Scottish Parliament to make provision for persons being questioned by the police on suspicion of having committed an offence to have a right of access to legal assistance; to enable provision to be made for criminal advice and assistance under the Legal Aid (Scotland) Act 1986 to be available for such persons in certain circumstances without reference to financial limits; to extend the period during which a person may be detained under section 14 of the Criminal Procedure (Scotland) Act 1995, and to enable that period to be further extended in certain circumstances; to provide for a right to make representations in relation to applications for extension of time limits for bringing appeals; to provide a time limit for lodging bills of suspension or advocation; to make provision about the grounds for references made to the High Court by the Scottish Criminal Cases Review Commission and to confer power on the High Court to reject such references in certain circumstances; and for connected purposes.

Legal assistance

1 Right of suspects to have access to a solicitor

(1) The 1995 Act is amended as follows.

(2) In section 14 (detention and questioning at police station), in subsection (6)—

(a) in paragraph (e), for “subsection (1)(b) of section 15” substitute “sections 15(1)(b) and 15A(2) and (3)”, and

(b) in paragraph (f), after “15(1)(b)” insert “or 15A(2)”.

(3) In section 15 (rights of person arrested or detained)—

(a) in subsection (1)—

(i) for “section 17” substitute “sections 15A and 17”, and

(ii) in paragraph (b), the words “solicitor and to one other” are repealed,

(b) in subsection (4), for “section 17” substitute “sections 15A and 17”, and

(c) the title of the section becomes “Right of persons arrested or detained to have intimation sent to another person”.

(4) After section 15, insert—
“15A Right of suspects to have access to a solicitor

(1) This section applies to a person (“the suspect”) who—

(a) is detained under section 14 of this Act,

(b) attends voluntarily at a police station or other premises or place for the purpose of being questioned by a constable on suspicion of having committed an offence, or

(c) is—

(i) arrested (but not charged) in connection with an offence, and

(ii) being detained at a police station or other premises or place for the purpose of being questioned by a constable in connection with the offence.

(2) The suspect has the right to have intimation sent to a solicitor of any or all of the following—

(a) the fact of the suspect’s—

(i) detention,

(ii) attendance at the police station or other premises or place, or

(iii) arrest,

(as the case may be),

(b) the police station or other premises or place where the suspect is being detained or is attending, and

(c) that the solicitor’s professional assistance is required by the suspect.

(3) The suspect also has the right to have a private consultation with a solicitor—

(a) before any questioning of the suspect by a constable begins, and

(b) at any other time during such questioning.

(4) Subsection (3) is subject to subsections (8) and (9).

(5) In subsection (3), “consultation” means consultation by such means as may be appropriate in the circumstances, and includes, for example, consultation by means of telephone.

(6) The suspect must be informed of the rights under subsections (2) and (3)—

(a) on arrival at the police station or other premises or place, and

(b) in the case where the suspect is detained as mentioned in subsection (1)(a), or arrested as mentioned in subsection (1)(c), after such arrival, on detention or arrest (whether or not, in either case, the suspect has previously been informed of the rights by virtue of this subsection).

(7) Where the suspect wishes to exercise a right to have intimation sent under subsection (2), the intimation must be sent by a constable—

(a) without delay, or

(b) if some delay is necessary in the interest of the investigation or the prevention of crime or the apprehension of offenders, with no more delay than is necessary.
(8) In exceptional circumstances, a constable may delay the suspect’s exercise of the right under subsection (3) so far as it is necessary in the interest of the investigation or the prevention of crime or the apprehension of offenders that the questioning of the suspect by a constable begins or continues without the suspect having had a private consultation with a solicitor.

(9) Subsection (3) does not apply in relation to the questioning of the suspect by a constable for the purpose of obtaining the information mentioned in section 14(10) of this Act.”.

2 Criminal advice and assistance: automatic availability in certain circumstances

(1) The Legal Aid (Scotland) Act 1986 (c.47) is amended as follows.

(2) In section 8 (availability of advice and assistance), after “to” in the first place where it occurs insert “any provision made in regulations under section 8A(1) and”.

(3) After section 8, insert—

“8A Criminal advice and assistance: automatic availability in certain circumstances

(1) The Scottish Ministers may by regulations provide that, in such circumstances as may be prescribed in the regulations, advice and assistance in relation to criminal matters is to be available for any relevant client without reference to the financial limits in section 8.

(2) In subsection (1), “relevant client” means a client who is a person to whom section 15A of the Criminal Procedure (Scotland) Act 1995 (right of suspects to have access to a solicitor) applies.”.

(4) In section 37(2) (parliamentary procedure), after “7,” insert “8A(1),”.

Detention

3 Extension of period of detention under section 14 of 1995 Act

(1) In section 14 of the 1995 Act (detention and questioning at police station)—

(a) in subsection (2), for “Detention”, where it first occurs, substitute “Subject to section 14A, detention”, and

(b) in each of subsections (2), (4) and (5), for “six” substitute “12”.

(2) After section 14 of the 1995 Act, insert—

“14A Extension of period of detention under section 14

(1) This section applies in relation to a person who is being detained under section 14 of this Act (“the detained person”).

(2) Before the expiry of the period of 12 hours mentioned in section 14(2), a custody review officer may, subject to subsection (4), authorise that period to be extended in relation to the detained person by a further period of 12 hours.

(3) The further period of 12 hours starts from the time when the period of detention would have expired but for the authorisation.

(4) A custody review officer may authorise the extension under subsection (2) in relation to the detained person only if the officer is satisfied that—
(a) the continued detention of the detained person is necessary to secure, obtain or preserve evidence (whether by questioning the person or otherwise) relating to an offence in connection with which the person is being detained,

(b) an offence in connection with which the detained person is being detained is one that is an indictable offence, and

(c) the investigation is being conducted diligently and expeditiously.

(5) Where subsection (4) or (5) of section 14 applies in relation to the detained person, the references in subsection (2) of this section to the period of 12 hours mentioned in section 14(2) are to be read as references to that period as reduced in accordance with subsection (4) or, as the case may be, (5) of section 14.

(6) Where a custody review officer authorises the extension under subsection (2), section 14 has effect in relation to the detained person as if the references in it to the period of 12 hours were references to that period as extended by virtue of the authorisation.

(7) In this section and section 14B, “custody review officer” means a constable—

(a) of the rank of inspector or above, and

(b) who has not been involved in the investigation in connection with which the person is detained.

14B Extension under section 14A: procedure

(1) This section applies where a custody review officer is considering whether to authorise the extension under section 14A(2) of this Act in relation to a person who is being detained under section 14 of this Act (“the detained person”).

(2) Before deciding whether to authorise the extension, the custody review officer must give either of the following persons an opportunity to make representations—

(a) the detained person, or

(b) any solicitor representing the detained person who is available at the time the officer is considering whether to authorise the extension.

(3) Representations may be oral or written.

(4) The custody review officer may refuse to hear oral representations from the detained person if the officer considers that the detained person is unfit to make representations because of the person’s condition or behaviour.

(5) Where the custody review officer decides to authorise the extension, the officer must ensure that the following persons are informed of the decision and of the grounds on which the extension is authorised—

(a) the detained person, and

(b) any solicitor representing the detained person who is available at the time the decision is made.

(6) Subsection (7) applies where—

(a) the custody review officer decides to authorise the extension, and
(b) at the time of the decision, the detained person has not exercised rights under section 15 or 15A.

(7) The custody review officer must—

(a) ensure that the detained person is informed of the person’s rights under section 15 or 15A which the person has not yet exercised, and

(b) decide whether there are any grounds, under section 15(1) or section 15A(7)(b) or (8) (as the case may be), for delaying the exercise of any of the rights.

(8) The custody review officer must make a written record of—

(a) the officer’s decision on whether to authorise the extension, and

(b) any of the following which apply—

(i) the grounds on which the extension is authorised,

(ii) the fact that the detained person and a solicitor have been informed as required under subsection (5),

(iii) the fact that the detained person has been informed as required under subsection (7)(a),

(iv) the officer’s decision on the matter referred to in subsection (7)(b) and, if the decision is to delay the exercise of a right, the grounds for the decision.”.

Sections 1 and 3: transitional and saving provision

(1) The amendments made to the 1995 Act by section 1 have effect in relation to any person who is detained, or who attends or is arrested, as mentioned in subsection (1) of section 15A of the 1995 Act (as inserted by section 1(4)) where the period of detention, attendance or, as the case may be, arrest starts on or after the day on which this Act comes into force.

(2) The amendments made to the 1995 Act by section 3 have effect in relation to any person who is detained under section 14 of the 1995 Act where the period of detention starts on or after the day on which this Act comes into force.

(3) Subsection (4) applies in relation to any person who is detained under section 14 of the 1995 Act where the period of detention began before this Act comes into force.

(4) Despite sections 1 and 3, sections 14 and 15 of the 1995 Act continue, after this Act comes into force, to have the effect they had immediately before that time.

Appeals

Extension of time for late appeals: right to make representations

(1) The 1995 Act is amended as follows.

(2) In section 111 (supplementary provision about appeals in solemn cases), after subsection (2) insert—

“(2A) An application under subsection (2) seeking extension of the period mentioned in section 109(1) of this Act must—
(a) state—
   (i) the reasons why the applicant failed to comply with the time limit in section 109(1), and
   (ii) the proposed grounds of appeal, and
(b) be intimated in writing by the applicant to the Crown Agent.

(2B) If the prosecutor so requests within 7 days of receipt of intimation of the application under subsection (2A)(b), the prosecutor must be given an opportunity to make representations before the application is determined.

(2C) Any representations may be made in writing or, if the prosecutor so requests, orally at a hearing; and if a hearing is fixed, the applicant must also be given an opportunity to be heard.”.

(3) In section 181 (extension of time for appeals in summary cases)—
   (a) after subsection (2) insert—
   “(2A) An application for a direction under subsection (1) in relation to the requirements of section 176(1) of this Act must—
      (a) state—
         (i) the reasons why the applicant failed to comply with the requirements of section 176(1), and
         (ii) the proposed grounds of appeal, and
      (b) be intimated in writing by the applicant to the respondent or the respondent’s solicitor.
   (2B) If the respondent so requests within 7 days of receipt of intimation of the application under subsection (2A)(b), the respondent must be given an opportunity to make representations before the application is determined.
   (2C) Any representations may be made in writing or, if the respondent so requests, orally at a hearing; and if a hearing is fixed, the applicant must also be given an opportunity to be heard.”, and
   (b) in subsection (3)(a), after “hearing” insert “(unless the respondent has requested a hearing under subsection (2C))”.

(4) The amendments made by this section have effect in relation to any application made under section 111(2) or, as the case may be, 181(1) of the 1995 Act on or after the day on which this Act comes into force.

6 Time limit for lodging bills of advocation and bills of suspension

(1) After section 191 (appeal by suspension or advocation) of the 1995 Act, insert—

“191A Time limit for lodging bills of advocation and bills of suspension

(1) This section applies where a party wishes—
   (a) to appeal to the High Court under section 191(1) of this Act by bill of suspension against a conviction or by advocation against an acquittal, or
   (b) to appeal to the High Court against, or to bring under review of the High Court, any other decision in a summary prosecution by bill of suspension or by advocation.
(2) The party must lodge the bill of suspension or bill of advocation within 3 weeks of the date of the conviction, acquittal or, as the case may be, other decision to which the bill relates.

(3) The High Court may, on the application of the party, extend the time limit in subsection (2).

(4) An application under subsection (3) must—

(a) state—

(i) the reasons why the applicant failed to comply with the time limit in subsection (2), and

(ii) the proposed grounds of appeal or review, and

(b) be intimated in writing by the applicant to the other party to the prosecution.

(5) If the other party so requests within 7 days of receipt of intimation of the application under subsection (4)(b), the other party must be given an opportunity to make representations before the application is determined.

(6) Any representations may be made in writing or, if the other party so requests, orally at a hearing; and if a hearing is fixed, the applicant must also be given an opportunity to be heard.”.

(2) In the case where the date of the conviction, acquittal or other decision referred to in subsection (1) of section 191A of the 1995 Act (as inserted by subsection (1) of this section) is before the date on which this Act comes into force, subsection (2) of section 191A (as so inserted) has effect as if, for the reference to the date of the conviction, acquittal or, as the case may be, other decision, there were substituted a reference to the date on which this Act comes into force.

References by the Scottish Criminal Cases Review Commission

(1) The 1995 Act is amended as follows.

(2) In section 194B (SCCRC’s power to refer cases to the High Court), in subsection (1), before “the case” insert “, subject to section 194DA of this Act,”.

(3) In section 194C (grounds for reference)—

(a) the existing words become subsection (1), and

(b) after that subsection, insert—

“(2) In determining whether or not it is in the interests of justice that a reference should be made, the Commission must have regard to the need for finality and certainty in the determination of criminal proceedings.”.

(4) After section 194D, insert—

“194DA High Court’s power to reject a reference made by the Commission

(1) Where the Commission has referred a case to the High Court under section 194B of this Act, the High Court may, despite section 194B(1), reject the reference if the Court considers that it is not in the interests of justice that any appeal arising from the reference should proceed.
(2) In determining whether or not it is in the interests of justice that any appeal arising from the reference should proceed, the High Court must have regard to the need for finality and certainty in the determination of criminal proceedings.

(3) On rejecting a reference under this section, the High Court may make such order as it considers necessary or appropriate.”.

General

8 Interpretation
In this Act, “the 1995 Act” means the Criminal Procedure (Scotland) Act 1995 (c.46).

9 Commencement
This Act comes into force at the beginning of the day after the day on which the Bill for this Act receives Royal Assent.

10 Short title
This Act may be cited as the Criminal Procedure (Legal Assistance, Detention and Appeals) (Scotland) Act 2010.
Criminal Procedure (Legal Assistance, Detention and Appeals) (Scotland) Bill
[AS PASSED]

An Act of the Scottish Parliament to make provision for persons being questioned by the police on suspicion of having committed an offence to have a right of access to legal assistance; to enable provision to be made for criminal advice and assistance under the Legal Aid (Scotland) Act 1986 to be available for such persons in certain circumstances without reference to financial limits; to extend the period during which a person may be detained under section 14 of the Criminal Procedure (Scotland) Act 1995, and to enable that period to be further extended in certain circumstances; to provide for a right to make representations in relation to applications for extension of time limits for bringing appeals; to provide a time limit for lodging bills of suspension or advocation; to make provision about the grounds for references made to the High Court by the Scottish Criminal Cases Review Commission and to confer power on the High Court to reject such references in certain circumstances; and for connected purposes.

Introduced by: Kenny MacAskill
On: 26 October 2010
Bill type: Executive Bill